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REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 27, 1959 and JULY 3, 1959

IN THE

Supreme Court of Nebraska

JANUARY TERM 1959

VOLUME CLXVIII

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1959

IN RE ASSESSMENT OF INHERITANCE TAXES UPON THE ESTATE OF CATHERINE S. PIKE, DECEASED. COUNTY OF KEITH, NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. CLARENCE A. TRISKA, APPELLANT AND CROSS-APPELLEE.

95 N. W. 2d 350

Filed February 27, 1959. No. 34490.

1. **Judgments: Appeal and Error.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right and should examine its own records and take judicial notice of its own proceedings and judgments in the former action. Such cases are exceptions to the general rule warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law.
2. **Statutes.** Generally, the word "may" used in statutes will be given its ordinary meaning, and when so used such word will be construed as permissive or discretionary and not mandatory unless it would manifestly defeat the object of the statute.
3. **Taxation.** It is generally the rule in all jurisdictions that in determining inheritance taxes due, the expenses, costs, and attorneys' fees incurred in litigation independent of the estate and between distributees over their respective interests in order to establish the right to take the property should not be deducted from the fair market value of the property in determining the clear market value of the taxable beneficial interest therein.
4. ———. The general rule with relation to inheritance taxes is

that insofar as the transferee of property has paid a consideration to the transferor therefor, the tax due will be assessed and determined only on the difference between the fair market value of the property and the consideration paid therefor.

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

McGinley, Lane, Powers & McGinley and *Baskins & Baskins,* for appellant.

Firmin Q. Feltz, for appellee.

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

CHAPPELL, J.

This appeal involves the propriety of an appraisement of three described real properties located in Keith County, Nebraska, and the propriety of the determination of the inheritance tax due thereon. In that connection, the record discloses substantially the following: Catherine S. Pike, hereinafter generally called Mrs. Pike, died testate March 1, 1954, and a petition was filed in the county court of Keith County seeking probate of her last will. Theretofore, on September 18, 1952, she had filed an action in the district court against Clarence A. Triska, hereinafter called Triska or defendant, seeking to set aside and cancel a contract and warranty deed to the aforesaid properties which she alleged had been procured on July 28, 1950, by mistake, fraud, and misrepresentation of Triska. She also sought an accounting and injunctive relief.

The deed had been placed in escrow with a third person, one LeRoy A. DeVoe, a lawyer, to be delivered to Triska on the death of Mrs. Pike, conditioned upon Triska's full performance of a contract which required him to manage and maintain all of her property and handle all of her financial and business affairs as he would his own because she was physically unable to

do so. The contract also required Triska to provide for and furnish all of her care and support, maintenance, needs, and comfort so long as she lived and pay the expenses of her last illness and burial, all of which was required to be done by Triska without regard to the availability of funds from Pike resources. Such action was pending when Mrs. Pike died, so it was revived in the names of the executor of her estate and named beneficiaries of her last will, of which Triska was not one.

In that connection, on September 8, 1954, Triska filed a contingent claim in her estate to preserve and protect his rights, which would eventually be decided by the pending litigation. Thereafter, on May 1, 1956, the district court rendered a decree finding and adjudging the issues generally in favor of Triska; that he had performed the contract without any breach of duty; that he was entitled to delivery of the warranty deed to him by the escrow holder, together with possession and use of the real property; and that upon the basis of an accounting there was then due Triska the sum of $7,175.79, which had been spent by him out of his own resources in performance of the contract. However, no judgment was rendered therefor, because it was part of the consideration for the warranty deed to be paid by Triska in services and money.

On July 12, 1957, we affirmed that judgment. See Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311. In that opinion, which is found in the record now before us, we recited the facts and cited authorities which require no repetition here. Therein we also said: "By analogy, of course, plaintiff herein (Catherine S. Pike) retained legal title to the real property described in the contract and deed, but lost control over them so long as defendant performed the conditions of their contract and understanding, and upon full performance thereof by defendant (Triska) during plaintiff's lifetime, as held by the trial court and affirmed herein, then on * * *

the date of plaintiff's death, the fee title to the property described in the deed vested in defendant, who became entitled to delivery of the instrument to him by Mr. DeVoe."

The record now before us also shows without dispute that Triska also paid out in Mrs. Pike's behalf some additional $8,806.83 from his own funds, which included Mrs. Pike's hospital bills, funeral expenses, and other obligations, including her support and maintenance during her lifetime, as required by Triska's contract with her and orders of the court. This record also shows that at the time of Mrs. Pike's death real estate and paving taxes in the sum of $2,508.48 were a lien against the property involved, and as required, Triska paid such taxes out of his own funds.

After final disposition of Pike v. Triska, *supra,* and as authorized by section 77-2018.01, R. S. Supp., 1953, Triska filed an application in the estate of Catherine S. Pike, deceased, in the county court of Keith County requesting the appointment of an appraiser of the real property involved for determination of inheritance taxes due, as provided by law, which were those statutes in force and effect March 1, 1954. Thereupon an appraiser was duly appointed and qualified, who, after notice and hearing, filed a report in the county court. In that connection, the fair market value of the property was appraised at $73,500 as of March 1, 1954. Triska did not file objections to the report within 5 days as he "may" have done under the provisions of section 77-2020, R. R. S. 1943, but on April 10, 1958, he filed a "Claim for exemptions under the Nebraska state inheritance tax laws." Therein he included his claim for $500 statutory exemption about which there is no dispute. He claimed a deduction before determination of taxes due of the following items: $7,175.79 plus $8,806.83, plus $2,508.48 heretofore mentioned and theretofore paid by him, making a total of $18,491.10, plus $500 statutory exemption, or a total of $18,991.10. Further, he claimed

a deduction before a determination of taxes due of some $23,037, which represented all costs and attorney's fees incurred and paid by Triska in the litigation of Pike v. Triska, *supra.*

After a hearing upon the report of the appraiser and Triska's claim of exemptions, an order was rendered and filed by the county court finding and adjudging that the fair market value of the real property involved as of March 1, 1954, was $73,500, but that same was received by Triska pursuant to his contract with Mrs. Pike as finally determined in Pike v. Triska, *supra;* and that Triska had expended from his own resources, as required, the total sum of $18,491.10 heretofore mentioned, which, together with the $500 statutory exemption, or a total of $18,991.10, was exempt from taxation. The order also allowed an exemption of $23,037 for costs and attorney's fee incurred and paid by Triska in Pike v. Triska, *supra.* In other words, Triska was allowed a total exemption of $42,028.10 and the order found that the clear market value of Triska's beneficial interest was $31,471.90, and found and adjudged that as of March 1, 1954, same was subject to an inheritance tax due of $3,670.78, together with delinquent interest thereon of $1,061.13 to April 18, 1958, which made a total sum of $4,731.91 due on April 18, 1958, from Triska to the state. Such tax and interest was thereupon paid to the county treasurer of Keith County by Triska.

Therefrom County of Keith, hereinafter called plaintiff, appealed to the district court under the provisions of section 77-2023, R. R. S. 1943, which provides that: "Any person or persons, dissatisfied with the appraisement or assessment, *may appeal from the determination of the tax due made by the county court to the district court* * * *," and fixed time limitations for such an appeal. (Italics supplied.)

At this point, it should be said that, contrary to plaintiff's contention, such an appeal, since 1951, is taken

"from the determination of the tax due made by the county court" and not from the "appraisement or assessment." The latter are simply elements to be considered and determined by the county court, which has jurisdiction of the entire proceeding in determining the taxes due. The appraiser, if appointed, is simply an officer of the county court who serves in an advisory capacity by making a report of the fair market value of the property as of the date of death. However, the county court is not bound by such an appraisement but may at its discretion take further evidence and enter an order fixing the fair market value of the property and determining the taxes due upon the clear market value of the beneficial interest taken by the taxpayer. See, §§ 77-2019, 77-2020, 77-2021, 77-2022, 77-2027, 77-2006, R. R. S. 1943; State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136. Such proceedings in court are at all times in rem. In re Estate of Sautter, 142 Neb. 42, 5 N. W. 2d 263.

In that connection, plaintiff's petition on appeal, as far as important here, alleged that defendant had failed to file any objections to the appraiser's report within 5 days after the report was filed with the county judge, as section 77-2020, R. R. S. 1943, provides that he "may" do. Therefore, plaintiff alleged that such appraisement of the fair market value by the appraiser became final and could not be questioned on appeal to the district court. We do not agree. It is pertinent to say here that the word "may" contained in said section does not mean "must" as argued by plaintiff, since the county court, as heretofore stated, has exclusive original jurisdiction to fix the appraisement in any event.

In Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497, this court said, citing authorities: "In general, the word 'may,' used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive,

discretionary, and not mandatory." That rule is applicable and controlling here.

Plaintiff's petition also alleged that defendant succeeded to the beneficial interest in the real estate involved, and thereafter made application for the appointment of an appraiser and for certain exemptions, but that defendant was entitled to only $500 exemption because in effect: (1) The county was not a party to the litigation of Pike v. Triska, *supra,* and was not bound by the conclusions reached by this court or orders of the district court rendered therein; and (2) that in any event the costs and attorney's fees incurred and paid therein by defendant were erroneously allowed as exemptions. Therefore, plaintiff alleged that inheritance taxes due from defendant should have been determined upon $73,000 as the clear market value of defendant's beneficial interest, together with interest thereon from March 1, 1954.

With regard to such taxes and interest, section 77-2010, R. R. S. 1943, provides in part: "All taxes imposed by sections 77-2001 to 77-2037, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of seven per cent per annum shall be charged and collected therefrom for such time as such taxes are not paid; Provided, if the tax is paid within sixteen months from the accruing thereof, interest shall not be charged or collected thereon, * * *." In that connection, as said in State ex rel. Nebraska State Bar Assn. v. Richards, *supra,* citing authorities: "The mere fact that delay had been caused by litigation did not excuse the county judge from assessing it."

At this point it should be said that plaintiff's contention heretofore numbered (1) has no merit. In Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661, we reaffirmed that: "Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the

parties now before it, the court has the right and should examine its own records and take judicial notice of its own proceedings and judgments in the former action. Such cases are exceptions to the general rule warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law." Such rule has application and is controlling here. It is peculiarly fortified by the fact that this is an in rem proceeding involving the same property as that in Pike v. Triska, *supra*. Therein both the trial court and this court decided that on March 1, 1954, the date of Mrs. Pike's death, fee title to that property vested in defendant. Plaintiff contends that defendant's beneficial interest therein is liable for inheritance taxes, because section 77-2002, R. S. Supp., 1953, provides that: "Any interest in property whether created or acquired * * * shall be subject to tax at the rates prescribed by sections 77-2004 to 77-2006 * * * if * * * (2) intended to take effect in possession or enjoyment, after his death; * * *." The effect of plaintiff's position is to contend for its own advantage that defendant so acquired a beneficial interest by virtue of Pike v. Triska, *supra,* which was liable for inheritance taxes, but plaintiff was not bound by a determination of the obligations imposed upon defendant in performance of his contract as consideration for acquiring that interest. Plaintiff's contention is untenable. If defendant had not so acquired such interest then of course the property would not be liable for any inheritance taxes in this proceeding.

In that connection, plaintiff's contention heretofore numbered (2) has merit. It is generally the rule in all jurisdictions that in determining inheritance taxes due, the costs and expenses of litigation independent of the estate and between distributees over their respective interests to establish the right to take the property, should not be deducted from the fair market value of the property in determining the clear market value of the taxable beneficial interest therein. We adhere to that

rule and conclude that the costs and attorney's fee amounting to a total of $23,037, incurred and paid by defendant in the litigation of Pike v. Triska, *supra,* were not deductible from the fair market value in determining the clear market value of defendant's taxable beneficial interest. See, 85 C. J. S., Taxation, § 1185, p. 1039, and authorities cited; People v. Estate of Klein, 359 Ill. 31, 193 N. E. 460, 96 A. L. R. 622, and authorities cited and discussed in Annotation thereto, pages 626 to 628 inclusive.

To plaintiff's petition on appeal defendant answered, denying generally and alleging factually at length and in effect that the order of the county court fixing the clear market value of defendant's beneficial interest and determining the tax due thereon was correct, and he prayed for such a determination. Plaintiff's reply was a general denial.

After a hearing whereat evidence was adduced consisting entirely of stipulations, exhibits, and the testimony of one witness for plaintiff, the trial court rendered its judgment on May 7, 1958, which determined that the order of the county court rendered April 11, 1958, erroneously determined and assessed the tax due, together with interest thereon, and that such order should be set aside. The judgment also found and adjudged that the fair market value of the property as of March 1, 1954, was $73,500, and that there should be deducted therefrom the sum of $7,175.79 plus the sum of $2,508.48 heretofore mentioned as paid by defendant, plus his $500 statutory exemption, which left $63,315.73 as the net taxable estate, and that there was due and payable to plaintiff as inheritance taxes from defendant the sum of $8,846.83 with interest at 7 percent from March 1, 1954. The court also determined that on April 18, 1958, defendant had paid the Keith County treasurer for inheritance taxes $3,670.78 and interest to that date of $1,061.13, but that there was due for inheritance taxes the additional sum of $5,176.05 and

interest thereon of $1,514.24 from March 1, 1954, to date of the judgment, or a total of $6,690.29, for which amount judgment was rendered.

Thereafter, defendant's motion for new trial was overruled and he appealed, assigning as far as important here, that: (1) The trial court erred in finding that the fair market value of the property involved was $73,500 as of March 1, 1954; and (2) the trial court erred in disallowing the deductions claimed by defendant, which consisted of $8,806.83 paid by defendant in performance of his contract, plus $23,037 costs and attorney's fees incurred and paid by defendant in Pike v. Triska, *supra.* We conclude that assignment No. (1) has no merit, but that assignment No. (2) has merit with regard to the $8,806.83 item in that the trial court should have allowed that claimed deduction, but that the deduction of costs and attorney's fees of $23,037 incurred and paid by defendant in Pike v. Triska, *supra,* was properly refused for reasons heretofore stated.

Defendant included other assignments of error with regard to restriction of cross-examination by defendant of the appraiser called as a witness by plaintiff, and in permitting counsel for plaintiff to impeach the testimony of such witness. However, from an examination of the entire record, we deem it sufficient to say that such assignments have no merit.

Plaintiff cross-appealed, assigning that the trial court erred: (1) In allowing the deductions of $7,175.79 and $2,508.48 heretofore mentioned; and (2) in the admission of exhibits Nos. 1, 2, and 3 offered by defendant. Such assignments have no merit. Exhibits Nos. 1, 2, and 3 were respectively stipulated to be and they were copies of original orders and judgment of the trial court, the opinion and decision of this court on appeal affirming that judgment, and the judgment on the mandate of this court in Pike v. Triska, *supra.* They were not erroneously admitted in evidence and, as heretofore said, they were

binding upon plaintiff as an adjudication of defendant's rights and interests in this proceeding.

With regard to defendant's first assignment of error, the appraiser called as a witness for plaintiff had admittedly appraised the fair market value of the property involved at $73,500 as of March 1, 1954. He had also acted as a referee by appointment of the district court in Pike v. Triska, *supra.* As such he had become acquainted with all court proceedings and the costs and expenses incurred in that matter from its inception. He again reiterated in this trial that the fair market value of the property was $73,500 on March 1, 1954; and that he had so fixed the fair market value but such amount was not the clear market value, which he correctly described as the value of the beneficial interest which defendant finally took, and not the fair market value. He then testified that he thought the clear market value would be about $45,000, which figure he arrived at by considering and deducting most of the costs and expenses incurred in the litigation of Pike v. Triska, *supra,* from the fair market value of $73,500. However, he again reiterated that $73,500 was the fair market value of the property if it could have been sold on March 1, 1954, with such litigation still pending. Since defendant was not entitled to have directly deducted any expenses, costs, and attorney's fees incurred and paid by him in Pike v. Triska, *supra,* the clear market value of defendant's beneficial interest could not be determined indirectly by subtracting such costs and expenses from the fair market value of the property. We conclude from the record now before us that the fair market value of the property involved was $73,500, and that the trial court properly so found.

Finally, we turn to plaintiff's first assignment of error. In that connection, it is generally the rule, as said in 85 C. J. S., Taxation, § 1171, p. 1008, citing authorities with relation to inheritance taxes: "In so far as the transferee of property has paid a consideration to the

transferor therefor, the tax will be levied only on the difference between the valuation of the property and the consideration." In the final analysis, the clear market value of defendant's beneficial interest in the property for inheritance tax purposes must be measured by the fair market value of the property as of the date of the death of the grantor, less the consideration paid therefor.

This record conclusively shows that the consideration paid by defendant for the property involved was a total of $18,491.10, which sum, together with defendant's statutory exemption of $500, or a total of $18,991.10, should have been deducted from $73,500, thereby leaving defendant with a beneficial interest having a clear market value of $54,508.90, which sum is liable for inheritance taxes due plus interest from March 1, 1954, as provided by sections 77-2006 and 77-2010, R. R. S. 1943, after giving defendant credit for $3,670.78 taxes and $1,061.13 interest thereon already paid by defendant on April 18, 1958.

For reasons heretofore stated, the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render judgment in conformity with this opinion. All costs are taxed to County of Keith.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF MILLARD F. CLUCK, JR., DECEASED. ARTHUR STORM, APPELLANT, V. R. LAVONNE CLUCK, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF MILLARD F. CLUCK, JR., DECEASED, ET AL., APPELLEES.

IN RE ESTATE OF MILLARD F. CLUCK, JR., DECEASED. ROSE V. STORM, APPELLANT, V. R. LAVONNE CLUCK, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF MILLARD F. CLUCK, JR., DECEASED, ET AL., APPELLEES.

95 N. W. 2d 161

Filed February 27, 1959. Nos. 34506, 34507.

Executors and Administrators. The only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make such application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so. § 30-605, R. R. S. 1943.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Harlan A. Bryant and *William H. Heiss,* for appellants.

Neighbors & Danielson, for appellees.

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

CHAPPELL, J.

In these cases, two separate transcripts on appeals from two separate judgments rendered by the district court for Scotts Bluff County were filed in this court, but it was stipulated that each case involved the same identical issue and that such actions should be consolidated, heard, and determined as one with but one brief filed by each of the parties.

In separate petitions filed in the district court for Scotts Bluff County on March 18, 1958, in appeals from the county court of Scotts Bluff County, Arthur Storm and Rose V. Storm, his wife, hereinafter called plaintiffs, sought to have vacated and set aside an order rendered on May 19, 1954, by the county court barring claims in

In re Estate of Millard F. Cluck, Jr., deceased. Plaintiffs therein also sought to be allowed and permitted to file exhibits A, separately so designated and attached to each petition, as claims against said estate, and to have a hearing on their petitions after due notice thereof. Thereafter, on April 4, 1958, R. LaVonne Cluck, as administratrix of the estate of her deceased husband, Millard F. Cluck, Jr., and as guardian of the estates of two named minor children, filed a general demurrer to each of plaintiffs' petitions. On June 18, 1958, said demurrers were each sustained. Plaintiffs elected to stand upon their petitions, whereupon they were each dismissed at plaintiffs' costs. Plaintiffs' motions for rehearing were each thereafter overruled and they separately appealed, assigning in the consolidated brief that: "The Court erred in sustaining the Demurrers to Appellants' Petitions." We do not sustain the assignment.

Plaintiffs' petitions and claims attached thereto were originally filed in the county court on September 13, 1957. Their separate petitions with claims attached, which plaintiffs filed on appeal in the district court, were identical in form and substance except that the claim of Arthur Storm was for damage to his car and for medical and hospital expenses for his wife, Rose V. Storm, whose separate claim was for her alleged permanent injuries. Such damages, as far as important here, were alleged to have been proximately caused by the negligence of Millard F. Cluck, Jr., when, on November 13, 1953, a car owned and driven by him and one owned by Arthur Storm but driven by his wife, Rose V. Storm, collided on a highway in Saunders County.

The general rule is that: "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.

"In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part

thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant." Babin v. County of Madison, 161 Neb. 536, 73 N. W. 2d 807.

Plaintiffs' separate petitions, with claims separately attached thereto, and filed in the district court, each alleged in substance as follows: That the estate of Millard F. Cluck, Jr., deceased, was indebted to plaintiffs in a specified amount as disclosed by the attached claims; that on November 13, 1953, plaintiffs were residents of Saunders County but later became residents of Douglas County; that Millard F. Cluck, Jr., a resident of Scotts Bluff County, died intestate; that on November 20, 1953, proceedings were instituted in the county court of Scotts Bluff County for the appointment of an administratrix of his estate; and that notice of the filing of said petition was duly ordered and published 3 successive weeks in the Scottsbluff Daily Star-Herald, a legal newspaper of general circulation and published daily except Monday in Scotts Bluff County. A copy of such notice was set forth verbatim in plaintiffs' petitions. However, plaintiffs then alleged that they had no notice or knowledge of such publication and that same was not called to their attention by mail or otherwise.

Plaintiffs then alleged that R. LaVonne Cluck, the widow of Millard F. Cluck, Jr., deceased, was duly appointed administratrix of his estate; and that she at all times knew the circumstances of her husband's death in the accident of November 13, 1953, and the probable claim of plaintiffs for damages. Plaintiffs also alleged that on December 16, 1953, an order in said estate for notice to creditors was duly rendered by the county court and that said notice was duly published for 3 successive weeks in the legal Scotts Bluff newspaper aforesaid. A copy of said notice, which provided: "Notice is hereby given that all claims against said estate must be filed on or before the 12th day of April, 1954, or be forever barred, and that a hearing on claims will be

held in this Court on April 13th, 1954, at ten o'clock A. M." was set forth verbatim in plaintiffs' petitions. However, in like manner as heretofore set forth, plaintiffs alleged that they had no notice or knowledge of such publication.

Plaintiffs also each alleged that on May 19, 1954, the county court rendered a judgment in said estate barring claims. A copy of said judgment was then set forth verbatim. As far as important here, it provided: "IT IS THEREFORE CONSIDERED ORDERED AND ADJUDGED by the court that all claims not heretofore filed herein against the estate be, and they hereby are, forever barred." However, in like manner as heretofore set forth, plaintiffs alleged that they had no notice or knowledge of such judgment.

Plaintiffs then alleged that unless said judgment barring claims was vacated and set aside and plaintiffs were permitted to file their claims against the estate, they would be deprived of valuable property rights without notice, knowledge, or an opportunity to be heard. Their prayer was to have such judgment vacated and set aside, for permission to file their claims, and for hearing thereon after due notice was given.

At the outset it should be noted that Millard F. Cluck, Jr., was admittedly instantly killed in Saunders County on November 13, 1953, in the presence of plaintiffs and in the same accident as here involved. Plaintiffs and their counsel must have then known or could have timely learned by the exercise of any diligence that decedent was a resident of Scotts Bluff County and that his estate was being administered in that county. As a matter of fact, as hereinafter noted, plaintiffs and their counsel did soon learn of that fact, but by their own neglect, fault, and want of due diligence they took no timely steps to protect and preserve their rights.

In that connection, it has now become elementary that: "Where cases are interwoven and interdependent and the controversy involved has already been considered

and determined by the court in former proceedings involving one of the parties now before it, the court has the right and should examine its own records and take judicial notice of its own proceedings and judgments in the former action. Such cases are exceptions to the general rule warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law." Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661.

In that connection, our records, opinion, and judgment in Storm v. Malchow, 163 Neb. 541, 80 N. W. 2d 477, and Storm v. Malchow, 163 Neb. 543, 80 N. W. 2d 479, both decided January 18, 1957, disclose that on September 23, 1954, more than 10 months after November 13, 1953, plaintiffs Arthur Storm and Rose V. Storm filed original actions in the district court for Saunders County against R. LaVonne Cluck, as administratrix of the estate of Millard F. Cluck, Jr., deceased, and others, seeking to recover the same damages allegedly resulting from the same accident as relied upon by plaintiffs in their claims here involved. Therein, the administratrix demurred to plaintiffs' petitions, whereupon the trial court sustained the demurrers and dismissed plaintiffs' petitions for want of jurisdiction of the subject matter. Upon appeal therefrom we affirmed the judgments, holding in the first opinion and applicable to both cases, that: "A cause of action for personal injuries alleged to have been proximately caused by negligence of a decedent during his lifetime survives, and, when no action was brought thereon during his lifetime, it must be prosecuted by a claim filed against the estate of decedent in the county court which has exclusive original jurisdiction thereof."

In so holding, we relied on Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856, adopted as early as April 14, 1949, wherein we held: "Where exclusive jurisdiction of a subject matter is constitutionally conferred on county courts, and where relief sought in an action per-

taining thereto but instituted in a district court is such that the county court, under powers so conferred, is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises.

"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."

Such rules must have been well known by counsel for plaintiffs, or could have been discovered by the exercise of any diligence. It will also be noted that such original actions aforesaid were filed almost 10 months after administration proceedings had begun on November 20, 1953, but less than 4 months after May 19, 1954, the date of the judgment barring all claims, and less than 1 month after plaintiffs could, for good cause shown, have applied for an extension of time to file their claims, which they did not do, although by the exercise of any diligence they did or could have timely known about the proceedings in the estate of Millard F. Cluck, Jr., deceased, long before their original actions were filed.

Further, Storm v. Malchow, 163 Neb. 541, 80 N. W. 2d 477, and Storm v. Malchow, 163 Neb. 543, 80 N. W. 2d 479, were both decided on January 18, 1957, and thereafter, with full notice and knowledge of their alleged rights, plaintiffs, by their own fault and lack of due diligence, procrastinated for almost 8 months until September 13, 1957, before they ever made any effort to file their claims against the estate. Under such circumstances, they are in no position now to complain that the trial court refused to vacate and set aside the judgment barring all claims which was rendered May 19, 1954, some 3 years and 4 months before plaintiffs made any effort to file their claims on September 13, 1957.

On the other hand, in any event this state has clear and unambiguous applicable and controlling in rem pro-

cedural and substantive statutes which bar plaintiffs' claims. Such statutes have been so construed and applied both by ancient and recent decisions of this court which have long since become customary, commonplace, elementary, and well-known to courts and lawyers throughout this state. Section 30-601, R. R. S. 1943, provides in part that: "When letters * * * of administration * * * shall be granted by any court of probate * * * it shall be the duty of the judge of the court to receive, examine, adjust and allow all lawful claims and demands of all persons against the deceased; Provided, the judge shall within forty days after the issuance of such letters * * * of administration, give notice of the date of the hearing of claims against the deceased and the limit of time for the presentation of claims by creditors, which notice shall be given by posting in four public places in the county, or by publication in a legal newspaper of the county three successive weeks, or in any manner which the court may direct." Admittedly, such section was complied with in every respect.

Section 30-603, R. R. S. 1943, provides that: "The court shall allow such time as the circumstances of the case shall require for the creditors to present their claims for examination and allowance, which time shall not in the first instance exceed eighteen months nor be less than three months; and the time allowed shall be stated in the order." Admittedly, that section was complied with in every respect.

In that connection, section 30-604, R. R. S. 1943, provides: "The court may extend the time allowed to creditors to present their claims, as the circumstances of the case may require; but not so that the whole time shall exceed two years." Also, section 30-605, R. R. S. 1943, provides: "Any creditor who has failed to present his claim within the time allowed, may, within three months after the expiration of such time, apply to the court for additional time for the filing and determination of his claim, and the court may, for good cause

shown, allow such further time not exceeding three months, but notice of the time and place for the hearing on claims thus filed within the additional time shall be given to all parties interested as prescribed in section 30-601." Further, section 30-609, R. R. S. 1943, provides in part that: "Every person having a claim or demand against the estate of a deceased person who shall not after the giving of notice as required in section 30-601 exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or setting off the same in any action whatever."

In this case, claims of creditors, as admitted by plaintiffs, were timely required and noticed to be filed on or before April 12, 1954, and judgment barring claims was rendered May 19, 1954. However, plaintiffs, for want of any diligence, never made any timely application for an extension of time to file their claims and never made any attempt to file them in the estate until September 13, 1957, more than 3 years after April 12, 1954, when they were required to file them, and more than 3 years after May 19, 1954, when the judgment was rendered barring all claims. In other words, plaintiffs, by their own fault or neglect and for want of due diligence, failed to comply with either or all of sections 30-604, 30-605, and 30-609, R. R. S. 1943.

In In re Estate of Yetter, 125 Neb. 763, 252 N. W. 202, this court held that: "A claimant against the estate of a deceased person is not entitled to have time extended beyond that duly fixed by the county court so that he might present his claim, where such claimant has been guilty of inexcusable inattention, neglect, or lack of diligence."

As early as Estate of Fitzgerald v. First Nat. Bank of Chariton, 64 Neb. 260, 89 N. W. 813, this court concluded that what is now section 30-609, R. R. S. 1943, was a statute of nonclaim, and held that: "An adminis-

trator can not waive the defense of non-claim to the prejudice of his estate, either by agreement with the claimant or by neglecting to plead such defense."

In In re Estate of Golden, 120 Neb. 226, 231 N. W. 833, we reaffirmed that conclusion and, citing authorities, said: "Claims not filed within the time limited by the county court, after due notice, are forever barred. * * * Time and notice given by the county court were in strict compliance with the statutes. The statute of non-claim as a bar is more rigorously applied than the general statute of limitations. * * * In Nebraska an administrator cannot waive the defense of nonclaim to the prejudice of the estate * * *. There is, however, a statutory provision that permits the filing of a belated claim within three months from expiration of the general time-limit. 'The court may,' says the statute, 'for good cause shown allow further time not exceeding three months.' * * * The sufficiency of the showing by claimants is the controlling question. The jurisdiction of the county judge to permit the filing of a belated claim depends upon good cause shown. In absence of such a showing he has no discretion to grant such permission." In conformity therewith, this court specifically held: "Claims against the estates of deceased persons are forever barred, unless presented within the time allowed by the county court for the filing of claims, or unless permission to file belated claims is granted pursuant to statute for good cause shown.

"The statute of nonclaim is generally more rigorously applied than the general statute of limitations.

"The jurisdiction of the county court to permit the filing of a belated claim against the estate of a deceased person depends upon good cause shown, and in the absence thereof there is no judicial discretion for the granting of such permission."

In that connection, it would be novel indeed if it were argued that a possible defendant in a tort action is required, in the absence of statute, to notify a pos-

sible plaintiff in the action that in 4 years his claim will be barred by the statute of limitations governing tort claims. Obviously, due process of law does not require notice in such a case. By analogy, notice is no more required in connection with the running of a statute of nonclaim, which an administrator cannot waive as a defense, than it is for a general statute of limitations which may generally be waived or used as a defense.

As recently as Supp v. Allard, 162 Neb. 563, 76 N. W. 2d 459, a case identical in all material respects with those at bar, we discussed and applied the statutes heretofore quoted. Therein we held: "The only way a creditor can give the county court authority to make an order extending the time in which to file his claim is to make such application within 3 months after the expiration of the time previously allowed for filing claims and then only by showing good cause for doing so. § 30-605, R. R. S. 1943." Also, in that opinion, after quoting from sections 30-605 and 30-609, R. R. S. 1943, and citing authorities, we said: "Neither the statute nor our holdings thereunder make any distinction as to creditors based on whether or not they are residents or nonresidents of the state, or upon the fact of whether or not they had personal notice or actual knowledge of the time allowed for the filing of claims. We think none was intended." See, also, Lesoing v. Dirks, 157 Neb. 183, 59 N. W. 2d 164, and Lesoing v. Dirks, 157 Neb. 194, 59 N. W. 2d 170, which are companion cases identical in all material respects with those at bar. Therein, in the first opinion and applicable to both cases, we held: "Where a person claiming to have a claim against an estate, having failed to present his claim within the time allowed therefor in the first instance by the probate court, makes application for that purpose within 3 months after the expiration of the time previously allowed, the court may, for good cause shown, allow

further time not exceeding 3 months for the filing and determination of such claim.

" 'Good cause,' as employed in our statute of nonclaim, is not definitely defined therein, and the proper interpretation and application thereof must depend upon the circumstances of each case.

"The jurisdiction of the county court to permit the filing of a belated claim against the estate of a deceased person depends upon good cause shown, and in the absence thereof there is no judicial discretion for the granting of such permission.

"A claimant against the estate of a deceased person is not entitled to have time extended beyond that duly fixed by the county court so that he might present his claim, where such claimant has been guilty of inexcusable inattention, neglect, or lack of diligence."

No authority in point has been cited or discussed by plaintiffs which could support any conclusion except that the judgments of the trial court should each be and hereby are affirmed. All costs in each case are separately taxed to each respective plaintiff, who is an appellant herein.

AFFIRMED.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SARPY, NEBRASKA, APPELLEE, V. CLARA MARIE MCNALLY, APPELLANT.

95 N. W. 2d 153

Filed February 27, 1959. No. 34508.

1. **Counties: Notice.** The statutory provision, referred to in the opinion, that a zoning resolution adopted by a county board shall be published in book or pamphlet form or in a newspaper published and of general circulation in the county is mandatory.
2. ———: ———. The statutory provision mentioned above requires that the entire zoning resolution, including any map, plat, or zoning plan attached to, made a part of, or referred to in the resolution, must be published.

3. ———: ———. A failure to comply with the statutory provision mentioned above prevents a zoning resolution from becoming valid, effective, or enforceable.
4. ———: ———. It cannot be presumed that a county zoning resolution was published in the manner provided by law when the proof establishes it was not.
5. Statutes. Invalid legislation confers no rights and imposes no duties or obligations. Legally it is as though it had never been composed or adopted.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Reversed and remanded with directions.*

Richard G. Stehno and *Eugene L. Wohlner,* for appellant.

Dixon G. Adams, for appellee.

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

BOSLAUGH, J.

The subject of this appeal is the legality of a judgment granting a permanent injunction prohibiting appellant from using Lots 4 and 5, Old Orchard Place, an addition to Sarpy County, owned by her, for the purpose of operating her business of automobile wrecking and storage. A primary issue presented by the appeal is the validity of zoning measures or regulations adopted by appellee on behalf of and for Sarpy County, referred to as resolutions.

The resolution bearing date of May 3, 1941, applied to territory in Sarpy County outside of incorporated municipalities including the real estate of appellant above described. The resolution restricted the use of real property within the territory and made the use thereof subject to the conditions specified in it. It divided the territory into eight districts from the highest restriction class to the lowest restriction class. The text of the resolution did not describe the area or the boundaries of any district but it did contain this lan-

guage: "The boundaries of such districts are hereby established as shown on the Zoning Plan which accompanies and is hereby made a part of this regulation." Appellee by resolution bearing date of June 15, 1942, amended the original resolution in many respects.

A resolution adopted by appellee bearing date of March 28, 1955, recited that the Sarpy County zoning regulations and the zoning plan adopted and partially amended are hereby wholly amended. It affected the same territory as the original resolution dated May 3, 1941. The resolution restricted the use of real property within the territory and made the use thereof subject to the conditions specified in it. It divided the territory into 12 districts from the highest restriction class to the lowest restriction class. The text of the resolution did not describe the area or the boundaries of any district but it did contain this language: "The boundaries of such districts are hereby established as shown on the Zoning Plan which accompanies and is hereby made a part of this regulation." Appellee by resolution bearing date of April 16, 1956, amended the resolution bearing date of March 28, 1955, in many respects. There is no proof that there has ever been any map or, in the language of the resolution, zoning plan, attached to any of the resolutions mentioned and described above. The written text of the resolution bearing date of May 3, 1941, and the written text of the resolution bearing date of June 15, 1942, were published by being printed in book or pamphlet form. The text of either of them was not otherwise published. The zoning plan, hereafter called the map, delineating the boundaries of the districts was not included in and made a part of the book or pamphlet containing the printed text of the resolution. The proof is that the map first referred to in the record was not adopted until June 15, 1942, more than a year after the original resolution was passed by appellee. The record is conclusive that the map referred to in the original resolution as being a part thereof was never published in

any manner as required by the applicable statute.

There is in the record what purports to be two pages of an issue of a newspaper the heading of which is: "Bellevue Press, Bellevue, Nebraska, Friday, April 15, 1955," on which is printed the resolution bearing date of March 28, 1955. There is no proof of publication exhibited. There is no proof that what is exhibited by the two pages of printed matter was an intended or authorized publication of the text of the resolution. There was not included as a part of it any map describing any zoning district. It is much more important that it was stipulated at the trial that the resolution of March 28, 1955, and the one containing the amendments thereto of April 16, 1955, were published by printing the written text of each of them in pamphlet form and that they were not otherwise published. There was no map included in or made part of the pamphlet in which the text of the resolutions last referred to was published. There was no publication of a map describing the boundaries of the districts specified in the resolutions or either of them as provided and required by law.

It is made indisputable by the record that without a map it could not be ascertained from any of the resolutions what regulations and restrictions were prescribed and what uses were permitted for any given parcel of land in the zoning area. The conclusion is inescapable that the resolutions or any of them were not published as required by law.

There is no issue in this case concerning the authority of appellee to adopt and make effective zoning regulations in Sarpy County by compliance with applicable statutory provisions. The challenge made by appellant is that the attempt of appellee in this regard was procedurally deficient and ineffective. A statutory requirement is that any zoning resolution adopted by the county board "* * * shall be published in book or pamphlet form or in a legal newspaper published in

and of general circulation in the county one time * * *." §§ 23-114 and 23-171, R. R. S. 1943. The precise problem concerning the publication of the resolutions presented by this case has not previously engaged the consideration and decision of this court but it and other closely related situations have been discussed and determined in other jurisdictions.

In Berrata v. Sales, 82 Cal. App. 324, 255 P. 538, the court said: "The city of Petaluma in purporting to adopt a zoning ordinance, which did not describe the respective districts except by reference to a certain zoning map on file with the city clerk, but which map was not published in connection with the publication of said purported ordinance, did not comply with the requirement * * * of the charter of said city that no ordinance shall be passed by the council 'until its publication at least once in full in the official newspaper'; and said purported ordinance was void." It is said in the opinion in that case: "The trial court found that the procedure mapped out in the act of the legislature was not followed, in that no notice was ever given by the city council, as required by the act of the legislature referred to. * * * It needs no citation of authority to support the statement that notice of the proposed passage of a zoning ordinance limiting the use of property which, otherwise, naturally attaches to the property in question is a substantial matter and is one of which property owners are entitled to notice. The property owner, as has been so frequently said in other cases, is entitled to have his day in court. * * * It will be seen from the quotations which we have set forth of the proposed zones that no streets are mentioned, and so far as the published ordinance is concerned, it cannot be ascertained therefrom where the commercial district or business district or zone created by the ordinance exist in the city of Petaluma."

Village of Durand v. Love, 254 Mich. 538, 236 N. W. 855, considered an ordinance fixing the fire limits of

a village which recited that the portion thereof described and shown on a certain map and blueprint, Exhibit A, on file in the office of the village clerk, the same being a part of the ordinance, "* * * be and the same is hereby designated and declared to be the fire limits of the village of Durand." The court concluded: "An ordinance sometimes may refer to a public record already established by lawful authority and become effective without publication of such record as part of the ordinance. But Exhibit A was drafted solely for the purpose of the ordinance and to define the fire limits, had no prior official approval and had no purpose, use, force, or official sanction except as it was given by and as part of the ordinance. An ordinance cannot at the same time establish a paper as a public record and also incorporate it by reference as a previously established public record. Without publication of the map, the ordinance was not published in full, did not comply with the statute, and is void."

W. H. Barber Co. v. City of Minneapolis, 227 Minn. 77, 34 N. W. 2d 710, considered an ordinance which provided: " 'The City of Minneapolis is hereby divided into five (5) districts aforesaid and the boundaries of such districts are shown upon the map attached hereto and made a part of this ordinance, being designated as the Use District Map * * *.' " The court concluded: "The publication of the ordinance and the map was required by virtue of * * * the Minneapolis city charter, which provides that before any ordinance shall be in force it shall be published in the official paper of the city. This requirement is mandatory, and it is clear that failure to comply therewith would render any ordinance ineffective. As stated in Basting v. City of Minneapolis, 112 Minn. 306, 308, 127 N. W. 1131, 140 A. S. R. 490: '* * * The charter of the city provides that no ordinance enacted by the city council shall take effect until * * * it has been published by the city clerk in the manner prescribed. * * * The approval and publication were

essential elements in the passage of the ordinance and a consummation or completion of the legislative power of enactment.' * * * The rule making publication of an ordinance mandatory before it may take effect if charter provisions require such publication has been held to require publication of zoning maps made part of city zoning ordinances. * * * It is expressed in the Sherwin case as follows (30 Pa. D. & C. 705): 'While the requirements that the zoning map be published along with the body of the ordinance may work a hardship upon the defendants, the law clearly intends that the entire ordinance be published unless other provisions be made. Knowledge that a measure is pending by one whose rights may be affected by its enactment will not cure a defect of publication: * * * For this reason the failure to publish the ordinance in its entirety is fatal.' "

The statute considered in Benton v. Phillips, 191 Ark. 961, 88 S. W. 2d 828, prescribed the manner of giving notice of a zoning ordinance. It was not complied with. The court declared: "The only authority cities of the second class have to pass zoning ordinances is that conferred upon them by act 108 of the Acts of 1929. Of course, in exercising this special authority, they must comply with the act in order to render their ordinances valid relative to zoning the city. * * * The purpose of this provision was to give every one notice of the plan so that they might make suggestions and objections thereto as well as to acquaint every one purchasing lots with the use to which they might be put. In placing restrictions of this kind upon the use of real estate, notice was necessary and should have been given in the manner prescribed in the act conferring the power to do so upon cities. It is necessarily a mandatory provision in the law, and must be followed in the passage of the zoning ordinance. * * * Having failed to comply with the act in the passage of the zoning ordinance, same is void * * *."

In Katz v. Higson, 113 Conn. 776, 155 A. 507, a zoning

ordinance involved was required to be published at least twice. The zoning commission prepared an ordinance and caused it to be published with an accompanying map with notice of public hearings to be held in reference to it. They were held and substantial changes were made in the ordinance and map. The matter was then presented to the council of the city and it adopted and published an ordinance that: " 'The zoning ordinance as presented by the zoning commission, together with the accompanying map, be, and the same are hereby adopted, with the following exceptions' * * *." The exceptions were stated. This ordinance was advertised in two issues of a newspaper. In adjudging the ordinance last referred to void the court said: "The purpose of the provision in the charter requiring the publication of ordinances is to inform the public of the laws which govern them, and the requirement should be interpreted accordingly. * * * To give effect to that purpose the legislature deemed it best to require that each ordinance should be published; it evidently considered that more ought to be done than merely to give notice that an ordinance concerning a certain matter had been enacted, leaving persons interested in or possibly affected by it to find out for themselves its precise terms. Obviously this was the effect of the publication of the ordinance before us * * *. Only by printing the entire ordinance including that proposed by the commission and made a part of it would such notice be given as would satisfy the provision we have quoted from the charter. The publication which was made was insufficient."

Kelly v. City of Philadelphia, 382 Pa. 459, 115 A. 2d 238, in considering a city zoning regulation observed that zoning laws are enacted in the exercise of the police power and in the absence of specific legislation or a constitutional grant municipalities have no authority to enact zoning ordinances. The court further stated: "Where the Legislature in conferring police powers upon

a municipality has with particularity designated a specified length of time respecting notice to citizens of a hearing, its clearly expressed and mandatory provisions cannot be relaxed; and an ordinance adopted under the police power without compliance with the statutorily prescribed notice of hearing, is invalid."

In State ex rel. Lightman v. City of Nashville, 166 Tenn. 191, 60 S. W. 2d 161, it is stated: "This provision of the charter is mandatory. * * * It is made so by the negative words in section 4, which in effect declare that the City Council shall have no authority to determine the boundary of any district or impose any regulations until after the final report of the zoning commission based on public hearings. Statutes prescribing how the delegated police power may be exercised are mandatory and exclusive of other methods. * * * It is admitted on the record that these mandatory requirements were not met."

In Fierst v. William Penn Memorial Corp., 311 Pa. 263, 166 A. 761, the statute involved required a zoning ordinance to be published in a newspaper, including any map referred to in the ordinance, or if the map was not published with the text of the ordinance the ordinance should state the place where the map was on file and could be examined. None of these requirements were complied with except the text of the ordinance was published. It is said in the opinion: "It is contended by appellant township that, while it did not publish a copy of the zoning plan, or state with particularity, in the publication of the ordinance, where the zoning plan was on file and could be examined, there was substantial compliance because, in a section of the ordinance as published, it was stated 'the location and boundaries are hereby established as shown on the zone map which accompanies this ordinance, and which is hereby declared to be a part hereof.' It is difficult to see how this meets the requirement that in the publication of the ordinance reference shall be made to the

place where the map is on file and can be examined. The mere statement that the zone map accompanied the ordinance did not indicate where it was on file or could be examined. * * * Nor do we think it matters that appellees had knowledge of the provisions of the zoning ordinance before establishing the cemetery. We are not dealing with a valid ordinance, but with an invalid one. Knowledge of the existence of an invalid ordinance cannot cure the defect. Failure to follow the express provisions of the law as to publication made the ordinance of no effect. There are numerous cases which hold that the publication of municipal ordinances is mandatory and until complied with as the law directs, such ordinances are ineffective * * *. Without the map the ordinance is unintelligible, as these extracts from it will show: 'The location and boundaries of the said Use Districts are hereby established as shown on the zone map which accompanies this ordinance * * *.'"

In Milano v. Town of Patterson, 197 Misc. 457, 93 N. Y. S. 2d 419, the zoning ordinance stated that the boundaries of the several districts were to be created and shown "on the map entitled 'Building Zone Map of the Town of Patterson' which accompanies this ordinance and is hereby declared to be a part thereof." No map was published although the text of the resolution was. The opinion states: "The publication was defective and incomplete. By the language used the zoning map was made a part of the zoning ordinance. This map was never published, hence section 269 of the Town Law was not complied with. This failure renders the ordinance void * * *."

Alabama Alcoholic Beverage Control Board v. City of Birmingham, 253 Ala. 402, 44 So. 2d 593, states: "So it can be seen from the foregoing authorities that the city is under no duty or obligation to zone, but if it does attempt to zone, it must follow the procedure prescribed in the act giving it the power to zone. * * * there are two separate code sections placing a positive

and direct restriction against the right of the city to adopt a zoning ordinance unless and until due advertisement thereof is made. * * * It is admitted in this case that the ordinance in question was not so advertised. Therefore it must fall and it must be declared void and inoperative."

Hutchison v. Board of Zoning Appeals, 138 Conn. 247, 83 A. 2d 201, concerned an attempt to make a change in zone boundaries. The requirements to effect such a modification were not observed. The opinion of the court states: "Compliance with these provisions is a prerequisite to any valid and effective change in zone boundaries. * * * Failure to comply with any of the required steps constitutes a jurisdictional defect. * * * The underlying purpose of such requirements is 'not to permit changes, exceptions or relaxations (in zoning regulations) except after such full notice as shall enable all those interested to know what is projected and to have opportunity to protest, and as shall insure fair presentation and consideration of all aspects of the proposed modification. This is not a technical requirement difficult of performance by the unwary. It is dictated by common sense for protection of an established neighborhood to be subject to change only after fair notice.' Kane v. Board of Appeals of Medford, 273 Mass. 97, 104, 173 N. E. 1."

In Village of Williston Park v. Israel, 301 N. Y. 713, 95 N. E. 2d 208, the Court of Appeals said: "Special Term ruled that 'By reason of the failure to publish the map, to post the map, to include the map in the ordinance as published or to set forth that such map was on file in the office of the village clerk, and by reason of the failure of the ordinance to otherwise describe in the text of the ordinance the use districts attempted to be created, the ordinance is null and void.' * * * Judgment affirmed * * *."

Leahy v. Inspector of Buildings of New Bedford, 308 Mass. 128, 31 N. E. 2d 436, makes this statement: "But

the Legislature could determine the extent of the power granted to these municipalities and prescribe the terms and conditions under which it could be exercised, and action taken beyond the authority conferred or not in compliance with the terms and conditions governing its exercise would be invalid."

In Union P. Ry. Co. v. Montgomery, 49 Neb. 429, 68 N. W. 619, this court said: "Another suggestion made is that the first section of the ordinance is valid for the reason one publication is sufficient as to it, since it does not impose a penalty. Doubtless there are ordinances in which parts may be upheld, while others are rejected as invalid. But this ordinance does not belong to that class. The statute expressly requires that an ordinance which prescribes a penalty shall be published in a certain manner and for a specified period. This requirement applies to the whole of such an ordinance, and not merely to the penal portion. Such is the plain import and meaning of the statute." See, also, L. A. Thompson Scenic Ry. Co. v. McCabe, 211 Mich. 133, 178 N. W. 662; Schierloh v. Wood, 230 App. Div. 788, 244 N. Y. S. 651; Wood v. Town of Avondale, 72 Ariz. 217, 232 P. 2d 963; Moon v. Smith, 138 Fla. 410, 189 So. 835; County of Winnebago v. Niman, 397 Ill. 37, 72 N. E. 2d 818; Rock Island Metal Foundry v. City of Rock Island, 414 Ill. 436, 111 N. E. 2d 499.

The resolutions or any of them did not create use districts and attempt to define them with respect to boundaries. The map referred to in the respective resolutions identified the use districts and neither of the maps was published within the meaning of the statutes requiring publication of the entire resolution. No notice of any kind of the boundaries of the several districts was published. There is nothing in the text of the resolutions as they were published that gave notice to anyone as to the boundaries of the districts. Notice is futile unless a property owner is able to determine from such notice that his property is or is not affected.

This would seem to be the obvious purpose of the statutory requirement for publication of the resolution. The publication made was insufficient as to each of the resolutions.

Grant of power to a county in this state is strictly construed. State ex rel. Johnson v. County of Gage, 154 Neb. 822, 49 N. W. 2d 672. A zoning resolution is in derogation of the rights of an owner under the common law and it follows that the procedure prescribed by the Legislature in the exercise of the police power is strictly construed and must be rigidly followed. Milano v. Town of Patterson, *supra.*

Appellee attempts to sustain the validity of the resolutions by appealing to the doctrine that there is a presumption that public officers perform their duties in accordance with law and that it is presumed that statutory requirements as to publication of legislation such as the resolutions here involved were complied with. There is a presumption that legislation valid on its face was enacted as required by applicable law. Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490. There is no presumption of official action lawfully performed when the contrary is established. The record under review evidences without dispute that the resolutions important to this case were not published in any manner authorized by the statute which gives appellee the only authority it has to act in the field of zoning. Union P. Ry. Co. v. Montgomery, *supra,* discusses this subject in this manner: "It is urged that the same presumption prevails in favor of the validity of an ordinance that there is in favor of the validity of a judgment or of an act of the legislature. Grant it. But it will not be presumed that a legislative enactment was duly passed or proved when the contrary appears. So we cannot presume that this ordinance was published in the mode provided by law, when it is manifest from the certificate of the city clerk that the opposite is true." See, also, Union P. R. R. Co. v. Ruzicka, 65 Neb. 621, 91 N. W. 543.

The failure to publish the maps referred to in the resolution was not accidental or because of lack of information. It was purposeful on the part of appellee. One of the publishers of the Bellevue Press, when discussing the publication of the resolution of March 28, 1955, with appellee, suggested that the resolution and the map should be published together. This was declined by appellee because of the cost of such publication. The admonition is here appropriate that a municipality is not obliged to zone but if it attempts to zone it must follow the procedure prescribed by the act bestowing the power to zone. Alabama Alcoholic Beverage Control Board v. City of Birmingham, *supra*. Likewise the requirement of the statute that the whole zoning resolution, the text of it and the map made a part of it, must be published may not be disregarded because the publication seems expensive. W. H. Barber Co. v. City of Minneapolis, *supra*.

Appellee asserts that appellant is estopped from contesting the validity of the zoning resolutions because they have been in effect, enforced, and relied upon for 17 years. There is no reference to the record where any proof appears to support this assertion. There is evidence that appellant has been wrecking automobiles on her real estate continuously since January 1951. Obviously the zoning regulations were not enforced against her for about 6 years. It is not shown that she knew of the alleged zoning regulations until about the time this litigation had its inception. The conclusive answer to the challenge of the right of appellant to assert the invalidity of the alleged zoning regulations is that they were invalid from the time of their origin. Invalid legislation is not law. It confers no rights and imposes no duties or obligations. It is in legal contemplation as inoperative as though it had never been composed or enacted. Jessen v. Blackard, 160 Neb. 557, 71 N. W. 2d 100; Mara v. Norman, 162 Neb. 845, 77 N. W. 2d 569. This contention is without substance.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Sarpy County to render and enter a judgment of dismissal of this case.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

HELEN C. NELSON, APPELLANT, V. FRENCHMAN-CAMBRIDGE IRRIGATION DISTRICT, A CORPORATION, APPELLEE.

95 N. W. 2d 201

Filed February 27, 1959. No. 34529.

1. **Workmen's Compensation.** In order that a recovery may be had for benefits under the Workmen's Compensation Act it must be proved that an accident occurred which arose out of and in the course of the employment and resulted in disability or death.
2. ———. The burden of proving an accident arising out of and in the course of the employment is upon the person claiming the benefits of the act.
3. ———. Whether death resulted from an accident arising out of and in the course of the employment, or from disease which brought on the alleged compensable accident, is a question of fact to be determined from the evidence.
4. **Appeal and Error.** On appeal of such a case this court will try the issues de novo on the record before it.

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

Doyle, Morrison & Doyle, for appellant.

Maupin, Dent, Kay & Satterfield and *William E. Morrow, Jr.,* for appellee.

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

CARTER, J.

The plaintiff brought this action under the Workmen's Compensation Act to recover benefits for the

death of her husband, whose death is alleged to have resulted from an accident arising out of and in the course of his employment. The trial court found for the defendant and dismissed the action. The plaintiff has appealed.

The deceased at the time of his death was the superintendent of the Frenchman-Cambridge Irrigation District. He was employed at a salary of $6,000 a year. He was required as a part of his duties to travel over the district to supervise the work of ditchriders and see to it that a proper distribution of water was made to users of irrigation water.

On July 29, 1957, he was found dead in a district pickup truck generally used by him in the performance of his duties. The evidence shows that the pickup truck was found in a ditch along a county road a short distance east of Arapahoe, Nebraska, within the boundaries of the district. The deceased was on the seat with his head near the right door. His face was near the front edge of the seat facing the floor. There was a small spot of blood on the seat cushion and some small spots of blood on the right door extending up to within a few inches of the glass portion of the door. The evidence shows also that there was blood on the floor of the car, the estimates of the amount varying from two tablespoons to one quart. Blood was observed about the nose and mouth. There was a cut on the right side of the head near the hairline from one-half inch to three-quarters of an inch in length from which blood had escaped. His hat was crushed and his glasses broken. A small notebook was found on the floor. There were no outward evidences of injury other than the cut on the head.

There were car tracks discernible from the point where the truck went into the ditch for approximately 60 feet. They indicated that the car had angled across the road from right to left in a straight line for that distance. It was evident that no control over the car was

exercised during the time it traveled this 60 feet before it went into the ditch.

It is the contention of the defendant that the death of the deceased was the result of heart disease existing long prior to the date of his death and that his death was in no manner caused or aggravated by personal injuries sustained by him in an accident arising out of and in the course of his employment.

The evidence shows that the deceased and his family resided at Gering, Nebraska, prior to March 1, 1957. On September 28, 1956, he suffered a heart attack which was diagnosed as an acute anteroseptal wall infarction. He was released from the hospital on October 14, 1956, and returned to work on November 1, 1956. On November 13, 1956, he gave his physician a history of slight pain in the center of the chest on exertion. On December 5, 1956, he complained of a shortness of breath. On December 13, 1956, his physician advised him to continue to take digitalis. On February 28, 1957, he was advised by his physician to continue taking digitalis and to see another physician upon his removal to Cambridge. There is no evidence that he ever saw a physician after leaving Gering. About a week before his death he complained to defendant's office manager that he felt tired out. The evidence reveals no other complaints between March 1, 1957, and the date of his death.

Ten months after incurring his first heart attack the deceased was found dead under the circumstances hereinbefore related. Admittedly an autopsy would have conclusively established the cause of death. The deceased was interred in Portland, Oregon, and no autopsy was had before his removal to that point. The physician called to the scene of the alleged accident had moved from the community and he could not be found. His evidence was not available at the trial.

The plaintiff relies upon the evidence of Dr. John Batty, who testified in answer to a hypothetical question that the deceased, in his opinion, died as the result of

trauma. In the hypothetical question Dr. Batty was required to assume as proved that there was blood coming from the mouth and nose of deceased when he was found and that there was at least a quart of blood distributed on the seat, floor, and door of the cab of his pickup truck. Dr. Harvey L. Clark, the medical expert called by the defendant, admitted that, if it was established that deceased lost as much as a quart of blood, it would be strong evidence of hemorrhage induced by trauma. The amount of blood in the car therefore becomes an important factor in determining the correctness of the conclusions of the medical experts.

The evidence that there was one quart of blood in the pickup truck was furnished by the witness, George Kozak. This witness was a ditchrider for the district on the day of the alleged accident. He had seen the deceased earlier in the day. He came to the scene of the accident before the deceased was removed by ambulance. After the pickup was removed from the ditch he drove it home, where he and his wife washed the blood out with a garden hose. He says he inspected the pickup at the scene of the alleged accident and after he got it home. His testimony is that there was some blood splattered on the seat, the door, and the floor. Most of the blood that he saw was on the floor under the seat. He estimated the total amount of blood that he saw to be a quart, maybe more.

The evidence shows that the pickup was examined by the witnesses Mues and Jansen, the persons who discovered the pickup in the ditch. They observed blood on deceased's head and face, but did not observe the blood in the car. The sheriff and county attorney examined the pickup and found very little blood. They did not look under the seat. The county attorney testified that the amount of blood he saw did not exceed two tablespoonsfull. The sheriff also saw some blood but did not look under the seat. The witness Jansen

testified that he saw a very small amount of blood that appeared to be moving very slowly from the mouth of the deceased.

The witness Laurel Upward testified that he was a member of the Arapahoe Volunteer Fire Department and that he assisted in attempting to revive the deceased with a resuscitator. His evidence is that he saw no blood in the mouth and that there was no congestion of blood that interfered with the operation of the resuscitator. Two undertakers testified that there were no apparent injuries to the deceased other than the cut on the forehead. The undertaker who embalmed the deceased testified that the circulatory system of the deceased appeared to be normal when he injected embalming fluid, except for the cut on the forehead. Dr. Batty testified in rebuttal that an internal hemorrhage could have been sealed off by the clotting of the blood.

The medical experts testified that the loss of one quart or more of blood is relatively a very large amount. It would seem that some of the witnesses who inspected the pickup would have observed it if any such amount was present in the cab of the truck, particularly the sheriff and county attorney who were present for the very purpose of investigating the death of the deceased. We think the evidence clearly preponderates in favor of the defendant on this issue. The answer of Dr. Batty to the hypothetical question asked him, having been based largely on the loss by the deceased of one quart or more of blood, becomes of little assistance in determining the cause of death.

We think the plaintiff has failed to sustain the burden of proving that the death of deceased arose out of the employment. The evidence indicates that the pickup was out of control when it angled across the road and into the ditch. It clearly indicates that deceased lost possession of his faculties before the pickup went into the ditch and before deceased suffered any traumatic in-

jury. The argument that the deceased may have fallen asleep, or was examining his notebook, or that his attention was otherwise diverted from his driving, is pure conjecture. The history of the deceased's previous coronary attack, the nature of the heart damage previously incurred, the fact that he returned to work before the healing processes were complete, and the likelihood of a recurrence as shown in the evidence, all point to a second heart attack rather than to the negligent operation of the pickup by the deceased. In any event, the evidence is of such a character that we must hold that plaintiff failed to sustain her case by a preponderance of the evidence as the law requires.

In order that a recovery may be had for benefits under the Workmen's Compensation Act it must be proved that an accident occurred arising out of and in the course of the employment which resulted in disability or death. Eschenbrenner v. Employers Mutual Casualty Co., 165 Neb. 32, 84 N. W. 2d 169. The burden of proof is upon the plaintiff to prove that disability or death resulted from an accident arising out of and in the course of the employment. Whether death or disability resulted from an accident arising out of the employment, or whether the disability or death was caused by disease which brought on the purported compensable accident, is a question of fact to be determined from the evidence. In an appeal of such a case this court will try the issues de novo upon the record. Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805. Under the evidence before us the plaintiff failed to overcome the proof that deceased died of a heart attack and that the alleged accident was incidental to it.

The trial court having arrived at the same conclusion, we affirm the judgment of the district court dismissing plaintiff's cause of action.

AFFIRMED.

MESSMORE, J., participating on briefs.

PATRICK J. STANOSHECK, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

95 N. W. 2d 197

Filed February 27, 1959. No. 34530.

1. **Criminal Law: New Trial.** The provisions of section 29-2103, R. R. S. 1943, are mandatory and a motion for new trial in a criminal action must be filed within 10 days after the verdict or judgment is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days.
2. ———: ———. The words "unavoidably prevented" as used in section 29-2103, R. R. S. 1943, are equivalent in meaning to circumstances beyond the control of the party desiring to file the motion for new trial. The law requires diligence on the part of clients and their attorneys, and the mere neglect of either will not entitle a party to relief on that ground.

ERROR to the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

Frederick W. Carstens, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for defendant in error.

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

CHAPPELL, J.

An admittedly proper information, filed by the State on November 21, 1957, in the district court for Gage County, charged defendant, Patrick J. Stanosheck, with grand larceny. He employed and was advised by an able lawyer.

On the morning of February 27, 1958, defendant appeared in open court with such lawyer and was arraigned. Thereat, the information was read aloud in open court and defendant's legal and constitutional rights were explained and protected in every material respect by the court. Defendant voluntarily pleaded guilty to the charge, whereupon the court rendered

judgment of guilty as charged, and so advised defendant and his lawyer in open court.

Thereafter, at request of the court and in open court, the county attorney outlined in substance the facts with relation to the alleged offense. In substance the facts were as follows: At 2 or 3 a. m. on October 21, 1957, defendant, who had been drinking liquor for a couple of days, drove a truck belonging to another party out to a farm of one Richardson near Odell in Gage County. There, in two trips, with the aid of a cattle chute, defendant loaded 11 head of branded cattle belonging to Richardson into that truck. Thereby defendant transported such cattle over to his own farm, then transferred them to another truck, and they were driven to the stockyards in St. Joseph, Missouri. The same day Richardson discovered his loss and informed the sheriff thereof. An investigation was then made, and the cattle were found and recovered. Ten head were found in the St. Joseph stockyards just before they were to be sold in defendant's name, and one head was later found at defendant's farm. Thereafter, defendant was apprehended and in a conversation with Richardson defendant told him that he was short of money; that the temptation was too great; and that he had taken the cattle which, without dispute, had a fair market value of $1,800.

After defendant's arraignment, plea of guilty, and judgment of guilty had been rendered, a plea for probation was made in defendant's behalf by his lawyer, whereat evidence was adduced in support of the plea and same was submitted to the court. In that connection, several friends and neighbors testified in defendant's behalf. A general summary of their testimony was that they thought defendant had learned his lesson and that he would obey the terms of probation; that he had a wife and eight good, intelligent children whose ages were from 3 to 18 years; and that defendant could become a good citizen if he would do more for his

family, as he had promised to do, instead of gambling and the like. In that connection, the court also recalled in open court, and it is not disputed, that once before defendant had committed one of the most serious crimes, and had been granted the mercy of the court and placed on probation.

Having been thus fully advised, the court denied plaintiff's plea for probation, so informed him and his lawyer in open court, and asked defendant if he had anything to say as to why sentence should not be passed upon him. Thereupon defendant orally responded, but the court decided that he had shown no good cause, whereupon he was sentenced to be imprisoned in the penitentiary of the State of Nebraska at Lincoln for a period of not less than 3 years nor more than 5 years, as authorized by the grand larceny statute, section 28-506, R. R. S. 1943. Defendant was then ordered to pay the costs of prosecution and to stand committed until such costs were paid or secured, and he was otherwise discharged according to law.

Following the hearing, defendant was given an opportunity to briefly visit with his brother and his lawyer, and was then taken to the county jail. There he had his noon meal and was permitted to visit with his wife. That same afternoon defendant was taken to the penitentiary by the sheriff and his deputy, where defendant was required to undergo a period of orientation for several days during which time he made no attempt to be permitted to contact his lawyer or any other lawyer.

However, thereafter on June 25, 1958, about 4 months after judgment and sentence, a motion for new trial was filed in the district court for Gage County by a lawyer for defendant who had not theretofore represented him. Such motion, after assigning in substance that the judgment and sentence of the court was an abuse of discretion and contrary to law, recited: "That this application by motion for a new trial has not been filed within the 10 day period of time provided for in

Section 29-2103 R. S. Neb. 1943, for the reason that the defendant was unavoidably prevented from making such application due to circumstances wholly beyond his control."

Thereafter, on August 14, 1958, a hearing was held in the district court whereat evidence was adduced on defendant's motion for new trial, and on August 25, 1958, his motion was overruled. Thereafter, defendant prosecuted error to this court, assigning, as far as important here, that the trial court erred in overruling his motion for new trial. As we view it, the primary and controlling question is whether or not defendant was unavoidably prevented from filing his motion for new trial within 10 days after February 27, 1958, as required by section 29-2103, R. R. S. 1943. We conclude that defendant was not unavoidably prevented from so doing, which disposes of all other matters.

In that connection, defendant makes no contention that he was not guilty as charged nor that he did not voluntarily plead guilty. He admitted that his lawyer was present at the hearing, judgment, and sentence on February 27, 1958. However, he claimed that he had no opportunity to consult with his lawyer after sentence, which is contrary to defendant's own testimony. He also equivocally claimed that his lawyer had told him prior thereto that a plea of guilty and judgment rendered thereon would bar his right of appeal from such judgment. In that connection, it should be said that admittedly defendant never requested that lawyer to file a motion for new trial or prosecute error, and under the circumstances presented here, such lawyer had no duty to do so unless a request for such action was made by defendant or some one authorized to act for him.

The general rule is that a right of appeal exists even though defendant has pleaded guilty to the charge against him, but that a defendant upon whom a sentence has been imposed must accept all of the sentence or

appeal in a manner provided by law in such cases. See, Benson v. State, 158 Neb. 168, 62 N. W. 2d 522, 42 A. L. R. 2d 991; Abbott v. State, 160 Neb. 275, 69 N. W. 2d 878.

Be that as it may, defendant admitted that following the hearing and sentence on February 27, 1958, he visited with his brother and his lawyer, and he was taken back to the county jail where he later visited with his wife. Admittedly defendant never requested the sheriff or county attorney to let him see any one beside members of his family before he was taken to the penitentiary, and he made no request of the sheriff or deputy on the trip there to contact anyone or to deliver any message to anyone for him, except that he did ask the sheriff to let his wife know how soon she could see him, and to give her his mailing address.

After arrival at the penitentiary and during the first 10 days of orientation classes with six or more inmates attending, and where guards and officers of the institution were present, defendant never asked permission to contact his lawyer or any other lawyer, either personally or in writing. He never asked any guard or official of the institution for an opportunity to contact a lawyer or members of his family for the purpose of perfecting an appeal, or asked them to contact a lawyer for him for that or any other purpose. He was interviewed by a minister also during that period, but did not ask him to contact or permit him to contact a lawyer or any member of his family for purposes of appeal. In fact, defendant had ample opportunity to do so but did nothing to protect his right of appeal.

Section 29-2103, R. R. S. 1943, provides in part, as far as important here: "The application for a new trial shall be by motion upon written grounds, and may be filed either within or without the term at which the verdict is rendered. It shall * * * be filed within ten days after the verdict was rendered unless unavoidably prevented."

As recently as Parker v. State, 164 Neb. 614, 83 N. W. 2d 347, we reaffirmed that: "The provisions of section 29-2103, R. R. S. 1943, are mandatory and a motion for new trial in a criminal action must be filed within 10 days after the verdict is rendered in order to be considered on appeal, except for the cause of newly discovered evidence or unless the defendant was unavoidably prevented from filing the motion within 10 days."

As early as Roggencamp v. Dobbs, 15 Neb. 620, 20 N. W. 100, this court said: "The words 'unavoidably prevented' evidently refer to circumstances beyond the control of the party desiring to file the motion. The law requires diligence on the part of clients and attorneys, and the mere neglect of either will not enable a party to relief on that ground. It might be different in case of the deliberate betrayal of a client by an attorney. But such case probably will not occur, and is not shown in this." Such statement has application under the circumstances presented here.

Also, in Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894, this court said: "An event or a result is unavoidable which human prudence, foresight, and sagacity cannot prevent. The words of the statute 'unavoidably prevented' signify something that was beyond the ability of the person affected to have avoided."

In Kock v. State, 73 Neb. 354, 102 N. W. 768, this court said: "But it is contended by the accused that he is one of the class of persons mentioned in the statute as being under disability; and he insists that, because he was taken to the penitentiary and imprisoned therein in compliance with the judgment of the court, the limitation does not apply to him. The mere statement of this proposition is its own refutation. * * * The fact is that he is under no disability by reason of his imprisonment; * * *." That case arose under somewhat different statutes relating to prosecution of error in criminal cases, but by analogy the statement therein

still has application in cases like that at bar.

In the light of the record and aforesaid authorities, we conclude that defendant was not unavoidably prevented from timely filing a motion for new trial, and that the failure to do so resulted in failure of jurisdiction to entertain defendant's motion for new trial. Counsel for defendant has cited no authority which would support any other conclusion. Therefore, the judgment of the trial court in overruling and denying defendant's motion for new trial should be and hereby is affirmed. All costs are taxed to defendant, Patrick J. Stanosheck.

AFFIRMED.

MESSMORE, J., participating on briefs.

CLARENCE GILLESPIE, APPELLEE, V. MICHAEL HYNES, APPELLANT, IMPLEADED WITH HENRIETTA HYNES ET AL., APPELLEES.

95 N. W. 2d 457

Filed March 6, 1959. No. 34503.

1. **Mechanics' Liens.** Where a party performs labor or furnishes materials for the improvement of a house pursuant to an agreement with the owner thereof, such party has 4 months from the completion of the work or the furnishing of the materials in which to file a mechanic's lien.
2. **Mechanics' Liens: Equity.** Where no equitable relief is granted in a suit to foreclose a mechanic's lien, a court of equity is without authority to enter a personal judgment in favor of the mechanic's lien claimant.
3. **Mechanics' Liens: Actions.** Where a mechanic's lien claimant fails to establish a lien in a suit to foreclose his lien, the issue of personal liability is a question to be determined as any other law action. In such a situation the trial court should retain the question of personal liability for trial as a law action.
4. **Mechanics' Liens: Opinions Disapproved.** Parsons Construction Co. v. Gifford, 129 Neb. 617, 262 N. W. 508; Robinson v. Dawson County Irr. Co., 142 Neb. 811, 8 N. W. 2d 179; Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298; Patterson

v. Spelts Lumber Co., 166 Neb. 692, 90 N. W. 2d 283, and cases of similar import are disapproved insofar as they conflict with the general rule that equity jurisdiction will not be retained to grant legal relief where no right to equitable relief is established.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

McCarthy & Kneifl, for appellant.

Leamer & Graham, for appellee.

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

CARTER, J.

The plaintiff brought this action to foreclose a mechanic's lien on Lot 19 and the east 8 feet of Lot 18, Block 32, Joy Place, an addition to South Sioux City, Nebraska, in the amount of $745. The trial court found that no lien existed and entered a personal judgment against the defendants Michael Hynes and Henrietta Hynes for $848.05 with interest and costs. The defendant Michael Hynes appealed.

The evidence shows that plaintiff was engaged in the plumbing and heating business. Hynes was moving a house onto the real estate involved here. Hynes inquired of plaintiff about the cost of heating and plumbing. The price of $1,250 was agreed upon. Plaintiff commenced the work during the first week in May 1953.

On November 15, 1953, Michael and Henrietta Hynes entered into a contract to sell the property to Raymond A. and Monica R. Bradish. Because of the work remaining to be done on the property the contract provided: "All work and material shall be completed and furnished in the dwelling house on said premises by first party. Party of second part to furnish water pipes, water heater and furnace complete, and install the same at their own expense." During the negotia-

tions for the sale of the property Hynes discussed the matter with the plaintiff and this resulted in an agreement that plaintiff would complete the work, except that which Bradish agreed to do by the terms of his contract of purchase, for the sum of $700. The evidence is clear that all of the heating and plumbing work within the agreement between Hynes and the plaintiff was completed in December 1953. No other work was performed by the plaintiff under the plumbing and heating contract with Hynes that would extend the time for filing a mechanic's lien beyond April 1954. Plaintiff filed a mechanic's lien on August 25, 1954. The claim of lien was not filed within 4 months as required by section 52-103, R. R. S. 1943, and consequently the trial court properly held that plaintiff had no enforceable lien against the property.

The defendant Hynes contends that the trial court, after holding that plaintiff had no enforceable lien, was without authority to enter a personal judgment against him. Hynes relies upon the principle announced in Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A. L. R. 1128, which states: "When the trial court determined that the interveners were not entitled to equitable relief, the court was without power to determine the legal action without the intervention of a jury. It is a general rule that, where a court in the exercise of its equity powers acquires jurisdiction for any purpose, its jurisdiction will continue for all purposes, and it will try all issues. (Citing cases.) But where there is no equitable relief granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action. This is especially true where such a course would operate to deprive a party of his constitutional right to a trial by jury. The constitutional right to a trial by jury cannot be defeated by an allegation of an equitable cause of action which does not exist. (Citing authorities.) The interveners were not entitled to equitable

relief in this case, and the parties did not waive their right to a jury trial upon the question of the amount, if any, due interveners. In truth, they demanded a jury trial, and the court properly refused to try these issues without a jury, but dismissed the interveners' petition without prejudice to an action at law."

In Massman Construction Co. v. Nebraska Workmen's Compensation Court, 141 Neb. 270, 3 N. W. 2d 639, this court said: "The plaintiff having instituted and prosecuted this case in the district court as an equitable action, and, after a complete hearing as such was had thereon, now seeks strictly a common-law relief therein, which a court of equity in the exercise of its equitable powers may not grant, and which, if originally presented as a case for original relief, such court, as a court of equity, would have no jurisdiction to entertain. It would seem within the reasons of the rule announced by the supreme appellate court of New York, as follows: 'The opinion in this court, in Mann v. Fairchild, (2 Keyes, 106, 111 et seq.), is that if a party brings an equitable action, even now, when the same court administers both systems of law and equity, the party must maintain his equitable action upon equitable grounds, or fail, even though he may prove a good cause of action at law on the trial.' "

The foregoing cases appear to state the general rule in equitable actions. A recognized text authority states the general rule to be: "The rule considered in the preceding sections that, where the equitable jurisdiction of a court is once brought into action in a proper case, the court will retain jurisdiction of the parties and the subject matter in order to do complete justice to all concerned, even in some instances to the extent of enforcing purely legal rights, applies as a general rule only when the court retains the original case in order to grant some substantial equitable relief. Where the bill on its face discloses no equitable ground of jurisdiction, no relief whatever can be granted where the courts

or the procedure in law and equity are distinct, and, even where the bill states a case entitling complainant to equitable relief, if the proof fails to establish the averments of the bill in that respect the court is without jurisdiction to proceed further and determine rights that are properly cognizable in a court of law. In other words, equitable rights must be both averred and proved before purely legal rights will be determined by a court of equity." 30 C. J. S., Equity, § 73, p. 427.

The general rule is stated in 19 Am. Jur., Equity, § 132, p. 132, as follows: "The rule which permits the court of chancery to retain jurisdiction of litigation and finally dispose thereof is limited in its application to cases in which equitable relief has been administered pursuant to the prayer of the bill or in which the jurisdiction of the court has been rightfully invoked. If the facts which are relied on to sustain equity jurisdiction fail of establishment, the court may not retain the case for the purpose of administering incidental relief. It is said that an equitable right must be both averred and proved as a prerequisite to the determination of adjudication of a purely legal right. The prevailing view is that where jurisdiction has not been established, the court may not award damages or enter any decree except for costs. If the rule otherwise, it has been argued, a litigant, by a pretended claim to equitable relief, might deprive his opponent of advantages incident to an action at law—for example the constitutional right of trial by jury."

Cases from other jurisdictions supporting this principle are legion. Some of them are Gogebic Auto Co., Inc. v. Gogebic County Board of Road Commissioners, 292 Mich. 536, 290 N. W. 898; Gregory v. Merchants State Bank, 23 Tenn. App. 567, 135 S. W. 2d 465; Wasatch Oil Refining Co. v. Wade, 92 Utah 50, 63 P. 2d 1070; Carlsbad Mfg. Co. v. Kelley, 84 W. Va. 190, 100 S. E. 65; Chicago, R. I. & P. Ry. Co. v. State Highway Commission, 322 Mo. 419, 17 S. W. 2d 535; Oregon Growers' Coop. Assn. v. Riddle, 116 Or. 562, 241 P. 1011; Illinois

Minerals Co. v. Miller, 327 Ill. App. 596, 65 N. E. 2d 44.

There appears to be a greater divergence of legal authority on the question of the right of the court to grant a personal judgment in a mechanic's lien foreclosure where no equitable right is established. We point out that the mechanic's lien statute provides benefits to the holders of mechanic's liens. One having no lien can claim no rights under it. Consequently one who claims a mechanic's lien and fails to establish it is in no better position than if the mechanic's lien statute did not exist.

We adhere to the rule announced in Reynolds v. Warner, *supra,* and the authorities cited in support of it. A holding to the contrary would operate to deprive a party of his constitutional right to a trial by jury.

The plaintiff contends that a personal judgment in favor of a mechanic's lien claimant may be rendered although he fails to establish his alleged lien. The following cases are cited in support of the foregoing rule: Patterson v. Spelts Lumber Co., 166 Neb. 692, 90 N. W. 2d 283; McHale v. Maloney, 67 Neb. 532, 93 N. W. 677; Maloney v. Johnson-McLean Co., 72 Neb. 340, 100 N. W. 423; and Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298.

The four cases cited are authority for the proposition that on the foreclosure of a mechanic's lien plaintiff may take a personal judgment against the party personally liable for the debt. In each of those cases equitable relief was granted. They are not inconsistent with the rule that where a court in the exercise of its equity powers acquires jurisdiction for any purpose its jurisdiction will continue for all purposes, and it will try all issues.

There are cases in this jurisdiction which are contrary to the holding in Reynolds v. Warner, *supra.* Among them are Parsons Construction Co. v. Gifford, 129 Neb. 617, 262 N. W. 508; Robinson v. Dawson County Irr. Co., 142 Neb. 811, 8 N. W. 2d 179; Gibson

v. Koutsky-Brennan-Vana Co., *supra;* Patterson v. Spelts Lumber Co., *supra.* We disapprove the holdings of these cases, and others of similar import, which conflict with the general rule that equity jurisdiction will not be retained to grant legal relief where no right to equitable relief is established.

We call attention to the fact that the district court is a court of general jurisdiction having both legal and equitable powers. While a failure to establish a right to equitable relief may terminate the right of the district court to determine all issues on the theory that the court in the exercise of its equity powers will continue for all purposes, it does not divest the court of its jurisdiction of the subject matter. Consequently, we hold under the facts of the present case that the trial court, having found that plaintiff was not entitled to any equitable relief, was not authorized to enter a personal judgment against the defendant Hynes as a right incidental to the exercise of its equitable jurisdiction. We think it was the duty of the trial court under such circumstances, in the absence of a waiver of a jury trial, to hold that phase of the case for trial as any other law action.

It is contended that the defendant Hynes waived a jury trial in the present case. There certainly was no express waiver of a jury trial. The case was tried as an equity proceeding and submitted to the court on that basis. At the close of the evidence, counsel for Hynes made the following objection: "The defendant Hynes objects to the entry of any judgment against him and asks the Court for time in which to prepare the entry of judgment." No ruling is shown to this objection. There was no opportunity afforded the defendant, after equitable relief was denied, to demand a jury trial except in a motion for a new trial, which was done. In fact, the trial court overruled Hynes' motion to dismiss at the close of plaintiff's evidence, an indication that the court would hold that the right to

equitable relief had been established, which would eliminate any question of a trial by jury. We do not deem the present record sufficient to sustain a holding that a jury was waived.

We affirm that part of the judgment denying a foreclosure of the claim of a mechanic's lien. We reverse that part of the judgment granting a personal judgment for plaintiff against the defendants Michael Hynes and Henrietta Hynes. The issue of personal liability is remanded to the district court with directions to try such issue as a law action.

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

SIMMONS, C. J., dissenting.

The mistake of the trial court in this case was that it followed the rules of law repeatedly stated in the judicial precedents of this state. That, so holds the court, was prejudicial error.

The court holds in this case that a mechanic's lien for foreclosure is, at its start, triable in equity; that if at the trial the plaintiff establishes a right to a lien for 1 cent or more it remains an equity action and the court has the right, *in equity,* to determine all issues presented in the case, including issues which standing alone would be triable at law. However, if the plaintiff fails to establish a lien for 1 cent or more, or the court, for any reason, holds the alleged lien to be invalid, whether during trial or at its close, then at that time the case ceases to be triable in equity, and the court *on its own motion* must stop hearing the case in equity and proceed to hear the law issue as an action at law with a jury waived, or if not waived, then to a jury.

Of course, the new rule must be applicable to actions generally. The common one is where a party seeks an injunction and a recovery of damages. The action is heard initially as an action in equity. The trial court in equity may hear *all the evidence* as to the right of

the plaintiff to an injunction and to damages. If at the close of the evidence the court determines that equitable relief by injunction should not be granted, then it cannot properly determine the issue of damages, *already tried.* It must then retry the cause and submit that question to a jury unless the defendant waives a jury, in which event the court determines it as in an action at law, although the court had heard the evidence as a cause in equity subject to equity rules. To reach that conclusion the court directly overrules and disapproves several recent decisions of this court and disapproves others generally. I shall refer to those decisions later.

This court has held: "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." Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245.

The excluding of the "prayer for relief" is contrary to several of our earlier decisions. In Keens v. Gaslin, 24 Neb. 310, 38 N. W. 797, we held: "In cases of doubt, where the pleader has stated a cause of action in equity, and also one at law, in such a manner as to leave it uncertain which one he intended to pursue, resort may be had to the prayer for relief to determine the character of the action."

Other decisions mentioned later herein include the prayer for relief as a proper consideration. In fact the prayer for relief was fully quoted and considered in Robinson v. Dawson County Irr. Co., 142 Neb. 811, 8 N. W. 2d 179, which is one of the cases directly disapproved in the court's opinion here.

As late as Johnson v. Radio Station WOW, on rehearing, 144 Neb. 432, 14 N. W. 2d 666, in a supplemental opinion we held: "The character of a cause of action is determined by the allegations of fact contained in the petition, unaffected by the conclusions of the

pleader. * * * The prayer of the petition asks for general equitable relief and is not, therefore, so restrictive as to preclude the holding that constructive fraud exists."

The above-quoted rule is a clear rule advising a trial court how to determine whether a "particular action" is one at law or in equity. It is a long-established and often-repeated rule. In the above opinion its source is shown to have been in Mills v. Heckendorn, 135 Neb. 294, 281 N. W. 49. There its source is shown to have been in 1 C J. S., Actions, § 54, p. 1154. Save for the clause "or the prayer for relief" it is in accord with our decisions from the beginning as will appear later in this dissent.

The text from which the rule was taken was quoted with full approval in our opinion, on rehearing, of Johnson v. Radio Station WOW, *supra.* The rule from Mills v. Heckendorn, *supra,* was quoted with full approval in Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333. Johnson v. Radio Station WOW, *supra,* was followed by this court in Benson v. Walker, 157 Neb. 436, 59 N. W. 2d 739, for the rule that: "The character of a cause of action is determined by the allegations of fact contained in the petition, unaffected by the conclusions of the pleader." It was followed again in Svoboda v. De Wald, 159 Neb. 594, 68 N. W. 2d 178.

I recognize that it may be said that the rule above quoted may be followed at the *beginning* of the trial, but, as a result of this opinion, it may no longer be followed *after the trial begins.* For under the decision of the court now made, a cause may start as one triable in equity, but if during the trial the evidence discloses that there is no equitable cause in fact, or the court concludes during the trial or at its close that equitable relief is not to be granted, the court at that point must stop its proceedings, and on its own motion, advise the parties that legal issues only remain for trial, and that the right to a jury trial must be waived, or the legal issues must be tried to a jury.

The court must then proceed to render a decree on the equitable issue and proceed in the same case to try the law issue as a law action and that even though it involves a resubmission of all the evidence properly received when the cause was properly proceeding as an action in equity. To reach that result the court overrules a long line of established precedents, some by direct reference, and many others without reference. The court rests its conclusion on two decisions of this court, namely Reynolds v. Warner, 128 Neb. 304, 258 N. W. 462, 97 A. L. R. 1128, and Massman Construction Co. v. Nebraska Workmen's Compensation Court, 141 Neb. 270, 3 N. W. 2d 639. I shall discuss those cases later herein. Without discussion of the cases, the court disapproves Parsons Construction Co. v. Gifford, 129 Neb. 617, 262 N. W. 508; Robinson v. Dawson County Irr. Co., *supra;* Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298; and Patterson v. Spelts Lumber Co., 166 Neb. 692, 90 N. W. 2d 283; "and others of similar import, which conflict with the general rule that equity jurisdiction will not be retained to grant legal relief where no right to equitable relief is established." Later herein I will discuss those cases and "others of similar import" which apparently are too numerous for the court to mention.

The judicial mowing machine thus cuts a wide swath through the established precedents of this court cutting down those that stand in its way, and weakening, if not effectively destroying, many others.

Trial courts have followed these now discarded precedents. We will have other cases where we will now be compelled to find "prejudicial error" was committed by the trial court requiring a reversal, and where it may be truly said that the only error of the trial court was that it followed our established long-recognized precedents.

Some interesting questions can arise on appeal as a result of this decision. Suppose a trial court reaches a

conclusion, such as was made by this court on trial de novo in Patterson v. Spelts Lumber Co., *supra,* that a mechanic's lien was valid for the sum of $6.52, and then proceeds to determine the amount of the judgment which the lienholder was entitled to recover in addition thereto and renders a decree *in equity* foreclosing the lien for $6.52, and awards judgment for the balance due, not protected by the lien. It is my understanding of the opinion of the court here adopted, that this decision does not disturb the holding in the case of Patterson v. Spelts Lumber Co., *supra,* that equity has the full right to render both a decree of foreclosure and a personal judgment under those circumstances.

But supposing on appeal the defendant contends that the trial court erred in awarding foreclosure for only $6.52 and in not awarding a lien for the balance of the items proven, and suppose a plaintiff cross-appeals, contending that he is not liable for the amount found due in the judgment against him. Under those circumstances we would retry the issue as to the lien and its amount de novo as in equity.

Supposing we determined that there was no valid lien for any amount then under this decision, a jury trial not having been waived, we would be required to remand the cause as to the liability of the defendant to the plaintiff for retrial as a law action.

But supposing the trial court had offered the defendant a jury trial on the law issue and it had been waived, and then had determined the law action as such, tried to the court without a jury. We would then on appeal review the record here as to the law issue on the presumed infallibility rule. (See my dissent in Capital Bridge Co. v. County of Saunders, 164 Neb. 304, 83 N. W. 2d 18.)

So it is conceivable that on an appeal here we might be called upon to review the evidence de novo as to one issue and reach a fact conclusion thereon. We might thereafter be required to review the same evidence, in

part at least, under the law rule and be compelled to reach a diametrically opposite conclusion.

The findings under the law rule would of necessity control and the finding under the equity rule would be required to yield. The law rule would then to that extent supplant the judicial, statutory approved, de novo rule.

Of course, when those or like questions come to us, we will decide them. Our docket is current and a few more cases added to it will not cause extreme burdens to us.

But what of the burden cast upon trial courts of trying causes piecemeal and twice where heretofore one trial has been held sufficient? I here refer to the often stated established rule that: "Where an equity court has obtained jurisdiction of a cause for any purpose it will retain it for all, and proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation." Dennis v. Omaha Nat. Bank, 153 Neb. 865, 46 N. W. 2d 606, 27 A. L. R. 2d 674. That rule was followed in Fiala v. Tomek, 164 Neb. 20, 81 N. W. 2d 691. I shall refer to other decisions later herein following the above rule. The court now limits the rule to a right to retain jurisdiction and refuses to follow that part which states that it will retain it (the cause) for all purposes and proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation. That vital restriction of the rule is inherent in the court's present decision. The trial court may now retain the cause only for jurisdictional purposes.

That rule like many others stated later herein is in the class of "others of similar import" which are here disapproved.

Heretofore we have often said that we should avoid creating pitfalls in the course of litigation and that we should seek to reduce the cost of litigation, expedite trials, and simplify issues (as by pretrial, etc.), all to the end of a better administration of justice.

To avoid these, and like questions, all we need do here is to follow our established rules and precedents which are now directly and indirectly overruled, disapproved, or modified.

The decisions of this court dealing with this subject matter are so interlocked and interwoven that it is impossible to refer to them separately and at times without repetition. Yet I deem it necessary in order to show the full impact of this decision on the established law of this state.

It becomes important to state the issues, in the case the court now decides, a bit more fully than is done in the court's opinion. Plaintiff filed his petition seeking to foreclose a mechanic's lien and praying for a personal judgment. He attached a copy of the lien as filed, and alleged that it had been filed within 4 months after the last item of labor and material had been performed, furnished, and delivered.

The mechanic's lien recited that the last item furnished was on July 26, 1954. He alleged that the mechanic's lien was filed August 25, 1954. His petition stated a cause of action in equity.

The defendants Bradish answered, denying any agreement with the plaintiff, denying any contract at any time, and denying the furnishing of labor and materials "subsequent to November 15, 1956 (sic)." They further alleged that if any cause of action against them ever accrued it accrued within 4 months subsequent to November 18, 1953, and was accordingly barred by the statute of limitations. Plaintiff by reply filed a general denial to this answer.

Defendants Hynes demurred on the ground that no cause of action was stated as to them. The trial court overruled the demurrer. Defendants Hynes then answered and pleaded the $700 contract recited in the proposed opinion. They further pleaded full payment, so far as they were concerned, and also pleaded that the lien was not filed within the time required by statute.

So both parties pleaded the statute of limitations as a defense to the mechanic's lien. Plaintiff by reply filed a general denial to this answer.

Defendants Bradish then replied to the defendants Hynes' answer and among other things alleged facts upon which they claimed the benefit of the statute of limitations.

The matter went to trial on the issues so made. The trial court held that "under the evidence and pleadings" plaintiff was not entitled to a lien. It rendered judgment against the defendants Hynes.

The defendants Hynes then filed a motion contending *for the first time* that the court had no jurisdiction to enter a money judgment against them and that they were entitled to a jury trial.

We have held: "The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded. * * * The statute of limitations must be pleaded either by answer or demurrer. * * * When a petition shows on its face that the action therein stated is barred by the statute of limitations a general demurrer will raise the defense." Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

The affirmative defense of the statute of limitations was raised here by answer and became an issue to be tried as to the facts. The decree of the court shows that it was tried out.

I call attention to these pleadings and the finding of fact for this reason: They show that the fact of the statute becoming a bar to the validity of the lien did not appear until the cause was tried.

We are then dealing with a case where equity had jurisdiction on the issues as made and where a trial of the facts was required to determine the sufficiency of the defenses pleaded.

The court holds, when it develops in the trial that equitable relief as such cannot be granted, that the court

then must submit the question of the right of the plaintiff to recover a money judgment to a jury.

It is contrary to the rule stated in the court's opinion "that, where a court in exercise of its equity powers acquires jurisdiction for any purpose, its jurisdiction will continue for all purposes, and it will try all issues." I discussed above the vital modification of this rule now made by the court.

The court to sustain its opinion, quotes at length from two of our decisions. The language used there by the court must be related to the issue being determined.

The court quotes from Reynolds v. Warner, *supra*. I shall refer to this decision later herein, and point out that the authority relied on to sustain that decision rests on an "ancient" equity rule that is not applicable in the states, such as Nebraska, where the reformed procedure is in effect. I point out now that the subject matter of that litigation was an attorney's lien; that such a right is a common law right; that the statutes provide no remedy such as is provided by section 52-114, R. R. S. 1943, wherein a mechanic's lienholder is authorized to proceed "by a petition in equity"; and that at the time that action went to trial the only issue remaining in it was that of how much if any amount could be recovered by the attorney—that being the sole and a law issue, and that a jury trial was there demanded.

The court also quotes from Massman Construction Co. v. Nebraska Workmen's Compensation Court, *supra*. In that case the plaintiff pleaded a cause of action in equity for an injunction. It included in its prayer a request for a writ of prohibition. The trial court denied the writ of prohibition. Plaintiff appealed. We affirmed. The effect of the holding is that a plaintiff cannot plead an equitable cause and then recover a law remedy. By contrast in the instant case plaintiff pleaded a cause in equity and prayed for equitable relief. Defendants Hynes injected the issue into the case of a separate contract between plaintiff and defendants Hynes and

Bradish and pleaded both the statute of limitations and payment in full. I shall develop later the effect of that injection of a law issue into the case by a defendant.

The quote from the Massman Construction Company case relied on here rests entirely upon the authority of Loeb v. Supreme Lodge, Royal Arcanum, 198 N. Y. 180, 91 N. E. 547. In that case the plaintiff sought equitable relief. The court held that the issues presented could not be tried on the law side of the court and dismissed the action for failure to prove the equitable cause alleged. The court was divided, four judges being for a dismissal and three judges insisting that the cause be tried to a jury. So to that extent the opinion of the New York Court of Appeals is contrary to the decision of the court in the instant case. But that is not the important distinction.

The important distinction is that in the New York case the plaintiff pleaded *only* an equitable cause of action and then sought a law remedy. In that regard the New York decision supports the Massman Construction Company case. But neither of the cases is the case which we have here.

I now cite Merry Realty Co. v. Shamokin & Hollis R. E. Co., 230 N. Y. 316, 130 N. E. 306. In that case the court stated "the case" as follows: "The plaintiff has brought action to foreclose a mortgage, taken in exchange of property as part consideration. The defendant having previously brought action for rescission, counterclaims by pleading the facts justifying rescission and asking that the exchange be set aside, that the Hollis lots be restored to it together with $1,500 damages." The trial court denied rescission and awarded damages for fraud and deceit. On appeal the court held: "The defendant had elected to rescind before this action was brought. After the amendment of the answer at the trial full and complete rescission was demanded. The judgment was not for rescission but for damages as in an action at law. The relief granted was inconsistent with the pleadings

and the theory of the action. This, we think, was error." The court to sustain its conclusion then quoted the same authority cited in Loeb v. Supreme Lodge, Royal Arcanum, *supra,* and other cases. The court then held: "Under our present system of pleading equitable and legal causes may be joined in the same complaint. * * * *Here no cause of action at law was ever pleaded.* * * * *Likewise the complaint could have been framed with a double aspect, a claim for rescission or, if such relief were found inadequate, a demand for money damages* * * *. Upon a new trial the defendant may have full rescission and get its lots back, or if this is impossible owing to changed circumstances or is inequitable for any reason, *then* it may have full and complete damages awarded by the Special Term for fraud and deceit in lieu thereof and a cancellation of the mortgage as part liquidation of these damages." (Emphasis supplied.)

It becomes patent then that, as in the Massman Construction Company case, where a plaintiff pleads solely an equitable cause of action he cannot recover a law remedy. But where as in the instant case a party joins "equitable and legal causes" or "with a double aspect" a claim for equitable or legal relief, the cause is triable in equity and the relief given that the circumstances of the case require.

It thus develops that the New York rule is exactly that for which I contend here and that the Massman Construction Company case is not important under the issues here made.

I point out later herein that when the court quoted from 30 C. J. S., Equity, § 73, p. 427, it quit reading too quickly. The Massman Construction Company case, as above pointed out, relies entirely on Loeb v. Supreme Lodge, Royal Arcanum, *supra.* That case is cited in 21 C. J., Equity, § 123, p. 144, note 85, for the rule in New York that: "In some cases it is positively declared that where a plaintiff seeks only equitable relief and fails to establish his equity, the court will not retain the

case to award legal relief." That is not the instant case.

The same paragraph from the Secundum which the court quotes, says this: "In other jurisdictions, under the influence of the provisions of the codes abolishing the distinction between actions at law and suits in equity and under which there is but one court and one form of action, in which the judgment may give all the relief either in law or equity to which the party may show himself entitled, it has been held that up to the point where the constitutional right of trial by jury would be unduly prejudiced by going further there is no want of power to grant legal relief in an action commenced to secure equitable relief only, and this is true notwithstanding the facts of the case were known to plaintiff when he commenced his action for equitable relief." 30 C. J. S., Equity, § 73, pp. 428, 429. Cited in support thereof is the New York rule: "* * * where a court of equity has jurisdiction of the cause it has power to dispose of all the matters at issue and grant complete relief, and even if it is found that the parties are not entitled to equitable relief the court may retain the cause and grant such relief as is proper." Among other cases cited is Merry Realty Co. v. Shamokin & Hollis R. E. Co., *supra.*

So I submit that the Massman Construction Company case having directly committed us to the New York rule we should be willing to follow it in a case that is in direct accord with the rule for which I contend. This would seem to be particularly appropriate in view of the fact that our code of reformed procedure originated in New York.

The court then quotes from 30 C. J. S., Equity, § 73, p. 427. This rule states a condition to a general rule which this court has not adopted heretofore and which is contrary to many of our decisions referred to in this dissent. I shall return to that later herein.

The court quits reading too quickly. Had it continued the quote it would have shown the concluding rule that

a "retention of jurisdiction will not defeat a judgment where there is *no objection* and no obvious reason for a jury trial." This relates itself to the subject of waiver, which will be later referred to herein. Cited in support of the text quoted by the court are two Nebraska cases, Reynolds v. Warner, *supra,* and Massman Construction Co. v. Nebraska Workmen's Compensation Court, *supra.* So far as Nebraska is concerned I submit that the authority of the text does not rise higher than our cases cited to sustain it. No other Nebraska decisions are cited. Our two cases do not sustain the broad scope of the rule.

The court does not quote the rule from the same authority citing cases from almost every jurisdiction, including Nebraska, that: "* * * it is a well settled rule that a court of equity which has obtained jurisdiction of a controversy on any ground, or for any purpose, will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter, * * *." 30 C. J. S., Equity, § 67, p. 414. Here I point out that as authority for this text the author cites seven of our decisions. Thirteen more, including two of those now disapproved, are cited in the pocket part supplement, and the antecedent authority, 21 C. J., Equity, § 117, p. 134, cites ten additional decisions of this court. Nor does the court quote the rule from the same authority that: "While it has been said that equity will not retain jurisdiction for the purpose of depriving a litigant of his right of trial by jury, and that if a trial of the legal matters by jury is essential to relief, or if the issue is peculiarly more appropriate for trial by jury than by a judge, equity will ordinarily decline jurisdiction as to those matters leaving the parties to their legal remedies, equity may, nevertheless, retain jurisdiction and pass on issues ordinarily tried by a jury, even though the effect is to that extent as to deprive litigant of a jury trial, * * *." 30 C. J. S., Equity, § 67, p. 420.

The court also quotes from 19 Am. Jur., Equity, § 132, p. 132. Here again, Reynolds v. Warner, *supra,* is cited to sustain the latter part of the text.

Text statements, unless analyzed, can be misleading. The first sentence quoted by the court from American Jurisprudence states a rule in the disjunctive. I leave out the first disjunctive clause. The cited rule then is: "The rule which permits the court of chancery to retain jurisdiction of litigation and finally dispose thereof is limited in its application to cases * * * in which the jurisdiction of the court has been rightfully invoked." That is this case. Here plaintiff pleaded a cause of action in equity. He prayed for equitable relief. His cause of action was good but was defeated by the defenses pleaded, *when those defenses were proven.*

The court could have but did not quote from the same authority which states: "The rule is that equity will not enter a partial or incomplete decree. Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; decide all issues which are involved by subject matter of the dispute between litigants; *award relief which is complete and finally disposes of the litigation* so as to make performance of the court's decree perfectly safe to those who may be compelled to obey it; accomplish full justice between the parties litigant; and prevent future litigation. * * * *A part of the controversy should not be remitted to a court of law.*" (Emphasis supplied.) 19 Am. Jur., Equity, § 127, p. 126. Curiously enough, Reynolds v. Warner, *supra,* is cited as authority for the clause first emphasized above.

Now what is the precise rule in Gibson v. Koutsky-Brennan-Vana Co., *supra,* and in Patterson v. Spelts Lumber Co., *supra,* at which the blanket disapproval is directed. It is this: "Ordinarily a personal judgment in favor of a mechanic's lien claimant may be rendered although he fails to establish his alleged lien."

The court makes no objection to the major premise

of the opinions that: "A court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter." As I have pointed out, however, the effect of this decision is to quite seriously modify that rule. The quote is from the Spelts Lumber Company case.

Is the rule stated a correct rule? If it is, then the conclusion of the court in the instant case is in error.

I call attention to the fact that the same rule was followed in Gibson v. Koutsky-Brennan-Vana Co., *supra,* citing the same authorities as are cited in the Spelts Lumber Company case. In that case the defendant sought foreclosure of a mechanic's lien. We affirmed a decree ordering the lien discharged of record and affirmed a personal judgment for the defendant against the plaintiff, holding: "We conclude that even though the mechanic's lien affirmatively pleaded in defendant's answer failed of foreclosure, the court did not err when it made an accounting between the parties and awarded a personal judgment against the plaintiff owners, they being personally liable for the material furnished by defendant."

So there was a precise holding affirming the application of the rule that was later stated and followed in the Spelts Lumber Company case.

I next call attention to the fact that Corpus Juris and Corpus Juris Secundum (the same authority upon which the court relies) cite 30 jurisdictions supporting the rule adopted in the Spelts Lumber Company and Gibson cases and 5 jurisdictions as holding contra. See 57 C. J. S., Mechanics' Liens, § 329, p. 1014. American Jurisprudence says it is the general rule. See 36 Am. Jur., Mechanics' Liens, § 283, p. 172. I am not arguing in favor of a rule by counting jurisdictions solely. I do think that before so well established a general rule is overruled *after* having been adopted by us *twice,* that the court should pay a bit of attention to the holdings of

authorities in other states. The court's opinion disapproves them without benefit of direct reference. I submit the challenged rule is the law of this state, so declared by two opinions directly, in recent years.

The court holds that to fail to follow Reynolds v. Warner, *supra,* "would operate to deprive a party of his constitutional right to a trial by jury."

The majority opinion does not define the boundaries of that "constitutional right."

What is the constitutional right of trial by jury?

The Constitution says: "The right of trial by jury shall remain inviolate, * * *." Art. I, § 6, Constitution of Nebraska.

We have held: "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." In re Guardianship of Warner, 137 Neb. 25, 288 N. W. 39. "* * * the purpose of these provisions was to preserve the right of trial by jury as it existed at common law and under the statutes in force when the Constitution was adopted." State v. Hauser, 137 Neb. 138, 288 N. W. 518.

The question, then, is: Is this such a case where the right of trial by jury existed when the Constitution of 1875 was adopted?

I take it that there will be no contention that a jury trial is a constitutional right in an equity case.

I point out that the right to a mechanic's lien is a statutory right.

The procedures for recovery are statutory also. Section 52-104, R. R. S. 1943, gives a person holding a lien a right to bring a civil action for the amount of his account and that the lien shall continue "until such suit is finally determined and satisfied." Section 52-114, R. R. S. 1943, gives the lienholder the right to "proceed * * * in equity" etc. The provision authorizing a proceeding in equity stems back as far as section 17 of an

act regarding mechanics' liens passed in 1858 (Laws 1858, p. 225), where the phrase used is "petition in chancery." So this was an equitable proceeding before the right of trial by jury provision was adopted in the 1875 Constitution.

I call attention again here, as I will develop later, that the attorney's lien statute which was involved in Reynolds v. Warner, *supra,* which is the main reliance of the court's opinion, has no such statutory procedure authority.

It is important to note that from the beginning the right of trial by jury in a civil action has been a limited, restricted right.

The Territorial Legislature by act approved February 13, 1857, adopted a code "Respecting practice and proceedings in Courts of Justice."

It therein provided that: "Issues of fact shall be tried by the court unless one of the parties require a jury." Laws 1857, c. XIV, § 11, p. 68. Here not a waiver but a demand for a jury was required. This chapter was repealed by the act of 1858 to which I now refer. Laws 1858, p. 213.

The Territorial Legislature of 1858 (Laws 1858, Tit. I, §§ 3, 5, p. 109) provided: "The distinction between actions at law, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place, there shall be, hereafter, but one form of action, which shall be called a civil action. * * * There can be no feigned issues; *but a question of fact, not put in issue by the pleadings, may be tried by a jury,* upon an order for the trial, stating, distinctly and plainly, the question of fact to be tried, and such order is the only authority necessary for a trial." (Emphasis supplied.)

It further provided (Laws 1858, Tit. IX, Art. I, §§ 262, 263, pp. 150, 151) that: "Issues of fact arising *in actions for the recovery of money,* or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered as here-

inafter provided. * * * *All other issues of fact shall be tried by the court,* subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this code." (Emphasis supplied.)

This provision regarding a jury trial is now found in section 25-1104, R. R. S. 1943. This provision, then, stems back to a provision of the territorial law that related to "actions at law" as is shown by the following history of the act. It did not apply in the beginning to actions in equity and I submit it does not do so now.

The above provision relates to "distinctions between actions at law." The Legislature in 1867 repealed that provision and enacted the provision: "That the distinctions between actions at law and suits in equity, and the forms of all such action and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action, which shall be called a 'civil action.' " Laws 1866-67, § 1, p. 877.

At the same time the Legislature repealed Title XXIV, "chancery," which was in the 1866 code. The Legislature also repealed Title VI, "joinder in actions" in the 1866 code so as to make it apply "whether they be such as have heretofore been denominated legal or equitable, or both, * * *." The same provision exists now in section 25-701, R. R. S. 1943. There is no claim here of misjoinder of causes of action. I cite this development to show that all of these reformed procedures were enacted prior to our 1875 Constitution and were an integral part of our judicial system before the right of trial by jury provision was placed in the 1875 Constitution.

The rule which the court now adopts is contrary to our holdings in the Gibson and Spelts Lumber Company cases. It is contrary to our holdings from the beginning in mechanic's lien foreclosure cases and other cases involving the right of an equity court to try all issues without the intervention of a jury. It is contrary to

the repeated declarations of this court regarding the power of an equity court.

I now cite some of the cases. In Dohle v. Omaha Foundry & Machine Co., 15 Neb. 436, 19 N. W. 644, we held: "An action to foreclose a mechanic's lien is essentially a suit in equity, and a party is not as a matter of right entitled to a jury trial therein."

That case has been repeatedly cited with approval in subsequent cases. It came before the court in Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383. There defendant sought to foreclose a lien on grain and to recover damages. We there said: "The cross-petition demanded equitable relief only. It invoked the equity powers of the court, and the issues made by the cross-petition, the answer of the appellant thereto, and the reply of the appellees were entirely equitable; but appellant also alleged by way of counter-claim in his answer that he had been damaged $10,000 by the wrongful termination of the contract by the appellees. * * * After the evidence was in, it appeared that the grain called for by the warehouse receipts sought to be foreclosed had been already disposed of by the appellant, and *his counsel now contends that the court should have then impaneled a jury.* But this position is untenable. *The court was sitting in equity. It had before it on the pleadings an equitable action, and it did not lose its jurisdiction because the evidence disclosed that the only adequate relief it could afford was a personal judgment. * * * The court was right in refusing the appellant a jury trial.*" (Emphasis supplied.)

The Dohle case was cited again in Sharmer v. McIntosh, 43 Neb. 509, 61 N. W. 727, where we held: "Where a petition states a cause of action for equitable relief and prays for equitable relief, a jury cannot be demanded as a matter of right for the trial of any issue arising in the case."

The Dohle case was cited again with approval in Yager v. Exchange Nat. Bank of Hastings, 52 Neb. 321,

72 N. W. 211. There the *prayer of the petition was for a money judgment.* On issues made the court submitted the matter to a referee. He reported in favor of the defendant. The report was confirmed and the case dismissed. The plaintiff contended that the action was one essentially for the recovery of money and that in actions for the recovery of money the cause shall be tried by a jury. We sustained the contention. We there held: "Whether or not a right to trial by jury exists must be determined *from the objects of the action as determined by the averments of the petition, and in case of ambiguity by resort to the prayer.* * * * If the action is in its nature one triable by jury, the right to such trial will not be defeated because, in order to accomplish the main object of the action, it becomes necessary to determine issues as to the existence of equitable rights." (Emphasis supplied.) The reason for the distinction is apparent.

The Dohle case was again cited with approval in Woodrough v. Douglas County, 71 Neb. 354, 98 N. W. 1092. We there held: "Plaintiff further contends that the law is unconstitutional because the act makes no provision for a trial by jury. It will be observed that, by the terms of the law itself, the action by the county to foreclose the tax lien is declared to be a suit in equity. There never was, and there is not now, any constitutional or statutory right of a jury trial in an equitable action."

I again point out that "by the terms of the law itself" an action to foreclose a mechanic's lien is a "proceeding in equity."

It does not appear that anyone since that time, until now, has challenged the rule of the Dohle case.

It may be pointed out that the Dohle case and the Morrissey case are cited in 89 A. L. R. 1391, for the rule that: "The great weight of authority is to the effect that the interposition by the defendant in an equitable action, of a counterclaim of a legal nature, gives him no right to a jury trial, either of the case

generally or of the issue raised by the counterclaim." The annotation cites decisions from 17 other states and England in support of the "great weight of authority" rule above quoted.

I next go to our decision in Pickens v. Polk, 42 Neb. 267, 60 N. W. 566. Before discussing this case I refer to the holding in the majority opinion that a failure to establish a right to equitable relief "does not divest the court of its jurisdiction of the subject matter."

In the above action Pickens brought an action against two defendants. Polk was the defendant with whom it was alleged Pickens had a contract that was the foundation of a mechanic's lien. Polk sold the property. The title vested in one Leeson. Pickens sought to foreclose the mechanic's lien naming Polk and Leeson as defendants. Service was had on Polk but not on Leeson within the statutory period.

We held that the action as to Polk was for a judgment upon the account, that he had no interest in the property, and that the relief sought as against either defendant was distinct and separate from the demand against the other.

The trial court rendered judgment against Polk for the amount of his (Pickens') account. We held: "*The court had jurisdiction of the subject matter.* * * * We think the action of the court, by which it retained and tried the controversy between appellee and Milton D. Polk on the account and adjudicated it, was proper and right." (Emphasis supplied.)

We reversed the decree "in so far as it awards a foreclosure of the mechanic's lien," dismissed the action as to Leeson, and affirmed the judgment as against Polk. I point out that the right to a jury trial was not presented, but the right of the *court* to determine the independent issue was affirmed.

We cited the Pickens case in Parsons Construction Co. v. Gifford, *supra*. This is one of the decisions which is disapproved in the court's opinion and without dis-

cussion. This is perhaps a proper place to discuss the Parsons Construction Company case. I call attention to the fact that it is written by the same judge who wrote Reynolds v. Warner, *supra* (which is the principal case relied upon by the proposed opinion), and that it was filed less than 8 months after Reynolds v. Warner, *supra,* was decided.

The Parsons Construction Company case was argued here on January 22, 1935. Under the mechanics of handling opinions here it is obvious that the decision had then been made in Reynolds v. Warner, *supra.* It must have been fresh in the minds of the court and of the judge who wrote it, for it was filed 8 days later. It appears obvious that the judge who wrote the two opinions, and the court, saw no conflict in the two decisions. The attorneys for Gifford, in the Parsons Construction Company case, filed briefs for rehearing in that case in October 1935, 9 months after Reynolds v. Warner, *supra,* was decided. They contended that the rule here discussed, as decided in the Parsons Construction Company case, was erroneous. They cited no Nebraska decisions to sustain them.

Reynolds v. Warner, *supra,* has remained in our reports now for a quarter of a century. During that time it has never been cited on the question here involved, although we have repeatedly, during that time, decided the precise issue now involved contrary to what the court now holds.

Now after all that time it suddenly comes forth with all the blazing light of the noonday sun. That which the court now sees clearly in it has heretofore not been seen at all.

The Parsons Construction Company case was an action to foreclose a mechanic's lien by a subcontractor. Gifford, a defendant, filed a cross-petition asking for damages against the contractor. The action was tried first on the issue of the mechanic's lien. *The trial court denied foreclosure of the lien,* just as it did in the instant case.

"Thereafter" (a year later) the case was tried on the issue of damages. Gifford then demanded a jury trial. A jury trial was denied.

We affirmed the denial of a right to trial by jury, citing the Pickens case as above quoted, and held: "In this case, the suit in equity was properly brought to foreclose a mechanic's lien. These other issues were pleaded by the defendants. It is a well-settled rule that a court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject-matter. * * * The subject-matter of this suit was the foreclosure of a mechanic's lien under a contract for the construction of the addition to the Sanford Hotel."

The writer of the opinion gave "another reason" also, but the first and initial reason is that above shown.

I next call attention to Lett v. Hammond, 59 Neb. 339, 80 N. W. 1042. Plaintiff's petition prayed for a money judgment on a contract. The defendant moved that the cause be transferred to the equity docket on the ground that it involved an accounting. When the cause came to trial plaintiff demanded a jury trial. It was refused and judgment (after trial) was for the defendant. Plaintiff appealed, asserting his right to a jury trial. We held: "*In a strictly law action* a party is entitled to a jury trial as a matter of right. * * * It is urged for defendant that there were issues in the case which were in their nature equitable. If so, they were but incidental to the main one, which was purely legal. The relief sought was the recovery of money asserted to be due because of a breach of the contract. No equitable relief was asked. With such prevailing conditions of the issues the plaintiffs had a right to a jury trial." (Emphasis supplied.)

The distinction made in the Lett case supports a denial of a trial by jury here.

Daniels v. Mutual Benefit Life Ins. Co., 73 Neb. 257, 102 N. W. 458, began as an action to foreclose a mort-

gage. We there held: "The next question urged is that the court erred in overruling the demand of plaintiffs in error for a trial by jury on the question of their liability for a deficiency judgment. The determination of this question depends *on the nature of the action at its inception.* If purely equitable the right of trial by jury did not exist; if legal in its nature at its inception, although equitable defenses might be interposed, the right of a trial by jury would still remain." (Emphasis supplied.)

The distinction there made supports a denial of a trial by jury here. The instant case was equitable at its inception, being made so by statute and by pleading.

I next call attention to our decision in Robinson v. Dawson County Irr. Co., *supra.* This is a "cow" case if there ever was one. The conclusion reached is directly contra to the court's present opinion. This decision also is disapproved by the court without discussion. In that case plaintiff sought an injunction which is an equitable cause as is the foreclosure of a mechanic's lien. Plaintiff sought also a recovery of damages which, considered separate and apart, is a prayer for a money judgment.

Plaintiff waived his alleged right to an injunction. In short, he waived his right to an equitable remedy. In the instant case the plaintiff insisted on his right to a remedy in equity, but the court found that it was barred by statute. So in the Robinson case the issue of equitable relief by way of injunction was out of the case before trial. In the instant case it was not out of the case until the evidence at the trial demonstrated that the defense of the statute of limitations was good.

In the Robinson case the trial court did what the court holds should have been done in the instant case. The issue of damages was tried to a jury and a judgment rendered for the plaintiff. Defendants appealed, complaining of the instructions. We held that there was "manifest error" in one of them.

Plaintiff contended that the action for damages was incidental to the equitable cause and that the verdict of the jury was "therefore * * * advisory only." We held that: "These contentions require an examination of the *nature of the action* and the procedure followed in obtaining the judgment from which this appeal is taken." (Emphasis supplied.)

We then stated that the suit was one to obtain an injunction and to recover damages. We quoted the prayer of the petition. (The tracks of Yager v. Exchange Nat. Bank of Hastings, *supra,* appear here.) We then held: "We think the case is one in which a court of equity could properly take jurisdiction, and jurisdiction once having been taken, the case will be retained for the adjudication of all issues. No objection was made to the court's calling of a jury. *The mere fact* that the trial court *failed to grant an injunction does not deprive such court from hearing the prayer for damages for the injuries suffered.* The verdict of the jury must, therefore, be treated as advisory in character and the presumption follows that any errors in the submission of the case to the jury were considered by the trial court before judgment was entered. Prejudicial error in the instructions to a jury called in an advisory capacity cannot be successfully asserted. We hold therefore that reversible error in the instructions in the present case could not be successfully assigned in view of the fact that the verdict of the jury was advisory only." (Emphasis supplied.) Obviously the conclusion was so patent that no authorities are cited to sustain it. Although "disapproved" the effect of the court's opinion is to overrule this decision.

I now go to others of our decisions "of similar import" to the four decisions of this court which are specifically disapproved in the court's opinion. As I view it these decisions also stand cut down and disapproved, without mention.

In Kuhl v. Pierce County, 44 Neb. 584, 62 N. W. 1066,

the court said: "The spirit of the constitution and laws of this state seems to be this, that if an issue of fact arise in an action equitable in its nature such issue of fact is triable to the court; but if the issue of fact arise in a *purely* legal action then the issue of fact is triable to a jury." (Emphasis supplied.)

The distinction in the cases is illustrated by our decision in Larabee v. Given, 65 Neb. 701, 91 N. W. 504. There the plaintiff brought an action for false representation in the sale of land. He had given a note secured by mortgage for a part payment. He sought a judgment for damages and an order restraining the negotiation of the note until the damages were ascertained and credited on the note. The obvious primary issue was false representation. The action was tried to the court "without a formal waiver of a jury." Error, if any, as to that was waived in this court. We held: "The principal contention on behalf of the plaintiffs in error is that the petition improperly joins causes of action for legal and equitable relief. We can not uphold this contention. It was definitely settled by this court in Erickson v. First Nat. Bank of Oakland, 44 Nebr., 622, and the cases there cited, that an injunction will be granted to restrain the sale of a negotiable note, so as to cut off defenses of counter-claim and recoupment thereto. It is perhaps true that *under the former practice,* and in jurisdictions in which legal and equitable remedies are administered by separate tribunals, the extent of relief obtainable in equity would be to restrain the sale of the note until the damages could be ascertained at law; but we are of opinion that under *our practice both issues may,* if the complainant desires, *be tried in a single action;* the right to a trial of the issue of damages by a jury being preserved to the defendant, *if he demands it.*" (Emphasis supplied.)

I point out this case because of its holding that, even on the trial of an essentially law issue raised by the petition, the defendant must demand it in order to have a

jury trial. The court, and not the defendant, must now raise that question.

Ames v. Ames, 75 Neb. 473, 106 N. W. 584, involved an action to cancel a deed to real estate; to adjudge the plaintiff to be the owner of an undivided one-third interest therein; to recover $1,500 on account of rents and profits; and for equitable relief. The plaintiff asked for a jury trial of the issues of fact. It was refused. The court found and decreed for the defendants. Plaintiff appealed. We held: "The prayer shows that the plaintiff sought equitable relief, and that a part of the relief sought was such as the court could grant only in the exercise of its chancery powers. On the other hand, while a part of the relief sought might have been in an action at law, no relief is prayed that the court, in the exercise of its plenary powers as a court of equity, might not have granted. And this would be true, even had the amendment to the prayer for relief been allowed, because, when a court of equity acquires jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all matters at issue in the case. 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 181. It would seem reasonable to hold that, where a party files a petition in the district court which states facts sufficient to entitle him to both legal and equitable relief, and prays relief, a part of which only can be had at law, but all of which may be had in equity, he intends thereby to invoke the chancery, and not the common law, powers of the court. There is no doubt that, after filing a petition of that kind, the plaintiff might elect to proceed at law, but he should manifest his election by some unequivocal act which would commit him to the theory that he had abandoned his claim to equitable relief. Here the only acts relied on as showing such election are the two requests for the submission of the questions of fact to a jury. But it is not an uncommon practice for courts, in the trial of purely equitable issues, to submit such

issues to a jury. But a jury cannot be demanded as a matter of right. (Citing cases.) There was nothing, therefore, in the demand for a jury inconsistent with the theory that the plaintiff was prosecuting a suit in equity, and nothing on the face of the record which would have prevented him, had a jury trial been allowed which resulted in a judgment in his favor, from insisting that it was a suit for equitable relief, and not in ejectment, *and that a second trial thereof as of course could not be had.* It seems to us the court very properly regarded and tried the cause as a suit in equity." (Emphasis supplied.)

In Card v. Deans, 84 Neb. 4, 120 N. W. 440, plaintiff brought an action in ejectment. Defendant asserted ownership and prayed to have title quieted in him as against the plaintiff. Plaintiff requested a jury trial. It was denied. On appeal by plaintiff we held: "Plaintiff complains because he was refused a jury trial. The petition was such as is usual in actions in ejectment, but the defendant alleged ownership of the real estate, and prayed for affirmative equitable relief, which could not be granted in a jury trial. This court has held that in a law action where the answer sets up an equitable counterclaim the cause is triable to the court. (Citing case.) In Jewett v. Black, 60 Neb. 173, it was held that in an action in ejectment where the defendant prays for affirmative equitable relief, and pleads facts entitling him thereto, the issues are triable to the court without a jury. The case at bar falls within this rule, and a jury trial was properly denied."

It would seem by analogy, that plaintiff having brought an action seeking "affirmative equitable relief, which could not be granted in a jury trial," and defendant having injected into the case a law issue, that the entire cause would be triable to the court.

Krumm v. Pillard, 104 Neb. 335, 177 N. W. 171, was an action to quiet title based on adverse possession. The defendant demanded a trial by jury. It was refused.

On appeal we held: "Our statutory provisions relating to this subject provide: 'Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury.' Rev. St. 1913, sec. 7843. 'All other issues of fact shall be tried by the court, subject to its power to order any issue or issues to be tried by a jury, or referred as provided in this Code.' Rev. St. 1913, sec. 7844. The decisions of our court on this subject have established a pretty clear line of demarcation between these two classes of cases. When the action is one *purely legal* in its nature, the rule is that either party ordinarily, as a matter of right, is entitled *to demand* a jury trial. (Citing cases.) When the cause is for equitable relief, a jury cannot be demanded as a matter of right by either party to try any issue arising in the case. (Citing case.) [In the instant case there was no demand for a jury.]

"The only question then to be determined is whether the present action is to be regarded as a *purely law action,* or is it one calling for the exercise of the equity power of the court. This must be determined by the *allegations and prayer of the petition.*" (Emphasis supplied.)

In In re Estate of Buder, 117 Neb. 52, 219 N. W. 808, we held: "An action or proceeding at law will not be converted into one in equity, merely because the answer sets up an equitable defense to the claim."

It seems to me that the converse of the rule would also be true.

In the body of the opinion we said: " 'Whether a case is one in equity or at law, does not depend upon the understanding of counsel, or of the trial court. nor upon the form of judgment rendered, but upon the nature of the action as shown by the pleadings.' "

I call attention to another fact in the record. Concededly the petition to foreclose the mechanic's lien was an action in equity. Plaintiff pleaded that there was due and owing him from the defendants the sum of

$745 for which amount he prayed judgment and prayed for a lien on the premises.

Defendants Hynes answered and alleged that they had contracted with the plaintiff for plumbing and heating; that when Hynes sold the property to defendant Bradish on November 15, 1953, Bradish agreed to pay the amount owing by Hynes to the plaintiff in the sum of $700 and that plaintiff agreed to that arrangement; that thereafter plaintiff performed no work on the premises for the defendants Hynes; and that therefore the lien filed in August 1954 was barred and the charge as against defendants Hynes had "been fully paid."

Defendants Hynes then offered a plea of payment of the amount once owing by them on the contract. It is that issue that the court holds should have been submitted to a jury—and without request.

I now call attention to the case of Schreiner v. Witte, 143 Neb. 109, 8 N. W. 2d 831. In this case plaintiff brought an action in equity to foreclose a chattel mortgage and for a deficiency judgment, in case one existed, after sale of the mortgaged property. The defendant answered and alleged by cross-petition a partnership; that plaintiff abandoned it to defendant's damage in the sum of $2,500; that plaintiff had failed to pay his half of personal taxes to defendant's damage; and that the plaintiff owed defendant for merchandise purchased. Plaintiff by reply admitted the partnership and alleged its termination; denied liability as to the taxes; and admitted owing the defendant for merchandise purchased.

It will be noted that all three of these defenses had nothing to do with the question of liability on the chattel mortgage or liability for a deficiency judgment. They were foreign to the equity issue. They presented the right of defendant to recover a money judgment, just as the instant case presents the right of defendants Hynes to avoid a money judgment, Hynes no longer having any interest in the real estate.

The court found for the plaintiff and decreed fore-

closure of the chattel mortgage; it found in favor of the defendant on his third cause of action and awarded judgment against plaintiff for the merchandise purchased; and it denied a recovery on the balance of the items set out in the cross-petition. The mortgaged chattels were sold and the sale confirmed. Plaintiff moved for a deficiency judgment. *Defendant objected to the jurisdiction of the court.* (As pointed out later this is exactly the objection which the defendants Hynes made here, and made no reference to a jury trial until on motion for a new trial.) One of the grounds advanced was that the defendant was entitled as a matter of law to a jury trial on the legal claims which plaintiff had against him. The trial court denied the motion for a deficiency judgment, and found that defendant was entitled to a jury trial on the issue of the amount of a deficiency judgment. Plaintiff was given leave to file an action at law to recover "for any deficiency."

We stated: "The defendant in the instant case submitted himself to a court of equity, set up his defense by way of cross-petition, and affirmatively alleged damages, that plaintiff was indebted to defendant for merchandise purchased and personal taxes paid by defendant.

" 'It is a well-settled principle of equity jurisprudence that where a court of equity has obtained jurisdiction of a cause for any purpose it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.' * * * The plaintiff in the instant case followed the correct procedure. The defendant is not now entitled to a jury trial. He voluntarily brought a law issue into the case. He had a right, if he was so minded, to file his amended cross-petition for damages in this equity suit. It was an independent cause of action, existing in defendant's favor, and would not be lost to him, or barred, if he had left it out of this suit. * * * The effect of the trial court's judgment is that plaintiff must again litigate the issues between himself and the defendant,

so that defendant may submit the questions presented to a jury." Schreiner v. Witte, *supra.*

The last quote above is the exact effect of the court's decision in this case. There, however, we reversed the trial court and directed that a deficiency judgment be entered.

The above is another of the decisions of this court that is cut down by the instant decision, and without benefit of being mentioned. The above decision was cited with approval in Brchan v. The Crete Mills, *supra,* discussed herein.

At this point I desire the call attention to Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56. In this case plaintiffs sought a mandatory injunction and a judgment for damages. Issues were joined and trial was had. The court found against the plaintiffs and dismissed the action. Plaintiffs appealed. Defendant contended that plaintiffs had no right of action in equity and that the cause for damages, if any, should be tried to a jury. We held that plaintiffs had proven a prima facie cause of action for a mandatory injunction and a prima facie case to sustain a recovery of damages.

We held: "The remaining question to be considered is that of whether or not the plaintiffs had the right to join in one and the same action their cause of action for equitable relief and the one for damages. This question like the other two must be answered favorably to the plaintiffs." We quoted from Brchan v. The Crete Mills, *supra,* and Schreiner v. Witte, *supra.* We remanded the cause for a new trial. If the decision in the present case is correct, we erred in that decision for failing to tell the trial court that if in the event on a new trial it was found that plaintiff was not entitled to an injunction, it should then submit the damage issue to a jury or require defendant to waive a jury. We did not do so. To have done so would have been to violate the principle there stated that: "Where a court of equity

has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters at issue, and thus avoid unnecessary litigation."

The above was an established, long-honored rule in this state. To it there must now be attached a "provided the plaintiff proves his equitable cause of action" clause.

The court rests its decision on Reynolds v. Warner, *supra,* "and the authorities cited in support of it." As stated above, that case involved an attempt to establish an attorney's lien.

The statute provides: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." § 7-108, R. R. S. 1943.

What is the nature of the right recognized by the statute?

In Sayre v. Thompson, 18 Neb. 33, 24 N. W. 383, we held that the statute was but a re-enactment of the common law. In Cones v. Brooks, 60 Neb. 698, 84 N. W. 85, we held that the statute was declaratory of the common law. This was followed in Zentmire v. Brailey, 89 Neb. 158, 130 N. W. 1047.

So we must start then with the fact that an attorney's lien is a common law right.

What is the remedy to enforce that common law right? Here I point out that the attorney's lien law provides no remedy. In that respect it differs from the remedy provided for the enforcement of a mechanic's lien where a petition in equity is directly authorized.

It is pointed out in Cones v. Brooks, *supra,* that the statute gives the attorney two classes of liens. One is a retaining lien which is given on money or papers which have come into his possession belonging to his

client. The second lien is the charging lien upon money in the hands of an adverse party, the giving of notice to the adverse party being essential to perfect the lien.

As to the retaining lien we held that it amounts to a mere right to hold possession of the papers as against the client until the attorney is fully paid. That being the only remedy, it necessarily follows that the litigation has had to do largely with the charging lien. As to that we have held a number of remedies could be available.

In Zentmire v. Brailey, *supra,* we affirmed the denial of an injunction to prevent the sale of property to enforce an attorney's lien. In Gordon v. Hennings, 89 Neb. 252, 131 N. W. 228, we referred to the "equitable right" of an attorney to satisfy his lien.

In Petersen v. Petersen, 76 Neb. 282, 107 N. W. 391, 124 Am. S. R. 812, an attorney attempted to intervene in a divorce case where a reconciliation had been had. He sought compensation for his services in the suit. It was denied. The attorney became plaintiff in error. We held: "The proceeding by the plaintiff in error differs in no essential particular from a suit at law prosecuted by him against the husband to recover as upon a quantum meruit for services rendered to the wife in the divorce suit."

In Corson v. Lewis, 77 Neb. 446, 109 N. W. 735, it was held that the value of the services under a contract of employment was recoverable under a quantum meruit.

In Card v. George, 140 Neb. 426, 299 N. W. 487, and in Marshall v. Casteel, 143 Neb. 68, 8 N. W. 2d 690, and again in Nicholson v. Albers, 144 Neb. 253, 13 N. W. 2d 145, we held that an attorney has no lien for services performed by him except as provided by section 7-108, R. R. S. 1943.

The court begins its quote from Reynolds v. Warner, *supra,* with: "When the trial court determined that the interveners were not entitled to equitable relief, the

court was without power to determine the legal action without the intervention of a jury."

I submit that the language relates the "when" to the time of the determination in the sense of "at that time" and not to the fact of the determination. That is the common meaning of the word. "When" did the court determine that interveners were not entitled to equitable relief?

The actual issues in the Reynolds case were between interveners and the defendant owners of the cause of action which was in foreclosure. The interveners were employed to foreclose a mortgage in *Cheyenne County.* They filed a lien for services in that case and *in other cases in Dodge County.* Interveners then filed a petition in intervention to enforce an attorney's lien. The opinion recites: "The fees in the Cheyenne county foreclosure case were paid. A small amount was due for costs and expenses at the time this petition of intervention was filed but was paid prior to the taking of any depositions in the case." It is a fair construction that interveners had been paid their fees for Cheyenne County services before the petition in intervention was filed for only a small amount was due for "costs and expenses" when the petition in intervention was filed. It follows that at the time (when) the petition in intervention was filed, interveners were not entitled to a charging lien. (Here I point out that section 7-108, R. R. S. 1943, provides a general lien for a "balance of compensation." It makes no reference to "costs and expenses.") The owners of the mortgage interest claimed damages for wrongful abandonment of the case by the interveners. They did not pray for a money judgment but rather a credit as a recoupment for damages arising from a breach of contract.

The trial court held that the attorneys could not enforce a charging lien in Cheyenne County for services in Dodge County. We affirmed. This is in accord with our decisions.

The alleged debtors "at the beginning of the trial" demanded a jury trial on the issue of the fees due for Dodge County litigation. "This preserved their right to a jury trial upon an *issue in a law action.* * * * the court * * * refused to try these issues without a jury" and dismissed the interveners' petition without prejudice to an action at law.

It follows that at the time "when" the court got to the point of trial there was no issue *to be tried except the issue of a law cause of action.*

I refer now to the four cases disapproved in the opinion in the instant case.

At the time "when" the court denied Gifford a jury trial in Parsons Construction Co. v. Gifford, *supra,* it had already tried the equity issue and was ready to try the damage (law) issue. The court had exercised its equity jurisdiction in the equity action and proceeded to determine the remaining issue in the exercise of its equitable powers in full accord with the rule stated in the Spelts Lumber Company case which was taken from the Gibson case, which is that an equity court having obtained jurisdiction would retain it for the purposes of administering complete relief.

In Robinson v. Dawson County Irr. Co., *supra,* it does not appear when the claimed right to an injunction was waived. I assume it was when the trial began. In any event the court tried the law issue to a jury. As pointed out, we held that the damage issue was incidental to the equitable issue and the jury's verdict was "advisory only."

In Gibson v. Koutsky-Brennan-Vana Co., *supra,* the court found that the equitable cause to discharge of record an alleged mechanic's lien should be sustained. So that at the time "when" the court determined the law cause it had exercised by trial its equity jurisdiction and then determined the law action for the balance due in equity. We affirmed.

In Patterson v. Spelts Lumber Co., *supra,* the court

had first exercised its equity jurisdiction to determine the validity and extent of the mechanic's lien and then determined the amount of the judgment in excess of the lien. In view of the fact that the power of an equity court to do that is conceded in the present opinion, I shall not discuss the case further.

I submit that the case of Reynolds v. Warner, *supra*, is quite distinguishable and is not an authority to be followed in the instant case.

Now let's go to the "authorities cited" in Reynolds v. Warner, *supra*, "in support of" that part of the opinion upon which the court relies.

The first one is Seng v. Payne, 87 Neb. 812, 128 N. W. 625. It was an action for injunction and states the established rule cited earlier herein that: "A court of equity, having obtained jurisdiction of a cause, should retain it for all purposes, and render such a decree as will protect the rights of the parties before it with respect to the subject matter of the suit, and thus avoid unnecessary litigation." In the instant case the court clearly modifies this rule, as I have pointed out.

The second case cited in Reynolds v. Warner, *supra*, is Bank of Stockham v. Alter, 61 Neb. 359, 85 N. W. 300. It was obviously cited for the rule that: "Where a court, in the exercise of its equity powers, acquires jurisdiction for any purpose, its jurisdiction will be retained for all purposes and to try all issues raised in the action." It, however, decided another question and reached precisely the same conclusion that the court reached in Robinson v. Dawson County Irr. Co., *supra*. In defining the issues the court stated: "The whole controversy thus seems to be reduced to two propositions, the amount due on the note, and the respective rights of the contestants in relation to the proceeds derived from the sale of the mortgaged property, to which in equity each had claims, and, as we view the record, such as are more cognizable and to be adjudicated in equity rather than in an action at law. * * * Construing

the pleadings together, the conclusion is irresistable that the amount due on the note, set out by the plaintiffs in their first petition filed, has been at all times the principal issue in the case." The "amount due on the note" standing alone would be a law issue. The balance of the issues was held to be more "cognizable and to be adjudicated in equity." We considered it as an action in equity under the rule that: "If the action is one cognizable in equity, the suggestion only is required that the court, having acquired jurisdiction for any purpose in the exercise of its equity powers, will retain such jurisdiction for all purposes of the case and to try all issues raised therein."

The trial court, however, had submitted one of the issues to a jury. On appeal the defendant contended there was error in an instruction. We held: "* * * the finding of the jury, being only advisory, was not conclusive and binding on the trial court." In this respect the holding is quite comparable to Robinson v. Dawson County Irr. Co., *supra,* now disapproved.

The above two decisions were cited to sustain the equity rule which I contend should be followed here.

As to the second part of the text taken from Reynolds v. Warner, *supra,* the court found no Nebraska decisions to sustain its position. It cited 1 Pomeroy, Equity Jurisprudence (4th Ed.), §§ 237, 238; and Stockhausen v. Oehler, 186 Wis. 277, 201 N. W. 823. The text cited from Pomeroy deals primarily with the remedy of injunction and with an equity rule in such cases concerning the allowance of compensatory damages when not given in addition or as an incident of some other special relief. The balance of the text deals with exceptions to the rule. The rule is stated separately and distinctly from the rules that follow in those states such as ours where: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and in their place there shall be hereafter but one form of action,

which shall be called a 'civil action.' " § 25-101, R. R. S. 1943.

Pomeroy deals with those situations separate and apart from the equity rule as such which he states and which is cited in Reynolds v. Warner, *supra.* Pomeroy is quoted at length in Varnes v. Schwartz, 50 N. D. 511, 197 N. W. 129, to which I shall refer presently. The quote is lengthy and will not be repeated here.

The case of Stockhausen v. Oehler, *supra,* was an action for rescission. The court quoted from McLennan v. Church, 163 Wis. 411, 158 N. W. 73, and held that: "A jury trial cannot be defeated by the mere allegation of an equitable cause of action, when as a matter of fact the equitable cause of action did not exist at the time of the commencement of the action, to the full knowledge of the plaintiff."

Assuming that holding fitted Reynolds v. Warner, *supra,* just how much validity does the rule have in this state?

McLennan v. Church, *supra,* was an action of specific performance. Specific performance was denied by the trial court and plaintiff appealed. The court held: "It is not the law, as seems to have been thought, and as counsel for respondents suggest, that in all cases where specific performance is sought and is not obtainable because of facts known to the plaintiff when he commenced his action therefor, that the court cannot or should not grant other relief by way of compensation, even though it be such as would be a proper subject of an action at law for damages. * * * There is but one court and one form of action; therefore, up to the point where the constitutional right of trial by jury would be unduly prejudiced by going further, there is no want of power to grant legal relief in an action commenced to secure equitable relief only, and the practice to grant such relief, in the interest of a speedy and economical settlement of controversy has been so progressive that it can no longer be properly said that where the facts

of a case warrant only legal relief and were known to the plaintiff when he commenced his action for equitable relief, the court will not, should not, or cannot afford the former. * * * In most, or in all, cases where legal relief is granted in an action for equitable relief, legal issues are involved appropriate to an action of a legal nature; so that was never, necessarily, regarded as going to the jurisdiction of the court to grant the latter. It was not so regarded before the constitution was adopted guaranteeing the right of trial by jury and such guaranty did not change the situation. (Citing cases.) The holdings to the effect that where the facts entitling the plaintiff to only legal relief were known to him when he commenced his action for equitable relief, the court will not grant the former, followed *an ancient judicial rule* which it was perfectly competent for the court to modify so as not to exclude cases commenced in good faith, and with reasonable ground therefor, to obtain one form of relief when another form only is obtainable, and it has been so extended as we have indicated." (Emphasis supplied.)

The court in Stockhausen v. Oehler, *supra,* did not overrule or modify this decision. Rather it cited it as authority.

I cite these cases because the court, in its opinion in the instant case, advances no contention of bad faith but rather contends only that plaintiff failed to establish his alleged lien.

I now go to Varnes v. Schwartz, *supra.* I shall interpolate references to the instant case and our laws to show the similarity between the two cases.

This was an action against the defendants to recover the amount due for threshing grain, and to foreclose an alleged thresher's lien on the grain threshed. Defendants by answer alleged that the lien was void and that the court was without jurisdiction. Here the defendants Hynes made no objection in their answer to the court's jurisdiction. Defendants alleged payment in full as did

defendants Hynes here. Defendants Schwartz interposed a counterclaim for money on a cause of action having nothing to do with the threshing or the alleged lien. The cause went to trial. Plaintiff offered his alleged lien in evidence. Defendants objected. They admitted the cause of action of the plaintiff, except the alleged lien. They challenged the validity of the lien; and they asserted the equitable jurisdiction of the court failed and "there being no primary jurisdiction there can be no adjudication of anything in this lawsuit." They demanded a jury trial "as to any issue of law." No such demand was made in the instant case. The defendants stood on their objection and offered no evidence as to issues raised by their answer. The court then held that plaintiff had no lien and awarded judgment for the plaintiff as the trial court did in the instant case.

On appeal the defendants asserted that the court was without jurisdiction. The court held that the trial court had jurisdiction as the court now holds in the instant case. On appeal the court held that the trial court did not err in not dismissing the action. That is the effect of the holding of the court in the instant case.

The reason the North Dakota case had for holding that the action should not be dismissed becomes important. It pointed out that in North Dakota the distinction between actions at law and suits in equity had been abolished. I have quoted above our section 25-101, R. R. S. 1943, containing a like provision. The court pointed out that the provision had been established "before statehood." Here our statute was enacted in 1867 (Code § 2, R. S., p. 394; Laws 1867, § 1, p. 71). Earlier I have pointed out its territorial legislative history. I point out that In re Guardianship of Warner, *supra,* we held that the constitutional provision that "The right of trial by jury shall remain inviolate" (Art. I, § 6, Constitution of Nebraska), "merely operates to

preserve, the right of jury trial as it existed prior to the adoption of our Constitution of 1875."

Obviously then the right of trial by jury provision must be read in the light of the fact that section 25-101, R. R. S. 1943, had been effective several years before the constitutional provision was adopted. The North Dakota court then quoted at length from Pomeroy. It held that while the reformed procedure did not abolish the essential distinction between legal and equitable rights or remedies, "it did combine the two jurisdictions and abrogate the distinction formerly existing between the two modes of procedure and establish 'that a single judicial action, based upon and conforming to the facts and circumstances of each particular case, whatever be the nature of the primary right which they create, must be used for the pursuit of all remedies, legal or equitable.' " It then held: "* * * that the trial court was correct in refusing to dismiss the action, and that it had jurisdiction to determine the amount due to the plaintiff and render judgment therefor, even though the lien proved invalid."

Up to that point there is a manifest parallel in the cases being reviewed and the instant case except that the conclusion of this court, based on Reynolds v. Warner, *supra,* is directly to the contrary.

The parallel continues.

The North Dakota court then considered defendants' assertion that they were entitled to a jury trial on the issue of payment and the counterclaim.

Appellant's assignment of error here is that "Equity" did not have jurisdiction of the subject matter and hence they were denied the right of trial by jury. The court holds that under our reformed procedure the trial court had jurisdiction of the subject matter but erred in not submitting the issues to a jury, the lien having failed by virtue of the affirmative defense of the statute of limitations.

The parallel continues in part.

Defendants' counsel in the North Dakota case at the time of trial objected as follows: " 'As to any issue of law in this lawsuit we demand the right of a jury, that is in so far as the Court treating this under a law action. In other words, we insist this is an equitable action and when that fails the case must be dismissed.' " In the instant case, as quoted by the court, defendants Hynes objected "to the entry of any judgment against him." They did not demand a jury trial. They did not mention a jury trial as was done in the North Dakota case.

Obviously here defendants Hynes were directing their objection to the jurisdiction of the court. The objection made *at the close of the evidence* in the instant case, went to the jurisdiction of the court to enter "any judgment." Appellant's assignment of error here so construed the objection.

The parallel continues.

In the instant case as pointed out by the court, at the close of the plaintiff's evidence defendants Hynes moved for a dismissal directed at the failure of the proof to establish a lien. The trial court denied the motion. The court holds that motion was an "indication" that the court would hold that the right to equitable relief had been established and "would eliminate any question of a trial by jury." That is what happened in the North Dakota case. The motion to dismiss was made after plaintiff's cause of action, excepting the validity of the lien, had been admitted. Defendants did not demand a jury. Here defendants Hynes did not demand a jury. The parallel ends. In the North Dakota case on appeal the trial court's judgment was affirmed. Here it is reversed.

In part the North Dakota decision goes to the question of waiver of a jury which I shall discuss later.

I have set it out in detail here because it goes to the foundation of the rule in Reynolds v. Warner, *supra*, which rests upon an "ancient judicial rule," as the Wisconsin court held, which is not applicable in this state

because of our reformed procedure provisions above set out.

I now quote the following from 1 Pomeroy's Equity Jurisprudence (5th Ed.), § 242, p. 457: "Wherever the true spirit of the reformed procedure has been accepted and followed, the courts not only permit legal and equitable causes of action to be joined, and legal and equitable remedies to be prayed for and obtained, but will grant purely legal reliefs of possession, *compensatory damages, pecuniary recoveries,* and the like, *in addition to or in place of the specific equitable reliefs demanded* in a great variety of cases which would not have come within the scope of the general principle as it was regarded and acted upon by the original equity jurisdiction, and in which, therefore, a court of equity would have refrained from exercising such a jurisdiction." (Emphasis supplied.) The author cites Nebraska cases to sustain the text along with citations from 19 other jurisdictions, including McLennan v. Church, *supra.* He cites no courts to the contrary. He does, however, make this quite revealing comment, applicable here: "The decisions, however, are not entirely unanimous. In some cases the court has not only refused to accept and act upon the spirit of the reformed procedure, but has even, as it would seem, failed to recognize the principle which belonged to the original jurisdiction of equity, the principle that, having obtained a jurisdiction for any purpose, the court might and should give full relief and do complete justice." Nebraska now takes its place along with a few unnamed courts in the above category.

It is not my purpose to argue here that we should infringe upon the constitutional right of a party to trial by jury. Rather it is my view that we should recognize and accept its limitations and the rules under which the right exists as established by our decisions now overruled directly and indirectly by the court's opinion.

If any case is to be disapproved, I suggest it is Reynolds v. Warner, *supra.* In any event it is a rather

dull sickle to use to cut down our decisions heretofore discussed.

In Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N. W. 2d 667, plaintiffs brought action to enforce an attorney's "charging lien" which was created "by agreement." The court held that an action to establish and enforce it was within the equity jurisdiction of the court. The "amount of attorney's fees" owing the plaintiffs by the defendant was an issue, and the only issue discussed. Defendant demanded a jury trial. The court held that ordinarily the value of an attorney's services is a question for the jury. The court then held: "However, when a cause of action for equitable relief *is pleaded* a jury cannot be demanded as a matter of right for the trial of any issue in the case. *This is true even though the defendant sets up a legal defense,* for when a court of equity acquires jurisdiction over a cause for any purpose it may retain the cause for all purposes and proceed to a final determination of all matters put at issue in the case." (Emphasis supplied.) [This reasoning is now no longer valid.]

The court then affirmed the trial court's decree, although a jury had been demanded by the defendant and denied by the trial court. There, as in the instant case, the plaintiff had alleged a cause for equitable relief. There the defendant set up a legal defense which "ordinarily" presented a jury question. In the instant case the defendant had set up a plea of novation and payment in full. There it was held that the court in equity could retain the cause for all purposes and proceed to a final determination of *all matters put at issue in the case,* even though a jury trial was demanded.

In the instant case the court holds that the issue of novation and payment in full may not be determined by the court sitting in equity after the equity cause fails of proof, but must be tried as a law issue separate and apart from the equity issue presented by the plaintiff.

I am compelled to the conclusion that the above decision is another of those which is cut down by the present decision of the court, and that without benefit of citation or mention by the court.

It is interesting to note that in Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra,* the defendant asked this court to follow Yager v. Exchange Nat. Bank of Hastings, *supra;* Lett v. Hammond, *supra;* Kuhl v. Pierce County, *supra;* and Reynolds v. Warner, *supra.* The court in its opinion in the case did not even mention the cases on this issue. Reynolds v. Warner, *supra,* was cited on the question of the restrictions of a charging lien.

Now I assume for the purpose of discussion that there was error in the court not offering a jury trial on its own motion. On that basis I desire to again call attention to Neighbors & Danielson v. West Nebraska Methodist Hospital, *supra.* At the close of that opinion the court assumed for the purpose of discussion that there was error in denying a jury trial. It then held that it was necessary for the appellant to show that it was denied a jury trial *and* that it was *prejudiced* by the denial. Here the appellant does not show that he demanded a jury trial, and the court's opinion makes no reference to prejudice being shown.

I am at a loss to understand why this decision is not also applicable here, but again it is among those not mentioned.

I now go to the question of waiver, assuming but not conceding that the court is correct in holding that defendants were entitled to a jury trial. I point out that the court holds that the trial court was not divested of jurisdiction of the subject matter.

The bill of exceptions shows that the action was tried "to the court" with defendants Hynes appearing by counsel. No objection was made to the trial to the court. Defendants Hynes' counsel participated in the cross-examination of plaintiff's witness. He objected

to the introduction of evidence. At the close of plaintiff's evidence he moved for a dismissal on the ground that plaintiff had failed to establish his lien. He elected to stand "on that record that Gillespie has made." The court overruled that motion and a similar motion that was made for defendants Bradish. No objection was made to the trial continuing "to the court." Defendants Bradish then offered evidence. Defendants Hynes' counsel participated in the cross-examination of defendants Bradish's witnesses. Defendants Bradish rested. Plaintiff then called a rebuttal witness. Defendants Hynes' counsel participated in the cross-examination of the rebuttal witness.

All three parties rested.

Defendants Hynes then objected to the entry "of any judgment against" them. The trial court then entered judgment against defendants Hynes. These defendants *thereafter* raised the question by motion to set aside the judgment that they "were entitled to have the question" of a money judgment "submitted to a jury, since no jury was waived."

The defendants are then confronted with this rule: "Defendant will be held to have waived the right to a jury trial where he * * * allows the trial to proceed as a suit in equity without objection." 50 C. J. S., Juries, § 107, p. 817. See, also, 35 C. J., Juries, § 119, p. 207. The texts cite decisions from 10 jurisdictions and show no decisions contra. When the court's opinion is filed in this case there will be one contra decision.

In 31 Am. Jur., Jury, § 58, p. 60, this rule is stated: "It is a general rule that submission of a cause in equity by both sides without objection waives the right to a jury trial. Generally, failure to challenge the jurisdiction of equity waives a right to jury trial." The same authority in section 59, page 61, states: "Going to trial before the court without demanding a jury or objecting constitutes a waiver of a jury trial. * * * the refusal of the trial court, in the exercise of its discretion in such

respect, to permit a jury trial after it has been waived by failure to demand it or give notice of a desire for it, is not the subject of exception. * * * Defendants cannot avoid the effect of their neglect to demand a jury trial on the theory that, the suit being to enforce a lien and therefore of equitable jurisdiction, a demand for a jury would have been an idle formality and of no avail. One who consents to the trial of a cause by the court without a jury cannot insist on appeal that it was, because of that fact, tried on a wrong theory, to his injury."

I call attention to Udgaard v. Schindler, 75 N. D. 625, 31 N. W. 2d 776. It was an action to determine adverse claims to real property, for damages for waste, and for breach of covenant. The action was tried to the court resulting in a judgment against the defendants for possession and for monetary damages. Defendants moved for a new trial. It was denied. Defendants appealed. On the direct issue raised in the instant case the court held: "Next for consideration is defendants' contention that they were entitled to a jury trial. The claim is that where the action to determine adverse claims is of the nature of the common law action of ejectment rather than that of the equitable action to quiet title, it is, regardless of form, an action at law to be tried to a jury. There is much to be said for defendants' contention. It is, however, unnecessary to decide that question here, for even though defendants were entitled to a jury trial they waived that right. The record shows that the trial judge set the case for trial without a jury and that the defendants went to trial without objection or demand for a jury trial. *They raised the question for the first time, upon a motion for a new trial.* [That is what happened in the instant case.] Certainly the defendants could not voluntarily submit the issues of a case to a court without a jury and hold in reserve their claim of a right to a jury trial in the event the decision should go against them." (Emphasis supplied.)

The court cited 50 C. J. S., Juries, § 91, p. 799, which is: "A jury trial is waived by voluntarily submitting a controversy to the determination of the court, or by permitting the court without any objection or demand for a jury trial to proceed to hear and determine it." In 35 C. J., Juries, § 114, p. 204, under the second clause of this rule, our decision in Schumacher v. Crane-Churchill Co., 66 Neb. 440, 92 N. W. 609, is cited. The syllabus points in our case read: "An order transferring an action in ejectment to the equity docket because of equitable defenses raised in an answer, will not preclude the moving party from demanding that the purely legal issues be tried by jury, if his request for a jury trial is timely and is insisted upon. * * * In such case, going to trial upon all the issues, without demanding a jury as to any of them, is a waiver of a jury as to that trial." In the body of the opinion we held: "There can be no doubt, however, that the plaintiff waived a jury at the first trial by going to trial upon all the issues without demanding a jury as to any of them. The statutory method of waiving a jury is not exclusive. Any unequivocal acts or conduct which clearly show a willingness or intention to forego the right, and are so treated by the trial court without objection, will have that effect."

I submit that under that decision and on this record the defendants Hynes waived any possible right to a jury in this case.

In Sherwin v. Gaghagen, 39 Neb. 238, 57 N. W. 1005, we held: "As a general rule *a court of equity will not interpose an objection* to its own jurisdiction on the ground that the plaintiff has an adequate remedy at law, but will retain the cause for trial and award the relief to which the parties would have been entitled in a court of law. * * * Objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law must be made before judgment on the merits of the cause, and will not be entertained when made for the first time in this court on the appeal

of the objecting party." This case is cited in 21 C. J., Equity, § 149, p. 169, along with cases from some 30 other jurisdictions.

I again call attention to Larabee v. Given, *supra,* where the plaintiff sought equitable relief and damages. We held: "* * * the right to a trial of the issue of damages by a jury being preserved to the defendant, *if he demands it.*" (Emphasis supplied.)

In Penn Mutual Life Ins. Co. v. Katz, 139 Neb. 501, 297 N. W. 899, we held: "Where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded."

I now call attention to Miller v. Knight, 146 Neb. 207, 19 N. W. 2d 153. It was an action for an injunction to restrain trespasses of defendants on land claimed by plaintiff as owner. Defendants denied plaintiff's right to possession and alleged ownership of the land in themselves. Plaintiff by cross-petition then claimed that he purchased the land but that title was taken in Knight as security for money loaned, and that defendants had been repaid and accordingly held the land in trust for plaintiff. The trial court found for defendants. Plaintiff appealed.

We retried the issue de novo as an action in equity and held that the evidence sustained the contentions of the defendants. But plaintiff contended that the evidence showed the defendants to be out of possession and hence defendants were limited to the law action of ejectment. We held as on trial de novo that the evidence showed the defendants were in possession and hence equity had jurisdiction to quiet title. We then held: "In the present case, no demand for a jury was made. Both parties sought equitable relief. The parties proceeded to trial on the theory that the suit was an equitable one. While we think the action was one in equity, the plaintiff is in no position to claim error prejudicial to his rights, even if it was not."

I deem the case to be a decision directly contra to that which the court now makes on the issue of waiver. It shows also the extent to which we have followed the "axiomatic" rule of equity and applied it to situations such as exist in the instant case, for immediately following the above quote we held: "There is no rule more axiomatic than that, where a suit in equity is properly brought and the court has jurisdiction of the subject-matter and all parties to the action, it is the duty of the court to adjudicate all questions and rights presented by the pleadings in order to do full justice to all the parties to it." Apparently no other authority was deemed necessary. Here the court holds that it has jurisdiction of the subject matter and the parties, and denies the balance of the axiomatic rule.

Miller v. Knight, *supra,* is cited in 50 C. J. S., Juries, § 99, p. 803, along with half a page of cases from other jurisdictions, for the rule that: "* * * a party who fails to make such demand will be held to have waived his right and cannot afterward object that the case was tried without a jury." The same rule is stated in 35 C. J., Juries, § 123, p. 210, supported by almost a page of citations from many jurisdictions.

In Linville v. Kowalski, 149 Neb. 402, 31 N. W. 2d 281, we held: "Where a party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded." This case is cited in 30 C. J. S., Equity, § 88, p. 453 (Annual Pocket Part), along with decisions from 15 other jurisdictions for the rule that: "* * * answering generally, or to the merits, or proceeding to trial on the merits, or doing both, without objection to jurisdiction waives such objection, * * *."

In Tucker v. Paxton Gallagher Co., 152 Neb. 622, 41 N. W. 2d 911, we held: "A party may not be heard to complain of error which he has invited. * * * Error may not be assigned upon a ruling or action of the

district court made or taken with the consent of the complaining party."

In Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686, we held: "A litigant may not effectively complain of a course of action he induced or in which he concurred."

In Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700, we held: "A litigant may not predicate error on any action of the court which he procured to be taken or to which he consented."

In the recent case of Crunk v. Glover, 167 Neb. 816, 95 N. W. 2d 135, we held: "The parties may not complain effectively of the action of the court which they induced."

What happens now to the precedents of this court cited herein? Of what value are our cases now as authorities? The court now disapproves four of them directly, without pointing out the extent of the disapproval. It disapproves all other "cases of similar import" without seeking to find or cite them to trial courts or members of the legal profession. I have cited herein cases that seem to me to be of "similar import" and others such as on the question of waiver where guides heretofore given to the trial courts and the legal profession are of no further value.

In Stevens v. Luther, 105 Neb. 184, 180 N. W. 87, we were asked to review and reconsider the rule as to whether the violation of a statute or ordinance enacted for the safety or protection of persons or property constitutes negligence. We said: "If the court were now establishing a rule for the first time, it might be inclined to follow the other line of decisions, but that which has been the law of the state, and accepted as such by the people and the courts for over 30 years, ought not to be set aside without the most convincing reasons."

I point out that Parsons Construction Co. v. Gifford, *supra,* the first of the decisions directly disapproved has stood unchallenged as the law of this state for 24 years and that the earliest of the decisions cited in sup-

port of it, Buchanan v. Griggs, 20 Neb. 165, 29 N. W. 297, was decided by this court 73 years ago. The decision of Pickens v. Polk, *supra,* directly analyzed in Parsons Construction Co. v. Gifford, *supra,* was decided 65 years ago. I am compelled to ask: What are the most convincing reasons? The court does not give them. In Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704, this court held: "Where this court established a rule and it has been followed for more than thirteen years by trial courts of this state, it ought not to be changed except for reasons of grave importance." It was cited with approval in Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86.

I point out that Robinson v. Dawson County Irr. Co., *supra,* "disapproved" in the court's opinion but in fact overruled on the question here involved, was decided 16 years ago, and has since been unchallenged.

In Muller v. Nebraska Methodist Hospital, *supra,* we stated that: "The principal question raised by this appeal is, shall we adhere to the doctrine of immunity for nonprofit charitable corporations from tort liability, a doctrine which has long been established in this state by the holdings of this court? * * * Appellant asks us to re-examine our holdings and seeks to have us reverse them on the basis that they are illogical and fundamentally unsound because they are based on concepts and conditions which no longer exist. On the other hand appellee asks us to apply the doctrine of stare decisis thereto.

" 'The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to, unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.' * * * 'So, where the court has decided a question of law in another case and a like state of facts is subsequently presented, the rule of stare decisis applies and will not be easily changed. * * *

That rule, like all others, is not without its exceptions, and, in the absence of complications resulting from property rights, it is the undoubted privilege, if not indeed the duty, of courts to re-examine their decisions whenever satisfied that they are fundamentally wrong.' * * * In considering the latter the following principle applies: 'Before overruling a former decision deliberately made, the court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it.' "

Why should not these tests be applied and the answers demonstrated here? In the above case we re-examined at length all of the conflicting decisions and adhered to our existing rule. Here the court issues a blanket disapproval of all cases of similar import, leaving the trial courts and the profession to determine in what respect and to what extent cases are disapproved.

In Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N. W. 2d 50, we held: "The doctrine of stare decisis is based on public policy and is entitled to great weight. It should be adhered to unless the reasons therefor do not exist or are clearly erroneous or mischievous or unless more harm than good will result from doing so."

I suggest it be followed here. The court here strikes down not one decision nor four. It strikes down many others by blanket disapproval. No one can say, this court cannot now say, what decisions are affected. Only a series of cases in future litigation can answer that question.

As an indication of the broad sweep of the court's decision disapproving long-established and followed cases, and of the effect on other precedents, I call attention to Mauzy v. Elliott, 146 Neb. 865, 22 N. W. 2d 142. In that case we had the question of the disposition of the surplus proceeds of a mortgage foreclosure sale. The jurisdiction of the court in equity to enter an order disposing of the funds was challenged. We held that equity

had that power. We cited as authority Gibson v. Koutsky-Brennan-Vana Co., *supra,* Parsons Construction Co. v. Gifford, *supra,* and Robinson v. Dawson County Irr. Co., *supra,* those being three of the four cases directly disapproved in the court's opinion. We cited, also, Miller v. Knight, *supra.* It can readily be that in the future some trial court and this court may be called upon to draw distinctions and determine the effect of the court's present opinion on that precedent. Why create that situation when it can be avoided by simply following our long line of established precedents.

I submit that beginning with the case cited in 15 Nebraska down to and including the Spelts Lumber Company case in 166 Nebraska we have an unbroken line of authorities all pointing to or directly holding to the exact contrary of the proposed opinion.

I say that with full regard to Reynolds v. Warner, *supra,* upon which the proposed opinion relies.

The importance of the issue decided prompts me to say more. A reasonable amount of research, the results of which are here disclosed, the necessities of time, and the outside limitations of a dissent as to length, prompt me to close.

ELEANOR M. KINCH, APPELLEE AND CROSS-APPELLANT, V. LAWRENCE B. KINCH, APPELLANT AND CROSS-APPELLEE.
95 N. W. 2d 319

Filed March 6, 1959. No. 34426.

1. **Divorce.** Under the statutes and decisions of this court no decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.
2. ———. Charges by a husband made in good faith that his wife is insane are not ordinarily cruelty, within the meaning of

that term as grounds for divorce, but if they are false they may furnish grounds therefor.

3. ———. In determining the question of alimony or division of property as between the parties the court will consider the respective ages of the parties to the marriage; their earning ability; the duration of the marriage; the conduct of each party during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto. From these elements and all other relevant facts and circumstances, the court will determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Box Butte County: LYLE E. JACKSON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Leo M. Bayer and *Stubbs & Metz*, for appellant.

Beatty, Clarke, Murphy & Morgan, Donald W. Pederson, Frank E. Piccolo, and *James E. Schneider,* for appellee.

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

YEAGER, J.

This is an action for divorce by Eleanor M. Kinch, plaintiff, and appellee and cross-appellant, against Lawrence B. Kinch, defendant, and appellant and cross-appellee, instituted by plaintiff in Box Butte County, Nebraska. The defendant filed a cross-petition in which he prayed that a divorce be granted to him. Trial was had and a decree was rendered granting a divorce to plaintiff. By the decree the plaintiff was awarded by way of permanent alimony and property settlement certain personal property and $31,500 payable at the rate of $3,150 annually, the first payment of which became

due on rendition of the decree. The parties have one child whose custody was awarded to the plaintiff except for 3 school vacation months, for which period custody was awarded to the defendant. The decree provided that the defendant should pay to plaintiff $75 a month while the child was in her custody. Plaintiff was awarded an attorney's fee in the amount of $2,000 and expenses in the amount of $918.28. Motion for new trial was duly filed by the defendant and overruled. From the decree and the order overruling the motion for new trial the defendant has appealed. The plaintiff has cross-appealed. The true basis of the appeal is that the plaintiff failed to establish by evidence any cause of action for divorce, but if it should be found that she had established grounds for divorce, the court erred in making its award for alimony and property settlement, for attorney's fees and expenses, and in awarding the custody of the child of the parties to the plaintiff.

The parties were duly married on July 17, 1945, and have been residents of the State of Nebraska ever since they were married. At the time of the commencement of the action, which was June 7, 1956, the plaintiff was residing in Box Butte County, Nebraska, and the defendant was residing in Dawson County, Nebraska. At the time of the commencement of the action the parties were the parents of one living child who was born on October 20, 1950. The child is a boy whose name is Larry Kinch.

As grounds for divorce the plaintiff charged the defendant with cruelty in certain respects. The charge of cruelty however in only one respect requires consideration herein. As to all others the testimony of plaintiff stands alone and without corroboration. Under the statutes and decisions of this court no decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that pur-

pose. See, § 42-335, R. R. S. 1943; Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299; Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321; O'Neill v. O'Neill, 164 Neb. 674, 83 N. W. 2d 92.

The single specification contained in plaintiff's petition requiring consideration is that the defendant "charged her in private and in public and in the presence of friends, acquaintances and members of his family with bein (sic) insane, for the purpose of humiliating and disgracing plaintiff, and has outside plaintiff's presence repeatedly told other persons that plaintiff is violently insane and dangerously insane, for the purpose of causing friends and acquaintances to shun her and fear her * * *."

The portion of this charge which declares the acts specified is supported by the testimony of the plaintiff and in some respects by the defendant. Material aspects of this testimony of plaintiff find support in the testimony of others who were witnesses on the trial of the case.

The substantial effect of the testimony of the defendant as to this subject was that he had an honest belief that the plaintiff was in mental and emotional unbalance and that all he ever did was in recognition of this condition and in an effort to restore her to a proper balance.

The parties both testified that the defendant placed plaintiff in the hands of a psychiatrist and one or more psychotherapists for attention but neither of these was produced as a witness and no psychiatrist or psychotherapist gave testimony hypothetically as to the mental or emotional condition of the plaintiff. Two doctors, not psychiatrists, who were witnesses by deposition, testified that she had a psychosis, was emotionally unstable, and was in need of psychiatric treatment. Neither of them however testified that she was insane or required any kind of segregation or confinement. The testimony of the defendant therefore stands alone

as to his claimed reasons for making remarks to others that plaintiff was insane and that she should be confined or committed to an institution.

A charge by a husband made in good faith that his wife is insane is not ordinarily cruelty but if it is false it may not well be considered otherwise. See, 27 C. J. S., Divorce, § 28, p. 558; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; Schutte v. Schutte, 90 W. Va. 787, 111 S. E. 840; Burns v. Burns, 145 Neb. 213, 15 N. W. 2d 753; Meredith v. Meredith, 148 Neb. 845, 29 N. W. 2d 643; Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669; Beals v. Beals, 152 Neb. 364, 41 N. W. 2d 152. If any such charge was false it could not be considered other than unjustifiable conduct which could well so grievously wound the feelings of the other spouse as to destroy the legitimate ends and objects of matrimony. The cases cited do not directly pass upon the attitude to be taken with regard to unproved charges of insanity but they do relate to any type of grievous charges which have not been proved.

While it may well be said that the verity of the statements made as to plaintiff's mental and emotional condition remain somewhat in doubt, yet it may hardly be said that good faith was an accompaniment at the time at least some of the statements were made. The record discloses that such statements were made to people who could not be calculated to have any interest in the affairs of these parties, or to be in a position to render aid and assistance in meeting the problem, if it existed.

The claim of good faith of the defendant in the making of these statements must be rejected. Accordingly the conclusion arrived at is that this charge of cruelty has been preponderantly sustained by the evidence.

The defendant by his cross-petition, which is of great length, charged the plaintiff with cruelty which he contends amounts to grounds for divorce. The charges are in general supported by the testimony of the defendant. Whether or not this evidence is true is

beside the point in the light of the rule already set forth herein that a divorce may not be granted on the uncorroborated testimony of a party to the action.

The acts and doings of the plaintiff which have been testified to by the defendant, if true, would afford grounds for a divorce in favor of the defendant but they stand without any substantial corroboration. It is true that there is testimony as to acts and doings on the part of the plaintiff which do not merit commendation which have been corroborated, but these, if true, may not fairly be regarded as cruelty sufficient upon which to rest a decree of divorce in favor of the defendant. The court did not err in granting a divorce to plaintiff.

As to the matter of custody of the child in case of divorce of the parties the record fails to disclose that either is an unfit person to have custody. Likewise, insofar as the character and quality of the parents and their desire and purpose to act in the favorable interest of the child and to provide a suitable environment for him is concerned, there is nothing sufficient to justify a refusal to award a division of custody, provided of course such division is made with a proper regard for the child's education.

It is true that the two doctors who gave testimony by deposition testified that in their respective opinions at the time when plaintiff was their patient it would not be in the best interests of the child for her to be in charge of the child's upbringing. Against this however other witnesses who were in a position to observe gave testimony which discounted these opinions. Also the trial judge had opportunity to evaluate her in this respect through her testimony and her manner while she was a witness, and came to the same conclusion as these other witnesses. In this light it is not believed that this court should assume, on the record presented, to say that she is not a fit and proper person to have custody of this child.

The decree rendered by the district court gave the

custody to the plaintiff for 9 months of each year which covered the school year, and it gave the custody to the defendant for the remaining 3 months. This appears proper except that the defendant should have the right of visitation without interference at reasonable times during the 9 months and the plaintiff should have a corresponding right of visitation during the 3 months.

No reason appears to justify any change in the decree relating to custody except, as indicated, provision should be made for visitation.

Coming now to the question of alimony and division of property, it must be said that the record is in such condition that no accurate approach may be had to the amount and value of property which must be considered in the determination of this question. This is true because of the failure of the defendant to make, as it appears, a full and fair disclosure of the extent and value of his property. All of the property to be considered stood in the name of the defendant. The property of the defendant consisted of 240 acres of land in Dawson County, Nebraska; and a considerable amount of farm equipment. Whether there was any money in sources available to the defendant is a matter of conjecture. There is basis for such conjecture that there was in the light of proof of receipt of sums of money without comprehensive evidence as to their disposition. An expert was engaged to appraise the personal property found on the farm before the trial. He did so and testified as to his appraisement. This was not truly determinative of value since it is not shown that this was all of the property owned, or that all of it was owned by the defendant. The defendant failed to furnish in comprehensive detail evidence as to the value of his personal assets. He however admitted a valuation at the time of trial of $18,000. If his valuations were arrived at on the basis used in the depreciation schedule appended to an income tax schedule, which is in evidence, then it becomes obvious that he had a personal property valu-

ation in excess of the valuation given in his testimony.

As pointed out the defendant had 240 acres of land in Dawson County, Nebraska. He testified that its value was $200 an acre, or $48,000. He called a witness who fixed its value at $58,000. On the other hand the plaintiff called a witness who was familiar with the land, its quality, and value. He testified that, in his opinion, all of it except about 5 acres had a value of $450 an acre and the other 5 acres had a value of $350 an acre. From an examination of all of the testimony as to value it becomes quite clear that the valuation testified to by the defendant was grossly inadequate. On the other hand the testimony of plaintiff's witness, particularly in the light of his cross-examination, had the appearance of truth and sincerity.

The testimony of the defendant as to his liabilities was unsatisfactory. In some particulars it appeared to be accurate but in others fragmentary and evasive. Evaluating it in the light of this testimony it is difficult to arrive at a conclusion that the liabilities exceeded $27,000.

The defendant did not choose to go into income experience in the operation of the farm, which would have at least in some measure thrown light on the value of the land. It was shown however that in 1956 the defendant's gross income was $29,507.48. Apparently in that year the defendant was engaged in farming his own farm and an additional 160 acres, and that he did some outside or custom work. Income is not allocated as to source.

We think that the record on its face, without projecting into possibilities which find some support in the evidence, discloses that at the time of trial the defendant had a net estate of at least $100,000.

The plaintiff had no property at the time of the marriage and acquired none thereafter. Little, if any, was added to that which was possessed by the defendant when the parties were married. While there has been

no marked increase in quantity of property the value in dollars has by the operation of economic forces greatly increased.

In the light of all that has been disclosed it becomes necessary to determine what should be awarded to the plaintiff on the dissolution of this marriage. The award made by the district court has already been disclosed herein.

There is no standard whereby to determine the amount of alimony and division of property which shall be awarded a wife in case a divorce is granted. Many statements in regard to this subject appear in the decisions of this court but all that may be said is that they are advisory and cautionary. There has been a wide variance in the results as is readily observable in the reported cases. The following contains the substance of the many statements:

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

In an application of this statement it should be pointed out that the plaintiff is now about 35 years of age and

the defendant is about 14 years older. At the time of the trial the plaintiff was gainfully employed and there was nothing to indicate that she would not be able to continue in gainful employment.

Taking everything into consideration as disclosed by the record the conclusion reached is that the award made by the decree by way of alimony, division of property, and child support is equitable and reasonable and should be sustained.

This court, during the pendency of this appeal, awarded temporary alimony and temporary child support. It is to be understood that for the period covered by that award the defendant shall not be required to also pay the monthly allowances provided by the decree for child support in order to have compliance with the decree as affirmed. These payments shall be in lieu of compliance for that period.

The district court allowed for the attorneys for plaintiff a fee in the amount of $2,000. Expenses in the amount of $918.28 were allowed. The defendant contends that the expense was at least in part improper. The plaintiff contends that the amount allowed for attorney's fees was insufficient. Without analyzing for the opinion what was involved in these respects but having in mind what is apparent in the record it will be stated that the contentions are without substantial merit.

The decree of the district court is therefore affirmed in all respects except one, and in this respect the cause is remanded with directions to modify. That one is that the decree shall be modified by granting the defendant the right of visitation of the child of the parties at reasonable times during the 9 months of each year when the plaintiff has his custody, and a corresponding right of visitation shall be accorded the plaintiff when the defendant shall have custody.

During the pendency of this appeal the attorneys for plaintiff were awarded a temporary attorney's fee in

the amount of $1,000. This award is confirmed and an additional fee of $2,000 is allowed for services on appeal. All costs are taxed to the defendant.

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

IN RE PETITION OF OMAHA PUBLIC POWER DISTRICT. WALLACE SUMP ET AL., APPELLEES, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT.
95 N. W. 2d 209

Filed March 6, 1959. No. 34492.

1. **Eminent Domain: Damages.** In a condemnation proceeding under the power of eminent domain the measure of damages where land is not taken is the difference in the reasonable market value before and after the damaging, taking into consideration the uses to which the land was put and for which it was reasonably suitable.
2. ———: ———. In determining the reasonable market value of land in a condemnation proceeding it is proper to consider the condition of the property and all its surroundings, as well as its adaptability for any particular use. If it has a peculiar adaptation for certain uses which adds to its value the owner is entitled to the benefit of it.
3. **Eminent Domain: Evidence.** Evidence as to the value of property for a particular use is not competent. Its adaptability for certain uses may be considered only in determining the reasonable market value of the land at the time it is taken or damaged.
4. ———: ———. The evidence as to the adaptability of property for certain uses must be limited to uses reasonably anticipated in the immediate future.
5. ———: ———. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged.
6. **Eminent Domain: Trial.** An instruction which fails to properly limit the consideration of future uses to reasonable uses in the immediate future is prejudicially erroneous.
7. **Eminent Domain: Evidence.** In proving the reasonable market value of property it is improper to admit testimony of an alleged offer of a particular price as tending to show its value.
8. **Eminent Domain: Appeal and Error.** In an action for damages

for the taking of an easement for a right-of-way it is error to permit testimony as to the value of the land as a site for a filling station.

9. ———: ———. Ordinarily a party is estopped from asserting such error where he subsequently elicits similar evidence on the same subject.

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

Fraser, Wenstrand, Stryker, Marshall & Veach and *Albert C. Walsh,* for appellant.

Eisenstatt & Lay, for appellees.

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

CARTER, J.

This is an action by the Omaha Public Power District to acquire by condemnation, through the power of eminent domain, an easement for an electric power transmission line across certain lands in Douglas County belonging to Wallace and Elaine Sump. From a verdict and judgment in favor of the Sumps for damages in the amount of $8,000 the power company has appealed.

The Sumps are the owners of the north half of the northwest quarter of Section 5, Township 14 North, Range 12 East of the 6th P. M., in Douglas County, Nebraska. The Sumps also own other land contiguous to the above-described property, the total acreage in the two tracts being approximately 96 acres. The easement crosses the southwest corner of the Sump lands. The easement was obtained for the purpose of crossing the corner of the Sump lands with a 161,000 volt transmission line, there being no poles, towers, or structures of any kind occupying any portion of the land. The minimum clearance of the transmission line in the center of the span between supporting structures is 29 feet at 120 degrees Fahrenheit. An easement for the right-of-way was taken for 35 feet on each side of the center

line and an additional 15 feet on each side thereof for the right to trim or fell trees and remove obstructions within 50 feet of the center line of the right-of-way which would be a hazard to the transmission line. The area contained in the 70-foot right-of-way amounts to .267 of an acre. The area contained in the 30 feet taken to protect against trees and obstructions amounts to .114 of an acre. The corner of the Sump lands separated from the main tract by the easement contains .023 of an acre. The excessiveness of the judgment is not assigned as error. Errors in the admission of evidence and in the court's instructions to the jury are assigned as constituting prejudicial error.

The power company contends that instruction No. 8 is prejudicially erroneous. The instruction states: "The measure of damages for land condemned for public use is the difference in the fair and reasonable market value of the land before and after the taking. The value of the land taken by eminent domain is not limited to the value of the land for the purposes for which it is actually being used at the time of the taking, but you may consider all uses to which it is adapted and might be put and will award compensation upon the basis of its most advantageous and valuable use, having regard to the existing business activities or wants of the community or such as may reasonably be expected in the future." The assignment of error is directed to the words "or such as may reasonably be expected in the future." The contention is that this part of the instruction permits a recovery for a future use that is too remote and has no probative value in determining the reasonable market value of the land at the time it was damaged.

We point out that the present case involves the taking of an easement for a right-of-way, and does not involve the actual taking of land. The measure of damages in such a case is the difference in the reasonable market value of the land before and after the taking of

the easement. Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N. W. 742, 124 A. L. R. 400; Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417. In determining the fair and reasonable value of land before and after it is damaged by a taking of an easement under the power of eminent domain it is proper for the jury to consider the purposes for which it was being used at the time it was damaged, and all uses for which it is adapted and might be put, and award compensation upon the basis of its most advantageous and valuable use. The evidence that is proper to be considered in establishing such value is discussed in Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, as follows: "The court properly admitted evidence of the nature of the community and its development into acreage or small tracts for country or suburban homes and the adaptability of the land in question for that purpose. The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which made up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted?" See, also, Quest v. East Omaha Drainage Dist., *supra;* State v. County of Cheyenne, 157 Neb. 533, 60 N. W. 2d 593.

The evidence, however, must be limited to the adaptability of the land for uses that may be reasonably expected in the immediate future. In 18 Am. Jur., Eminent Domain, § 244, p. 880, the rule is stated as follows: "In other words, the owner is to be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present or in reasonable anticipation in the near fu-

ture." See, also, 29 C. J. S., Eminent Domain, § 160, p. 1024. The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the market value of the land at the time the land is taken or damaged. There is a clear distinction between what land may be worth in the future and what it is worth at the time it was taken or damaged in view of the future. The fundamental issue is the reasonable market value of the land immediately before and immediately after it is taken or damaged.

The trial court by instruction No. 8 informed the jury that it could consider any use to which the land was adapted or could reasonably be expected in the future. It permits the jury to speculate upon the value of any reasonable use to which the land might be put at any time in the future. The time element is an important one and it must be limited to the immediate future, otherwise the jury is permitted to consider evidence which is too remote to have any probative value in fixing the reasonable market value of the property at the time it was damaged. The propensity of juries to return maximum verdicts in this type of case necessitates that evidence of adaptable uses be properly limited to reasonable uses in the immediate future. The instruction fails to properly limit the consideration of future uses for which the land is adaptable and constitutes prejudicial error.

The power company complains of error in instruction No. 11. The assignment of error is directed to the last sentence of the instruction, which states: "The damages are not to be reduced by reason of the fact that the Omaha Public Power District may or does permit the landowner to make some use of the condemned premises after condemnation." In view of the fact that no land was actually taken in the instant case, the quoted portion of the instruction is confusing and misleading. It should have stated, if it was to be given at all, that

the damages are not to be reduced by reason of the fact that the Omaha Public Power District may or does permit the landowner, after the condemnation, to make some use of the right-of-way actually taken. The Sumps as the owners of the fee title after condemnation were entitled as a matter of right to make any use of the premises which did not conflict with the terms of the easement acquired in the condemnation proceeding.

The power company assigns as error the admission in evidence of an offer to purchase the entire tract of land for $1,000 per acre prior to the commencement of the condemnation proceeding. Objection was duly made to this evidence, which objection was overruled. The evidence was improperly admitted. The rule is: In proving the value of property it is improper to admit testimony of an alleged offer of a particular price for the property as tending to show its value. Stewart v. James, 1 Neb. (Unoff.) 507, 95 N. W. 778; 31 C. J. S., Evidence, § 182 (c), p. 887; 20 Am. Jur., Evidence, § 375, p. 341.

The power company also asserts that the trial court erred in permitting, over objection, the testimony of witnesses as to their opinions as to the value of the property for use as a filling station. In this respect one witness was permitted to testify that the corner was worth $14,000 as a filling station site. Sump was permitted to state that the corner was worth $15,000 as a filling station site. The evidence was erroneously admitted. The rule is: Witnesses should not be allowed to give their opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown as well as its availability for any particular use. If it has a peculiar adaptation for certain uses, this may likewise be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it. Where these facts and circumstances are shown, the

only question as to value that is properly in issue is the reasonable market value at the time the property is taken or damaged. Langdon v. Loup River Public Power Dist., *supra;* Lynn v. City of Omaha, 153 Neb. 193, 43 N. W. 2d 527; Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328. We conclude that the trial court erred in admitting the evidence as to the value of the property for use as a filling station.

The Sumps contend that the power company cannot complain of the admission of the evidence because it adduced similar evidence in its case-in-chief. The power company did elicit such evidence in its case-in-chief. Ordinarily a party may not successfully complain of the introduction of evidence of a like character to that which it subsequently introduced. George A. Hoagland & Co. v. Scottish Union & National Ins. Co., 131 Neb. 112, 267 N. W. 242; Allen v. Massachusetts Mut. Life Ins. Co., 149 Neb. 233, 30 N. W. 2d 885. See, also, 5 C. J. S., Appeal & Error, § 1506(c), p. 894; 5A C. J. S., Appeal & Error, § 1735, p. 1028. The foregoing position is the correct one. In view of the fact that a new trial is required on other grounds, we have discussed the objection only to avoid error on the retrial.

The power company asserts that the trial court erred in permitting the plaintiffs on cross-examination over objection to elicit testimony concerning the location of the line and the possibility of locating it elsewhere. This evidence is clearly erroneous and the objections thereto should have been sustained. The matter of the location of the line is not an issue. The only issue is the amount of compensation to be paid the landowner for the taking or damaging of his property.

We do not deem it necessary to determine other questions raised by the appeal. For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MESSMORE, J., participating on briefs.

WARREN M. SCHERER AND RALPH R. NEUDECK, PLAINTIFFS IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

95 N. W. 2d 329

Filed March 6, 1959. No. 34518.

Criminal Law: Evidence. In a criminal case it is not error to exclude evidence which is not substantive proof of any fact relative to the issue, and evidence which does not tend to establish the guilt or innocence of a defendant of a crime charged is immaterial and should be excluded.

ERROR to the district court for Cuming County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Daniel D. Jewell, for plaintiffs in error.

Clarence S. Beck, Attorney General, and *Leslie Boslaugh,* for defendant in error.

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

CHAPPELL, J.

An information filed by the State in the district court for Cuming County charged defendants, Warren M. Scherer and Ralph R. Neudeck, with violations of what is known and cited as the Blue-Sky Law. The information contained nine separate counts involving six separate transactions in which designated securities were alleged to have been willfully and unlawfully sold by defendants to named persons, without the sale of such securities having been authorized by the Department of Banking, hereinafter called the department, and without defendants having secured from said department permits to do business as brokers or salesmen.

In that connection, counts I, V, and VIII separately charged that on designated dates defendants willfully and unlawfully sold described securities to named persons without the sale of such securities having been authorized by the department. Counts II and VI separately charged that on designated dates defendants willfully and unlawfully sold described securities without

having secured from the department permits to do business as brokers or salesmen. On the other hand, counts III, VII, and IX separately charged that on designated dates defendant, Warren M. Scherer, willfully and unlawfully sold described securities to named persons without the sale of such securities having been authorized by the department, and count IV separately charged that on a designated date defendant, Warren M. Scherer, willfully and unlawfully sold described securities without having secured from the department a permit to do business as a broker or salesman.

Defendants first filed separate pleas in abatement, but demurrers thereto were sustained, and thereafter defendants were each duly arraigned and entered pleas of not guilty. At all times here involved they were represented by able counsel.

Thereafter, defendants were tried jointly by consent to a jury. At conclusion of the State's case, defendants' separate motions for directed verdicts of not guilty were overruled, as were renewals thereof made at conclusion of all the evidence.

After submission of the issues to the jury by instructions, of which no complaint is made, two verdicts were returned. One such verdict found defendant, Warren M. Scherer, guilty as charged in each and all of the nine counts. The other verdict found defendant, Ralph R. Neudeck, guilty as charged in counts I, II, V, VI, and VIII. Such verdicts were duly read and received, and the court fixed bail bond of $5,000 for each defendant pending the filing and pendency of motions for new trial. Such motions for new trial were duly filed and overruled, whereupon judgments of conviction were rendered against each defendant, and thereafter a hearing was held with regard to the character of sentence to be imposed. Thereat both defendants and the State adduced evidence from which it appeared without dispute that defendants had each theretofore been convicted of a felony and had served time in prison therefor, and that

each defendant had theretofore or thereafter been charged with other offenses, in some of which they had been convicted and others were still pending.

After being so advised, the court imposed sentence. In that connection, defendant Warren M. Scherer was ordered to pay a fine of $1,000 on count II, and was sentenced to imprisonment in the Nebraska State Penitentiary for 5 years on each of the nine counts upon which he was found guilty, said sentences to run concurrently. Also, defendant Ralph R. Neudeck was ordered to pay a fine of $1,000 on count II, and was sentenced to imprisonment in the Nebraska State Penitentiary for a period of 5 years on each of counts I, II, V, VI, and VIII, upon which he was found guilty, said sentences to run concurrently. Also, each defendant was ordered to pay the costs of prosecution. Thereupon, each defendant filed notice of application for writ of error, and applied for suspension of sentences and the fixing of bail bond pending disposition of error proceedings. Such applications were granted and bail bond for each defendant was fixed at $5,000, which they provided. Thereafter, defendants timely prosecuted error to this court.

In that connection, defendants' joint brief assigned as error only that: "The District Court of Cuming County, Nebraska, erred in excluding evidence and the stipulations in reference to the application form for qualifying a security under the Blue Sky Law, Exhibit 19, the application form for securing a license as a broker, Exhibit 20, and application form for securing a salesman's permit, Exhibit 21, and in excluding such exhibits and in overruling the plaintiffs' in error offers of proof in relation thereto." We do not sustain the assignment.

Defendants do not challenge the sufficiency of the evidence to support the verdicts of guilty rendered against them or the reasonableness of the sentences imposed upon them. In such respect, there is ample evidence in this record that the sales of securities were made

as alleged; that such securities were not exempt under the provisions of the Blue-Sky Law; that the sale of such securities had not been authorized by the department; and that defendants never had any permit from the department to do business as brokers or salesmen. As a matter of fact, it was stipulated that no form of application was ever made or filed with the department for authority qualifying the sale of such securities and that defendants never made or filed any form of application with the department for a permit to do business as brokers or salesmen.

Defendants' affirmative defense, except as hereinafter mentioned, was primarily that the securities sold by them were exempt from provisions of the Blue-Sky Law, which fact they sought to establish only by cross-examination of a witness for the State. In that connection, such issue was submitted to the jury in a manner favorable to defendants, and no complaint is made thereof.

On the other hand, defendants' counsel by cross-examination of the assistant director of the department, and by calling him as their own witness, attempted to prove and offered to prove substantially the following: That the department had prepared exhibit 19, a form of application for qualification of securities; exhibit 20, a form of application for registration as brokers; and exhibit 21, a form of application for salesman permit. In that respect, it was stipulated, subject to objection, that none of such forms had been filed in the office of the Secretary of State. Defendants also offered said exhibits in evidence, and offered to prove that in order to qualify a security for sale, an applicant would be required to complete and file exhibit 19 under oath; that an applicant for registration as a broker would be required to complete and file exhibit 20 under oath; and that an applicant for a salesman's permit would be compelled to complete and file exhibit 21 under oath. All such evidence, except the stipulation that defendants

filed no applications, was excluded upon objections by the State that it was immaterial.

Defendants' contention with regard thereto was in substance that the forms in question were rules and regulations, which, under the provisions of section 84-902, R. R. S. 1943, were required to be filed in the office of the Secretary of State, and that because such forms had not been so filed they were not valid as against defendants, and that such fact was a defense to the charged violations. In that respect, there is no evidence in this record and defendants did not offer any evidence to prove that the department had adopted any rules and regulations under the Blue-Sky Law relating to the forms in question.

However, assuming for purpose of argument only, that the forms in question were rules required by Chapter 84, article 9, R. R. S. 1943, to be filed in the office of the Secretary of State, we are confronted with the question of whether or not such fact in any manner constituted a defense to the crimes with which defendants were charged, convicted, and sentenced. In other words, the real question is whether or not it is necessary for the department to prescribe such forms of application and file them in the office of the Secretary of State before the penal sections of the Blue-Sky Law can become operative and be enforced. We conclude that it is not.

Defendants were charged with violations of specific, clear, and unambiguous statutes of this state and not with a violation of any rule or regulation of the department. In that connection, defendants were charged, convicted, and sentenced for violations of and in conformity with sections 81-333, 81-314, and 81-338, R. R. S. 1943. See, also, related sections in Chapter 81, article 3, R. R. S. 1943.

There is no question about the right or authority of the department in its discretion to prescribe, prepare, and use forms of application. Section 81-316, R. R. S. 1943, provides in part: "The department shall pre-

scribe the forms of application and the forms of all other blanks, documents and records to be used and kept in connection with the administration hereof and, in addition, shall establish and promulgate such rules and regulations concerning the procedure and practice of applicants appearing before it as the department in its discretion may deem expedient and essential to the satisfactory enforcement and administration of said sections." Such section does not impose an absolute duty upon the department to prescribe any particular application forms of any kind, but is generally permissive and directs such department to prescribe only such forms of application as "the department in its discretion may deem expedient and essential to the satisfactory enforcement and administration of said sections."

It is important also to note that section 81-304, R. R. S. 1943, defines at length the meaning of words and phrases used in sections 81-302 to 81-346, R. R. S. 1943, unless the context otherwise indicates, and we find no applicable statutory definition of "rules and regulations." Defendants' argument fallaciously assumes, without citing any applicable precedent, that the Blue-Sky Law requires that all applications filed with the department shall be upon particular forms prescribed by it. As hereinafter noted, it clearly appears that the authority to prescribe forms is entirely discretionary and such forms are not required to be uniform as to all applicants. Rather, the department is given a broad discretion with regard to what it may require a particular applicant to include in his application filed in a particular case.

In that connection, section 81-315, R. R. S. 1943, provides in part: "Every person coming within the provisions of sections 81-302 to 81-346, before issuing, selling, negotiating, offering or attempting to take subscriptions for, or to promote the offering, issuance or sale of any securities not specifically exempt from the provisions of said sections, and for the purpose of procuring authority to issue, sell, negotiate, offer or pro-

mote the offering, issuing or sale of any such non-exempt securities within the State of Nebraska, shall file with the Department of Banking a verified written application for an order of authorization, which said application when and as filed, together with any and all amendments and additions thereto which may be made from time to time, shall become and remain a part of the permanent public records and files of the State of Nebraska. Such application shall state such facts as the department may require. The department may require such application to include * * *." Such section then goes on to enumerate and set forth 17 specific items of information and data which the department in its discretion may require such applications to include.

Also, section 81-305, R. R. S. 1943, provides in part: "No broker shall, within the State of Nebraska, sell or exchange or offer for sale or exchange any securities, or by advertisement or otherwise profess to engage in the business of selling or exchanging or offering for sale or exchange securities, whether or not such securities may be exempted under section 81-312, until such broker shall have secured from the Department of Banking a permit to do business as broker. At the time of applying to the department for such permit, the broker shall pay a filing fee in the amount provided for in section 81-337, and shall file with the department evidence establishing the sound moral character and good business repute of the applicant, and show for what length of time and where such applicant has been engaged in the sale of securities, together with a full statement of all the assets and liabilities of such applicant, and such other information as the department may require."

Considering and construing all of said sections aforesaid together, as we must, it is abundantly clear that the Legislature intended that the department should have a broad discretion with regard to information and data which it may require to be included in applications

made in any particular case. Such provision is entirely reasonable and logical because the facts and circumstances may of necessity vary greatly from one case to another. It is apparent that the department is authorized by the Blue-Sky Law to make whatever requirements it deems expedient and essential in each particular application filed with the department in order to protect the public from exploitation and fraud such as that clearly appearing in this record. We discussed that conclusion at length in Neudeck v. Buettow, 166 Neb. 649, 90 N. W. 2d 254.

We repeat that in this case the prosecution of defendants was based upon alleged violations of particular statutes and not upon the violation of any rule or regulation of the department. There is no evidence in this record, and defendants made no offer of proof, that they or either of them ever complied with or attempted to comply with any part of the Blue-Sky Law. The gist of this case is that defendants failed to obtain authority of any kind but, flaunting and violating the statutes, they sold securities in complete disregard of the Blue-Sky Law, and what is more, defendants made false promises and offered financial inducements to the buyers of securities which they never kept and never intended to perform. Defendants were and are in no position to collaterally raise the alleged invalidity of the forms of application heretofore described and such alleged invalidity was not in any sense a defense to the crimes charged.

In that connection, such conclusions are supported by People v. Calabro, 7 Misc. 2d 732, 170 N. Y. S. 2d 876; Kilgore Nat. Bank v. Federal Petroleum Board, 209 F. 2d 557; State v. Andre, 101 Mont. 366, 54 P. 2d 566; State v. Grimshaw, 49 Wyo. 192, 53 P. 2d 13; Hyde v. State, 131 Tenn. 208, 174 S. W. 1127; and People v. Asta, 343 Mich. 507, 72 N. W. 2d 282. Authorities cited and relied upon by defendants are entirely distinguishable and not controlling here. To discuss them further

would serve no useful purpose except to unduly prolong this opinion.

This court long ago established the general rule that in criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issue, and evidence which does not tend to establish the guilt or innocence of a defendant of a crime charged is immaterial and should be excluded. Burlingim v. State, 61 Neb. 276, 85 N. W. 76; Kastner v. State, 58 Neb. 767, 79 N. W. 713.

For reasons heretofore stated, we conclude that the verdicts, judgments of conviction rendered by the trial court, and the sentences imposed by the trial court should be and hereby are affirmed. All costs are taxed to defendants.

AFFIRMED.

MESSMORE, J., participating on briefs.

LEONE M. WILLIAMS, APPELLANT, V. HENRY L. WILLIAMS, APPELLEE.

95 N. W. 2d 205

Filed March 6, 1959. No. 34533.

1. **Contracts.** The practical interpretation given a contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction.
2. **Divorce: Attorney and Client.** Attorneys' fees in divorce proceedings will ordinarily be denied where there appears no reasonable justification for the position taken by the party claiming them.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Fitzgerald, Hamer, Brown & Leahy and *Lyle E. Strom,* for appellant.

Gross, Welch, Vinardi & Kauffman, for appellee.

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

SIMMONS, C. J.

This cause originated in an action for divorce. It resulted in a decree of divorce. The court approved, and incorporated in its decree, an agreement made by the parties. The decree provided for the division of described real and personal property. It also provided for the payment of determined amounts by the defendant to the plaintiff "as permanent alimony * * * separately and apart from any payments for the support and maintenance" of the children of the parties. The controversy here does not involve the division of property or the permanent alimony payments.

The parties had two children. It was agreed that the son was self-supporting and emancipated. It was then agreed that plaintiff should have the "care, custody and control" of the 17-year-old daughter.

The contract then provided in a paragraph separate and distinct from the property division and permanent alimony provisions that: "Laurens Williams agrees to provide suitably for the support, maintenance and education of Catharine Ann Williams, separately and independently of the permanent alimony payments heretofore provided for in paragraph III, subparagraph (a). In the event that, at any time or from time to time, the parties are not able to amicably to agree on the amount to be provided by Laurens Williams, the parties hereby agree that the matter shall be submitted to the District Judge assigned to the Domestic Relations Division of the District Court of Douglas County, Nebraska upon proper application of either party. Both parties understand and agree that this provision as to the support, maintenance and education of Catharine Ann Williams is subject at all times to change by order of the Court and pursuant to the laws of the State of Nebraska."

The decree was rendered July 26, 1957. The daughter was married the latter part of October 1957. On May 27, 1958, plaintiff applied to the court for support and maintenance money in the total amount of $652.24 furnished by her to the daughter for the 3-months' period between the date of the decree and the marriage of the daughter. She alleged that defendant "at no time furnished any funds *unto plaintiff* for the support, maintenance or education" of the daughter. (Emphasis supplied.) Defendant pleaded that he had fully complied with the provisions of the agreement and prayed that he be discharged from further obligation under the agreement because of the emancipation of the daughter by marriage.

The trial court denied plaintiff's application for an order for the payment of the support money and decreed the defendant was released and discharged from any further obligation under the agreement quoted above.

We affirm the decree of the trial court.

Plaintiff seeks to recover for cash given to the daughter on the date of the decree; for board and room at the regular guest rate in a lodge operated by plaintiff in Colorado; for board and room at the home in Omaha; and for incidental expenses, prior to the daughter going to college in Colorado. The daughter attended college for 3 weeks and then went to meet plaintiff in Salt Lake City. Plaintiff seeks to recover for motel expense at Salt Lake City, for plane ticket, and expenses of a trip to San Francisco. The suitability of some of these items for support and maintenance is not shown and need not be determined.

During that same period of time the defendant paid to or placed to the daughter's credit a total of $990; paid $404.53 for air line tickets; $213.18 for a hotel bill in Chicago; and $40 for medical services, or a total of $1,647.71 paid for or to the daughter in the 3-months' period.

In addition to that he paid $775 for tuition and board and room for a semester at the college. When the daughter left school some of this was refunded to her, the amount not being shown. The source of the fund for this college payment came from gift money which was held by defendant for the daughter.

Early in 1958 plaintiff and defendant were preparing a joint income tax return. During that period plaintiff asked defendant to pay $150 for board and room of the daughter. It is patent that the initial request was prompted by a desire for help to plaintiff in meeting income tax obligations. Later, in May 1958, plaintiff's attorney made demand on defendant for payment of over $500. This application followed.

It is not contended that defendant's payments, above recited, were not in an amount adequate to meet the support, maintenance, and education requirements of the daughter. Plaintiff in her application based her request on the fact that the amounts so paid were not paid "unto plaintiff."

Not within the issues of her application, plaintiff contends here that the divorce decree required the payments to be made through the clerk of the court. The decree negatives any such contention. It provided: "* * * that the payments provided for therein shall be made to the office of the Clerk of the District Court of Douglas County, Nebraska at the times provided therein and in the manner provided therein, and that process of law shall issue for the enforcement of the same; * * *."

The agreement provided for the payment of fixed amounts over a period of time of alimony, and for the payment of attorneys' fees, expenses, and costs, all in fixed amounts. The provision of the agreement here involved makes no reference to payments as such but rather refers to the obligation of the defendant to "provide" for the daughter with no amount fixed in the agreement or decree. Obviously "process of law" could

not issue to enforce payment until a fixed amount had been determined by the court. No such requirement of "payments * * * at the times provided" had ever been made.

Was defendant required by the agreement to pay the cost of support, maintenance, and education of the daughter to the plaintiff?

Clearly the contract made no such requirement.

As we construe it the agreement in the first instance placed the manner of providing support, to whom the support should be paid, and the amount of the support, entirely in the discretion of the defendant. The exercise of the discretion was subject to two conditions. If plaintiff was dissatisfied with the amount so provided she, at first, was to attempt to reach an amicable agreement with the defendant. This clause presupposes that the decision in the first instance was that of the defendant. If the matter could not be settled amicably between the parties, then it was agreed that the issue could be submitted to the court, recognizing that the agreement was subject at all times to the order of the court.

The plaintiff did not attempt either to negotiate with the defendant or to secure a court order for payments that could have been enforced by "process of law." Rather she waited until all obligation of the defendant to continue "to provide" for the daughter had ended and then attempted to secure money by resort to this agreement.

That the defendant understood that he was "to provide" for the daughter as he did is manifest. That the plaintiff so understood is demonstrable from this record and her own testimony.

Plaintiff testified that she knew the defendant had paid money to the daughter. On detailed examination she admitted knowledge of only one remittance of $100 "to buy clothes to go to college." The daughter went to college about September 15, 1957. Defendant shows

a remittance to his daughter of $100 on September 3, 1957. On September 5, 1957, plaintiff's statement of expenses shows "advanced cash" for the purchase of clothing in the sum of $82.50, and on September 6, plaintiff paid cleaning and pressing expense for the daughter "in preparation for attending school" in the sum of $35.75. These figures are their own commentary. Plaintiff made no objection to the defendant about sending money direct to the daughter. Defendant sent his daughter the sum of $150 on August 29, 1957, and on September 6, 1957, he sent her the sum of $200.

Plaintiff denies knowledge of the $150 payment on August 29, 1957. She was not asked about the $200 remittance. At the time the daughter was preparing to go to college defendant in a period of 8 days sent her a total of $450.

The plaintiff testified that, until the demands were made on the defendant in 1958, above recited, she made no demands on the defendant, but that she had mentioned it to the daughter "and she has tried to get money from her father." This followed her testimony that she had asked initially for $150 in 1958 which "covered the board and room." The defendant testified that on August 2, 1957, while the daughter was boarding and rooming at the plaintiff's lodge in Colorado, the daughter phoned him and asked for $120 to pay board and room for 4 weeks. On the following day he sent the daughter $120. Later, on August 29, 1957, in response to a request from the daughter, defendant sent her $150 and later, on September 3, 1957, in response to a request of the daughter that the $150 was "not sufficient," he sent another $100. Obviously the daughter's attempt to get money from the defendant, of which the plaintiff had knowledge, was quite successful.

The trial court commented on plaintiff's claim that she had knowledge only of the payment of $100 for

clothes for college and said: "It is difficult to believe that she was so uninformed of her daughter's financial affairs in view of her exclusive obligation of custody and control." We have the same difficulty.

Plaintiff testified that her lawyer advised her that defendant "had assured him and his lawyer that child support would be taken care of," and that she supposed defendant was going to take care of the college expense. This is consistent with defendant's understanding of his obligation under the agreement and his performance of it.

Patently, then, defendant met his obligations under this contract fully and as he understood he was to do it. It is patent also that plaintiff so understood the contract, knew of its performance by defendant, and participated in that manner of performance. Her position now is in direct conflict with what she did and what she knew was being done by the defendant.

The contract is clearly subject to the construction put upon it by the parties and under which the defendant has fully performed.

The long-established rule is: The practical interpretation given a contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction. Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311.

We follow the rule here and affirm the decree of the trial court denying recovery to the plaintiff.

Plaintiff assigns error in the refusal of the trial court to award attorneys' fees to her and requests an allowance of attorneys' fees in this court under the provisions of section 42-308, R. R. S. 1943. Whether this proceeding is one in which attorneys' fees may be allowed need not be determined. We have repeatedly denied attorneys' fees in divorce proceedings where there appears no reasonable justification for the position taken by the

party claiming them. See, Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808; Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877; Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217.

We find no reasonable justification for the position taken by plaintiff which requires the allowance of attorneys' fees either in the trial court or in this court in this proceeding. The decree of the trial court denying attorneys' fees is affirmed. Attorneys' fees in this court are denied.

The decree of the trial court is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

FRANK E. SMITH ET AL., APPELLEES, V. MAE BERBERICH ET AL., APPELLEES, IMPLEADED WITH DEFOREST R. SMITH ET AL., APPELLANTS.

95 N. W. 2d 325

Filed March 6, 1959. No. 34565.

1. **Deeds.** An ordinary quitclaim deed vests in the grantee only such title or interest as the grantor had at the time of the execution and delivery of the deed.
2. ———. A quitclaim deed purports to convey nothing more than the interest or estate in the property described of which the grantor was seized or possessed at the time, rather than the property itself.
3. **Vendor and Purchaser.** It is only those persons who possess a title which complies with the provisions of the Marketable Title Act who are qualified to invoke its aid.
4. ———. A conveyance, to satisfy the requirements of the Marketable Title Act, must purport to create in the person who claims its benefits or in his immediate or remote grantors the interest which is claimed.

APPEAL from the district court for Morrill County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded with directions.*

Neighbors & Danielson, for appellants.

Robert J. Bulger, for appellees.

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

BOSLAUGH, J.

The ownership of the northwest quarter of Section 10, Township 19 North, Range 52 West of the 6th P. M., in Morrill County, hereafter generally referred to as the land, is the controversy in this litigation. Frank E. Smith, Earl W. Smith, Raymond T. Smith, Verna M. Smith, Henry D. Smith, Harvey L. Smith, and Harold F. Smith, appellees, asserted ownership of the fee of the land subject to an oil and gas lease made by them as lessors. DeForest R. Smith and Fredwin W. Smith, appellants, claimed to own an undivided one-fourth interest in the land. The action was to quiet title to the land in appellees and they prevailed in the trial court. The only parties interested in the matter at issue in this appeal are the appellees and appellants above named. There is no issue of fact in this case. The trial was had on stipulations.

A patent to the land was on September 14, 1911, issued in which the heirs of Lewis E. Smith were named as patentees. The heirs of Lewis E. Smith were ten brothers and sisters. Francis L. Smith, one of the heirs of Lewis E. Smith, executed and delivered a quitclaim deed to the land to Lizzie M. Smith, his wife. She died intestate December 29, 1935, and her estate was administered in the county court of Morrill County in which proceedings a decree of heirship was rendered and entered on May 4, 1946. It found that appellees were the heirs at law of Lizzie M. Smith and assigned the entire tract of land to them. The patent, the quitclaim deed, and the decree of heirship constitute the entire chain of title to the land as it is evidenced and exhibited by the public records of Morrill County. Fred W. Smith, one of the heirs of Lewis E. Smith, died in-

testate in 1935. He left as his heirs at law two sons, the appellants.

Appellees are and have been during the pendency of this action, that is, since May 20, 1958, in the possession of the land. An affidavit to that effect was on June 6, 1958, executed by Frank E. Smith and it was filed the same day in the office of the county clerk and ex officio register of deeds for Morrill County.

Appellees and appellants have legal capacity to own real estate in Nebraska. An undivided one-eighth interest each in the land has descended to appellants and is owned by them if this devolution of title has not been intercepted by the Marketable Title Act.

The trial court found that appellees, successors in interest of a grantee of the land by quitclaim deed from a tenant in common, which had been recorded more than 22 years, who have the capacity to own real estate in Nebraska and who are in the possession thereof, with nothing appearing of record which purports to divest them or their predecessors of such purported interest therein, have the entire title to the land to the exclusion of appellants who are the successors in interest of another tenant in common, by reason of the Marketable Title Act. A judgment was rendered in harmony with the findings which quieted title to the land in appellees as against the claims of appellants.

The problem presented by this case is the significance, because of the Marketable Title Act, of a quitclaim deed from a tenant in common to the predecessor in interest of appellees who are in possession of the land in controversy, which deed has been recorded more than 22 years, as against the claim of appellants, the successors in interest of another tenant in common.

Section 76-288, R. R. S. 1943, a part of the Marketable Title Act, contains this: "Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by himself and his immediate or remote grantors under

a deed of conveyance which has been recorded for a period of twenty-two years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title to such interest * * *."

Section 76-289, R. R. S. 1943, a part of that act, reads as follows: "A person shall be deemed to have the unbroken chain of title to an interest in real estate as such terms are used in this act when the official public records of the county wherein such land is situated disclose a conveyance or other title transaction dated and recorded twenty-two years or more prior thereto, which conveyance or other title transaction purports to create such interest in such person or his immediate or remote grantors, with nothing appearing of record purporting to divest such person and his immediate or remote grantors of such purported interest. 'Title transaction' as used in this act, means any transaction affecting title to real estate, including title by will or descent from any person who held title of record at the date of his death, title by a decree or order of any court, title by tax deed or by trustee's, referee's, guardian's, executor's, master's in chancery, or sheriff's deed, as well as by direct conveyance."

The conveyance upon which appellees rely to invoke the aid of the Marketable Title Act is an ordinary quitclaim deed. It contains no covenant, warranty, or recital showing an intention not to limit the interest affected by the conveyance to that which the grantor then had. The conveyance is entirely void of any express terms or any implication that it was intended to convey any specific interest or estate in the land. The terms of the conveyance are characteristically those of a quitclaim deed of the present interest which the grantor had in the land described and none other. The terms of the granting clause of the deed are these: "* * * That the said party of the first part * * * by these presents do grant, convey, remise, release, and forever quit-claim unto the said party of the second part, and

to her heirs and assigns forever, all his right, title, interest, estate, claim and demand, both at law and in equity, of, in and to the following described real estate * * *." This court has consistently adhered to the doctrine that the distinguishing characteristic of a quitclaim deed is that it is a conveyance of any interest or title of the grantor in and to the land described rather than of the land itself.

Pleasants v. Blodgett, 39 Neb. 741, 58 N. W. 423, 42 Am. S. R. 624, states: "One who purchases real estate and takes a quitclaim deed therefor, takes only the interest his grantor has in the property at the time of such conveyance." See, also, Hagensick v. Castor, 53 Neb. 495, 73 N. W. 932; Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286, 77 N. W. 677; Bannard v. Duncan, 79 Neb. 189, 112 N. W. 353, 126 Am. S. R. 661; Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N. W. 133.

This estimation of such a deed inheres in the competency of the grantor to obtain, retain, and enjoy an after-acquired title to or an estate in the real estate to the prejudice and disadvantage of the grantee in a quitclaim deed. In Hagensick v. Castor, *supra,* the court said: "The general rule is that an ordinary quitclaim deed vests only in the grantee such title or estate as the grantor was at the time of the execution and delivery of the deed possessed of; and if a grantor in such a deed subsequently acquires the title to the real estate thereby conveyed, that title does not inure to the grantee in the quitclaim deed." The opinion in that case quotes from Van Rensselaer v. Kearney, 52 U. S. 297, 13 L. Ed. 703, as follows: "'A deed of this character (quitclaim deed) purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it. If otherwise, and the vendee has con-

tracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance; * * *.' " See, also, § 76-209, R. R. S. 1943; Troxell v. Stevens, 57 Neb. 329, 77 N. W. 781.

There is unanimity in the decisions that an ordinary quitclaim deed does not purport to convey the real estate but only any present interest of the grantor therein and that there is no implication from such a deed that the grantor had or conveyed entire title to the real estate.

In Greek Catholic Congregation v. Plummer, 338 Pa. 373, 12 A. 2d 435, 127 A. L. R. 1008, the court said: "Quit-claim deeds, long known to the law, are used when a party wishes to sell or otherwise convey an interest he may think he has in land but does not wish to warrant his title. It does not purport to convey anything more than the interest of the grantor at the time of its execution."

Frandson v. Casey (N. D.), 73 N. W. 2d 436, states: "A quitclaim deed is one which purports to convey, and is understood to convey, nothing more than the interest or estate in the property described of which the grantor is seized or possessed, if any, at the time, rather than the property itself. * * * A quitclaim deed does not purport to convey the property, but only the grantor's right, title and interest therein."

Bremhorst v. Phillips Coal Co., 202 Iowa 1251, 211 N. W. 898, states: "A quitclaim deed merely conveys whatever title the grantor may have, and any implication that he has a good title or any title whatsoever is excluded."

Nix v. Tooele County, 101 Utah 84, 118 P. 2d 376, says: "Quitclaim deeds do not imply the conveyance of any particular interest in property and grantees acquire only the interest of their grantors."

Waterman v Tidewater Associated Oil Co., 213 La. 588, 35 So. 2d 225, states: "A 'quitclaim deed' is one which purports to convey nothing more than the interest or estate of the property described of which grantor is seized or possessed, if any, at the time, rather than the property itself." See, also, Goldtrap v. Bryan (Fla.), 77 So. 2d 446; State v. Kemmerer, 14 S. D. 169, 84 N. W. 771; Hulke v. International Mfg. Co., 14 Ill. App. 2d 5, 142 N. E. 2d 717; Roddy v. Roddy, 342 Mich. 66, 68 N. W. 2d 762; Mack v. Tredway, 244 Iowa 240, 56 N. W. 2d 678; Annotation, 44 A. L. R. 1266; 26 C. J. S., Deeds, § 118, p. 946.

It is clearly provided in the Marketable Title Act, section 76-289, R. R. S. 1943, that a person shall have an unbroken chain of title to an "interest in real estate" when the conveyance "purports to create such interest in such person or his immediate or remote grantors * * *." The quitclaim deed from Francis L. Smith to Lizzie M. Smith did not purport to create in her an entire title to the land. It purported to create in her nothing more than the interest therein which her grantor then had in the land which was an undivided one-tenth interest as a tenant in common. The quitclaim deed was not the kind of a conveyance that could have created, under the Marketable Title Act, an entire title to the land in Lizzie M. Smith, the immediate predecessor of appellees. Lytle v. Guilliams, 241 Iowa 523, 41 N. W. 2d 668, 16 A. L. R. 2d 1377, involved the Marketable Title Act of Iowa. It is said in that case: "Only those who possess a title which complies with the conditions of the statute are qualified to invoke its aid." See, also, Tesdell v. Hanes, 248 Iowa 742, 82 N. W. 2d 119; Wichelman v. Messner, 250 Minn. 88, 83 N. W. 2d 800.

The quitclaim deed concerned herein did not qualify appellees to invoke the aid of the Marketable Title Act to sustain their assertion of ownership of the land by absolute title to the exclusion of appellants. The grantor

therein was the owner as a tenant in common of an undivided one-tenth interest in the land. That is what passed to the grantee and the deed did not purport to create in her a larger interest. It did not purport to transfer the interest in the land owned by the other tenants in common. The weakness and defect in the claim of appellees is that they assert an interest in the land more extensive than that which the quitclaim deed purported to create in the grantee named in that deed. If the conveyance from Francis L. Smith to Lizzie M. Smith had purported to create an entire title to the land in the grantee, it would have satisfied the provision of the Marketable Title Act and appellees would have been qualified to have invoked the aid of that act to sustain their claim of title to the land. The conveyance on which they rely was not of that character. The Marketable Title Act under the circumstances of this case did not intercept the undivided one-fourth interest in the land which had descended to appellants.

The judgment should be and it is reversed and the cause is remanded to the district court for Morrill County with directions to render a judgment quieting title to the interests in the land of appellants and appellees in accordance with this opinion and the stipulation of facts made by the parties as contained in the record herein.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

CHRYSTAL GEORGE ET AL., APPELLEES, V. ARDITH JONES ET AL., APPELLANTS.

95 N. W. 2d 609

Filed March 13, 1959. No. 34455.

1. **Mines and Minerals: Landlord and Tenant.** Where the only consideration for the lease of a gravel pit for a long period of

years was a royalty on the gravel removed, and the lease contained no express provision for a continuous operation or for forfeiture for failure to develop and operate the pit, there was an implied covenant on the part of the lessee to develop and operate the pit with reasonable diligence.

2. ———: ———. Where a lessee covenants expressly to pay the lessor a certain royalty for all the gravel removed from a gravel pit under a mining lease, even though there be no express covenant that the lessee shall work the gravel pit continuously, or in any particular way, or at all, there is manifestly an implied covenant on his part that he will work it as such gravel pits are usually worked, with ordinary diligence, under the surrounding circumstances.

3. **Appeal and Error.** When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. But in a case wherein the court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

APPEAL from the district court for York County: JOHN D. ZEILINGER, JUDGE. *Affirmed.*

Nate C. Holman, Emory P. Burnett, and *John R. Brogan,* for appellants.

Perry & Ginsburg, for appellees.

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

MESSMORE, J.

This is an action in equity brought in the district court for York County by Chrystal George and Felice George, plaintiffs, against Ardith Jones as the surviving widow of Harry Jones, deceased, and as administratrix of his estate, the heirs at law of Harry Jones, deceased, and one Adolph Hromas, defendants. The purpose of the action was for a forfeiture and cancellation of a mineral

lease and to quiet title of all mineral rights in certain land in the plaintiffs. The trial court found generally in favor of the plaintiffs and against the defendants; that the lease set forth and described in the plaintiffs' petition had been forfeited and that plaintiffs were entitled to a cancellation thereof; and that the title and right of possession in the real estate involved should be quieted and confirmed in the plaintiffs. The trial court ordered the defendants to immediately remove from said premises their gravel stock piles and all structures, machinery, and equipment belonging to the defendants. The defendants filed a motion for new trial. Upon the overruling of the motion for new trial, the defendants appealed.

The record shows that Ardith Jones is the surviving widow of Harry Jones, deceased, and administratrix of his estate; that Gale D. Jones, Irene Jones Nelson, and Ivan W. Jones are adults and heirs at law of Harry Jones, deceased; that James Vance Jones, Sandra Jones, Thomas Jones, and Samuel Jones are minor heirs at law of Harry Jones, deceased; that a guardian ad litem was appointed by the court to represent the interests of the minors; and that Adolph Hromas, a defendant, was a person to whom Ardith Jones, administratrix of the estate of Harry Jones, deceased, granted certain rights to remove gravel under a lease which will hereinafter be described.

There appears in evidence a gravel lease which was entered into in February 1956, by and between Chrystal George and Felice George as lessors, and Harry Jones as lessee. Insofar as need be considered in the instant case, the lessors leased to the lessee the following described real estate: The southeast quarter of Section 12, Township 9 North, Range 2 West of the 6th P. M., in York County, for the sole purpose and with the exclusive right to excavate and remove gravel to any extent lessee might desire. Lessee was given the right of ingress and egress over a selected route for hauling gravel

from said premises, and was also granted the right to construct and maintain any machinery, buildings, or equipment that might be required by him for the excavation, storage, or removal of gravel. This lease was granted to the lessee for a term of 5 years from March 1, 1956, and was to expire on March 1, 1961. The lessee agreed to pay as rental the sum of 10 cents for each cubic yard of gravel removed from the premises by the lessee, such rental being payable monthly during the term of the lease, commencing on April 1, 1956, and on the first day of each month thereafter. The provisions of this lease were binding on the parties thereto, their executors, administrators, heirs, and assigns.

The plaintiffs' petition alleged the ownership in them of the premises heretofore described; the interests of the respective defendants relating to the gravel lease and their relation to the lessee; and the entering into of the lease. It further alleged that since the death of Harry Jones, the lessee under the lease, the defendants had taken over and assumed the lease but had failed to use any diligence whatever in mining or extracting gravel from the premises, and failed to make reasonable effort to extract gravel from said premises; that for the entire period since the date of the death of Harry Jones the defendants, although repeatedly warned by the plaintiffs of their obligations in this respect, had failed and refused to continue the efforts to mine and remove gravel from the premises; and that by reason of the failure of the defendants to work and operate under the lease with reasonable diligence, the lease became forfeited and plaintiffs were entitled to cancellation of the same. The plaintiffs prayed for a determination of their rights under the lease, including a determination that the lease was forfeited and that title to the real estate be quieted in the plaintiffs; that defendants be required to remove their personal property therefrom; and for general equitable relief.

The defendants, by answer, admitted the ownership

of the real estate described in the plaintiffs' petition to be in the plaintiffs, but denied that plaintiffs were entitled to immediate possession thereof; admitted the execution of the gravel lease and the assumption of it by defendants according to its terms, and that certain machinery located on the leased property belonged to the defendants; but otherwise generally denied the allegations of the petition.

The defendants' answer affirmatively alleged that defendants had sought to operate the lease diligently since the death of Harry Jones, the lessee under the lease; that certain royalty payments had been made under the lease and further payments refused by plaintiffs; that there had been difficulty in keeping the machinery in repair, which fact was made known to the plaintiff Chrystal George who agreed that any delay because of such difficulty would not place defendants in default under the lease; and that operations had been continued and royalties tendered pursuant to the lease. The prayer of the answer was for dismissal of the plaintiffs' petition at plaintiffs' costs.

The plaintiffs' reply was a general denial of the allegations of the answer, except such as admitted allegations of the petition.

The answer of the guardian ad litem to the plaintiffs' petition was a general denial.

The defendants assign as error that the finding of the trial court for the plaintiffs was based on insufficient evidence; that the trial court erred in rendering judgment for a forfeiture of the gravel lease; and that the trial court erred in overruling the defendants' motion for new trial.

Elmer George testified that Chrystal George is his wife and Felice George is his daughter; that they are the owners and lessors of the gravel lease, wherein Harry Jones is designated as the lessee, of the property heretofore described; that he looked after the interests of his wife and daughter in this property and had busi-

ness dealings with Harry Jones during his lifetime while Harry Jones was operating the gravel pit under the lease; and that the only consideration for the lease was the payment of royalties of 10 cents for each cubic yard of gravel taken from the property by the lessee. This witness then detailed the amount of royalty payments received from the date of the start of the lease, which was March 1, 1956, to January 1957.

Harry Jones died on July 13, 1956. Gale Jones took over the operation of the lease the latter part of June 1956 and operated it until about a week or so in January 1957.

Elmer George further testified that the royalty for March 1956 was $108.50, based on the production of 1,080 cubic yards. It might be stated at this point that the amount of royalty is based on the number of cubic yards. For instance, $108.50 would be for 1,085 cubic yards. Hereafter we will not use the figure of cubic yards. In April 1956 the royalty was $147.50; in May, $107.50; in June, $65.50; in July, $188; in August, $337; in September, $281; in October, $162.30; and in November, $80.50. On January 16, 1957, there was a royalty of $22.50, which constituted the pumping by Gale Jones for the month of December. This lack of production was due to cold weather, the gravel pit being frozen so that pumping could not be done. There was a small royalty in January 1957, of $6.40. That was when Gale Jones terminated his operation of the gravel pit. Thereafter, in March 1957, Adolph Hromas started to operate the gravel pit. The royalty for March 1957 was $6; for April, $8; for May, $8; for June, $11.75; for July, $10.50; and for August, $31.50. The payments for July and August 1957, had been tendered to the lessors, but refused. This witness further testified that he had no knowledge of the production in September, as nothing was tendered in the way of royalties. He knew of only three loads of gravel in October, and no tender was made at that time. He made a trip to see Hromas in June

1957, and had a conversation with him in which he told Hromas he was very unhappy with the operation, and indicated that Hromas could be more successful operating under different circumstances on the property, to which Hromas told this witness he could pump where he pleased. Hromas would pay no attention to instructions given him by this witness. He further testified that he observed the premises at various times during the 2 months immediately preceding the trial of this law suit; that the entire operation of the gravel pit during that time was three loads of gravel; that by watching others test for gravel he was competent to determine where the best gravel could be found; that he made no tests himself, but acquired what knowledge he had over a period of 15 or 20 years by observation of others who were engaged in the business.

There are two exhibits in evidence, exhibit No. 13 and exhibit No. 14, which are jars of road gravel prepared by this witness. Exhibit No. 13 is gravel taken from a stock pile made by Gale Jones, and exhibit No. 14 is a sample of gravel pumped by Hromas and taken out of his gravel bin. This witness stated that both of these exhibits were fair samples of gravel produced by the respective operations. The type of gravel represented by exhibit No. 14 should never be stock piled.

On cross-examination this witness testified that after Harry Jones died, he and Gale Jones talked over the matter with reference to the operation of the gravel pit and as a result of this conversation Gale Jones decided to take over the operation of the gravel pit which resulted in a very successful operation; and that there were floods in June and July 1957, which were fairly heavy, and some things were washed away in this flood.

Dean Sack testified that he was engaged in the banking and road construction business; that he had had gravel pumps along the Blue River for 25 years and was familiar with the various types of gravel produced in York County, and their availability and use for road

purposes; that he was presently engaged in the gravel business and familiar with the George land; that he made tests on this land as to the availability of gravel; and that tests were made by him and Harry Jones 2 or 3 years previous and they found gravel that could be used for commercial purposes. He further testified as to what was required for road gravel to be acceptable for highway purposes; that they found that gravel could be produced with reasonable cost and at a profit, but there was no way to tell how much gravel was available in the ground; that the minimum acreage containing commercial gravel amounted to about 12 to 15 acres; that he and Harry Jones were in partnership in gravel operations when the lease heretofore mentioned was executed; that he was familiar with the market demand for road gravel in York County all during the year of 1957; that York County bought more gravel that year than had been purchased in any one year for the past 20 years; that there was a strong demand for grade "A" commercial gravel in York County and this was true in 1957; that the entire production of gravel from the George land could have been sold; that exhibit No. 13 appears to be a very good grade of clean road gravel; that exhibit No. 14 is somewhat similar to the gravel as shown in exhibit No. 13, but contains more dirt and fine sand and would have to be reprocessed before it could be marketable as road gravel; that when Gale Jones was operating the pump on the George land for this witness after the death of Harry Jones, he pumped as much as 200 cubic yards of gravel per day, but 100 to 150 cubic yards per day would be about right; that if this pump had pumped 150 yards of commercial road gravel per day it could have been sold; and that there was some flooding in June 1957, along the property involved, but that should not have delayed production for more than 2 weeks.

On cross-examination he testified that there were two gravel pits operating in the same area, one of which

was the one on the plaintiffs' property; that all of the gravel purchased by York County was purchased from this witness; and that the flood in June 1957 was a serious flood and did a considerable amount of washing in the whole area of the Blue River. This witness further testified on cross-examination that he attempted to acquire the gravel pit involved in this case; that he made an offer to the defendants for it two or three times; and that if this particular gravel pit was properly operated it would be capable of meeting the demand. On redirect examination he testified that a gravel pit that would produce 315 yards of gravel a month would not be considered a commercial gravel pit.

Gale Jones testified that he had been in the gravel business at different times for a period of 18 years; that in the summer of 1956, he tested the leased premises for gravel and discovered that for a depth of 16 feet there was all commercial grade gravel under approximately a 10-acre area, which would take about 2 years to exhaust; that he tested only to a depth of 16 feet, but found that he could pump to a depth of 40 feet; and that he took over the operation of the gravel pit shortly before his father died and continued to operate it until the first week of January 1957. He further testified to the volume of monthly production as heretofore set out; and that the drop in production would be due to the effect of cold weather and the necessity for certain repairs. He further testified that the pits cannot be operated during real cold weather, particularly when the water is frozen, and also when it is windy and freezing; that the floods in June should have delayed operations for not more than 2 weeks; that exhibit No. 13 is a good, washed road gravel, a commercial grade product; that exhibit No. 14 is sandy and dirty gravel that would not pass for commercial gravel; that this condition is the result of improper screening; and that the gravel shown in exhibit No. 14 could be sold commercially for fill purposes but not as a road gravel. He

further testified that while he was operating the gravel pit he had gravel similar to that as shown by exhibit No. 14, which would have to be rejected, and the fault corrected; that the gravel pit in question should produce from 100 to 150 cubic yards per day; that the only reason which could be attributed to the production figures for March 1957 to September 1957, would be no operation of the gravel pit; that there had been only minor changes in the equipment from the time he operated the gravel pit as near as he could discern from the exhibits; and that the bin was about in the same condition as when he was operating it.

On cross-examination he testified that commercial production from this gravel pit would be about 150 cubic yards per day, but during the time he operated the pit he had commercial production for only a few days each month. He further testified that during the month of July 1956, he had commercial production for about 10 days; during August he had commercial production for about 22 days; during September he had commercial production for less than 15 days; in November for less than 5 days; and that during the period from July 1956 to November 1956, he made payments under the lease to Chrystal and Felice George. He further testified on cross-examination that dirty gravel in the bin could result from a cave-in of the river bank and that the gravel as shown in exhibit No. 14 could have been the result of a cave-in; and that when he concluded his operation of the gravel pit the bin was not in good shape and needed repairs, among which was a new spill floor.

On redirect examination he testified that the minimum average monthly production from this gravel pit should be 1,500 cubic yards, but under ideal conditions it would be from 3,500 to 4,000 cubic yards.

Ardith Jones, now Ardith Jones Dollarhide, testified that she was the wife of Harry Jones, now deceased; and that she was operating the gravel lease with Mr.

Hromas and had not assigned the lease to any person. She further testified that Mr. Sack claimed to own the gravel equipment, and after her husband's death he and Gale Jones operated the gravel pit without her authority, and she received no compensation from them of any kind; that she had had considerable difficulty with Mr. Sack who was interested in the gravel lease; that she paid off the mortgage on the equipment to Mr. Sack; and that she had a conversation over the telephone with Elmer George in which he wanted to know how soon she was going to get the equipment operating and she told him she had just paid off the mortgage 2 days before and did not have anyone to operate the gravel pit at that time. She also had a conversation with Chrystal George before the mortgage was paid off and Mrs. George expressed dissatisfaction with the operation of the gravel pit by Gale Jones and Mr. Sack for the reason that they failed to itemize in their accounts where the gravel had been sold. Mrs. George did not believe she was getting all the royalties that she was entitled to from them and requested this witness to furnish her itemized statements which would be complete. At that time this witness told Mrs. George that there would be a delay in the operation of the gravel pit, but she would endeavor to get the operation going as soon as possible, and Mrs. George said she understood the difficulties and that there was no hurry. Mr. Hromas was to operate the gravel pit and this witness apparently agreed to take orders for gravel, which she did occasionally.

On cross-examination she testified that her arrangement with Hromas was that he was to pay her 15 cents a cubic yard for gravel removed, and in addition was to pay the royalty to the plaintiffs. She sold the equipment to Hromas and had not personally tried to operate the equipment under the gravel lease. She had no understanding with Hromas as to how long he would operate the equipment on the land in question, and he

could remove his equipment at any time he chose to do so. She further testified that Hromas was the only person she was able to find to operate the gravel pit, although she made efforts to find others; that she used the proceeds of the sale of the equipment which she received from Hromas to pay off the mortgage on it to Mr. Sack; and that the only compensation she received from the gravel pit was the income under the operation of the same by Hromas.

Adolph Hromas testified that he had little knowledge of the operation of gravel pits except that he had worked with a man engaged in such operations; that during his operation of the gravel pit on the land in question he stock piled gravel, placing it on top of the stock pile that was already there; that any gravel taken from a stock pile shortly before the trial would have been placed there by him; that he had gravel in the bin similar to that shown in exhibit No. 14, as did everyone else along the valley, and had such gravel in his bin shortly before the trial; that this gravel was the result of a cave-in of the river bank; that such gravel is usually sold at a discount to farmers for road work but cannot be sold as a good commercial grade of gravel; and that at the time of trial he had, and had previously, sold gravel similar to that shown by exhibit No. 13.

On cross-examination he testified to the production during his operation of the gravel pit, and gave figures which correspond essentially to those heretofore set forth. He further testified that the reason production had not been higher was due to breakdowns in the machinery and the lack of orders for gravel; and that the June floods occasioned a 2-week delay, after which the pumping drew lots of mud.

With reference to certain letters that he had written to Mrs. George, they apparently describe efforts being made to obtain production of gravel. Exhibit No. 4, a letter, contains a statement that: "When ever we get are (sic) casing plant going then we will need all the

sand and gravel we can pump." With reference to this matter, Hromas testified that they were making concrete irrigation casings at Crete, but due to the rain no casings were being used or made or sent over there. The same letter discloses an attempt to obtain a state contract which was unsuccessful because of inability to meet very short completion dates, and in addition, an unsuccessful bid on a Seward County contract for 25,000 yards of gravel, with the low bid being certain to result in a loss.

In exhibit No. 5, a letter, appears the statement: "Things are now starting to open up for us," and discloses plans that were under way for adding more equipment. In addition it contains the statement: "Next year I think we have place for 25,000 cu. yds. * * *." This would require more pumping equipment, which Hromas agreed to procure.

He further testified that he tendered royalty payments for July and August, but these checks were returned; and that after he received the checks back, he attempted to place them in escrow with the First National Bank of York, and never saw them again until the plaintiffs introduced them into evidence. Then there is a check for the September royalty which was sent to the bank to be placed in escrow, but was returned. He further testified that he conferred with Mrs. Jones about the operation, and she had taken orders for gravel to be filled by him. Mrs. Jones apparently just took orders for gravel occasionally, as she had no telephone.

Mrs. Chrystal George testified on rebuttal that she had no recollection of telling Mrs. Jones that there was no hurry in proceeding with the production of gravel. She could recall no conversation relating to the delays caused by difficulties in the estate matter of Harry Jones, deceased. She did recall having discussed the desirability of being furnished a record of sales along with the royalty check, which Mrs. Jones agreed to do.

Elmer George on rebuttal testified that exhibit No.

13 had not been taken from a stock pile which Hromas had placed on top of the one started by Gale Jones. He was certain of this because he was there when Jones dumped the stock pile, and the Gale Jones stock pile was then inaccessible because of a water slough. The Hromas stock pile was about 20 rods west of the one from which he took exhibit No. 13.

This case is for trial de novo in this court.

The lease in question is considered by the parties as a mining lease. It is the contention of the defendants that in this state there must be an abandonment of such a lease before a forfeiture will be declared. By our research we find no authority to sustain the contention of the defendants in this respect, nor has any authority directly in point been cited by the defendants on this point.

We are cognizant that courts of equity abhor forfeitures, that they are odious in law and not favored by the courts and will not be enforced unless the facts which purport to require such drastic action come clearly and plainly within the provisions of the law or of the lease, as the case may be. See Donnelly v. Sovereign Camp W. O. W., 111 Neb. 499, 197 N. W. 125.

We deem the following authorities applicable to the factual situation in the instant case.

In Phillips v. Hamilton, 17 Wyo. 41, 95 P. 846, it was held that even though a lease of land for mining purposes contains no express covenant or stipulation for diligence in the matter of exploration, nor any requirement as to the amount of work to be done within any stated period of time, yet if the consideration of the lease is a royalty to be paid to the lessor on the product of the mine, there is an implied covenant that the work of prospecting and development shall be prosecuted with reasonable diligence.

In Cotner v. Mundy, 92 Okl. 268, 219 P. 321, it was held that where the only consideration for the lease of a sand and gravel pit for a long period of years was a

royalty on the sand and gravel removed, and the lease contained no express provision for continuous operation or for forfeiture for failure to develop and operate the pit, there was an implied covenant on the part of the lessee to develop and operate the pit with reasonable diligence. See, also, Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S. W. 2d 1039.

An annotator presents the following in such respect. Where the consideration for the lease of land for the mining of minerals therefrom is the agreement by the lessee to pay a royalty on the product mined, this stipulation is construed to indicate it to be the intention of the parties that the lessee shall develop the leased premises for minerals to the mutual profit of himself and the lessor, and from this presumed intent there springs the implied obligation on the part of the lessee to develop the premises and mine the product. See Annotation, 60 A. L. R. 901.

As stated in Mansfield Gas Co. v. Alexander, 97 Ark. 167, 133 S. W. 873: "And the general rule for the construction of mineral leases, such as is involved in this case, is that the law implies a covenant upon the part of the lessee to make the exploration and search for the minerals in a proper manner and with reasonable diligence and to work the mine or well when the mineral is discovered, so that the lessor may obtain the compensation which both parties must have had in contemplation when the agreement was entered into."

Where a lessee covenants expressly to pay the lessor a certain royalty on all the minerals or products that may be mined under a mining lease, even though there is no express covenant that the lessee shall work the mine continuously, or in any particular way, or at all, there is manifestly an implied covenant on his part that he will work it as such mines are usually worked, with ordinary diligence, under the surrounding circumstances; not, indeed, simply for his own advantage and profit, but as well to the end that the lessor may secure the

actual consideration for the lease. Such a covenant arises by necessary implication. It would be unjust, unreasonable, and countervene the nature and spirit of the lease, to allow the lessee to continue to hold his term for a considerable length of time, without making any effort to work the mine. Such a construction of the rights of the parties would enable him to prevent the lessor from getting his royalties under the express covenant to pay for the same, and deprive him of all opportunity to work the mine himself, or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice. It is of the essence of the lease, necessarily implied, that the lessee shall work the mine with reasonable diligence, or surrender the lease. See Conrad v. Morehead, 89 N. C. 31.

In addition to the foregoing authorities relating to mining leases such as in the instant case, the trial court, at the request of counsel for the plaintiffs, viewed the premises. On this point the following authority is applicable.

When an action in equity is appealed, it is the duty of this court to try the issues de novo and to reach an independent conclusion without reference to the findings of the district court. But in a case wherein the court has made a personal examination of the physical facts, and where, in the same case, the oral evidence in respect of material issues is so conflicting that it cannot be reconciled, this court will consider the fact that such examination was made and that such court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. See, City of Wilber v. Bednar, 123 Neb. 324, 242 N. W. 644; Hehnke v. Starr, 158 Neb. 575, 64 N. W. 2d 68.

With the foregoing authorities in mind, and in considering the evidence heretofore set out, it appears that the arrangement alleged to have been made between

Ardith Jones Dollarhide and Hromas, to pay her a royalty of 15 cents for every cubic yard of gravel extracted and in addition to pay the plaintiffs 10 cents per cubic yard, was not a substantial arrangement in any respect. There is no evidence to disclose the term of this arrangement, and it is apparent that Hromas could remove the equipment from the property at any time he desired. The manner and form of Mrs. Dollarhide in taking orders for gravel is not very convincing. She did not have the means to do so. In order to sell a product of this kind it is a matter of common knowledge that it requires some solicitation on the part of the operator of the gravel pit.

It also appears from the evidence that Hromas made no diligent or reasonable effort to sell this product. He simply advanced the idea of being able to sell gravel in the future. It is obvious that he failed to process this gravel as grade "A" road gravel which was in great demand for road purposes and could have been sold. Making allowances for the time that the gravel pit could not have been operated due to the condition of the weather, due to cave-ins and repairs of machinery if such were needed, and break-downs upon which there is a complete lack of evidence, by comparison of figures relating to the royalties paid and the amount of gravel extracted by the original lessee and by Gale Jones who operated with Mr. Sack, the lack of pumping and excavating gravel by Hromas discloses a complete lack of reasonable diligence. We will not repeat the figures, but call attention to them as they appear previously in the statement of facts. We do state, however, that the capability of the gravel pit is no mystery, nor is it an unknown quantity as the evidence discloses. The original lessee and his son, Gale Jones, operated the gravel pit successfully as the production records indicate. The production of the defendants for a 7-month period from February 1957 to August 1957, amounted to 757.5 cubic yards. The original lessee and his son, Gale Jones,

produced more gravel in a single month than defendant Hromas had produced in 7 months of operating. During the working season when gravel could be produced, an average of 100 to 150 cubic yards of gravel per day can be taken from this gravel pit and processed as commercial grade "A" gravel for road purposes. Under ideal conditions this could be raised to 3,500 to 4,000 cubic yards per month. The record discloses without question that the defendants failed to use any degree of reasonable diligence in mining the gravel and disposing of it.

We conclude, in the light of the evidence adduced and the authorities heretofore cited, that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. SCHOOL DISTRICT OF SCOTTSBLUFF, IN COUNTY OF SCOTTS BLUFF, STATE OF NEBRASKA, ET AL., APPELLEES, V. P. COOPER ELLIS, COUNTY TREASURER OF SCOTTS BLUFF COUNTY, STATE OF NEBRASKA, APPELLANT.

95 N. W. 2d 538

Filed March 13, 1959. No. 34486.

1. **Constitutional Law: Taxation.** The legislative power to tax is a plenary one, limited only by the restrictions upon it contained in the Constitution. The provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power lodged in the Legislature.
2. **Taxation.** The power to tax and the power to provide for the allocation and distribution of revenues raised by taxation are identical and inseparable. The power to allocate and distribute tax revenues, including those raised by political subdivisions of the state under authority of the state, is a plenary one, subject only to the restrictions of the Constitution.
3. **Constitutional Law: Taxation.** The provision providing for the allocation of tax proceeds from motor vehicles taxed in each county, contained in Article VIII, section 1, of the Constitution, means that they shall be allocated in the same proportion that

the levy of each bears to the total levy in each tax district in the county on tangible personal property.

4. ———: ———. Section 77-1240.01, R. S. Supp., 1955, does not violate Article VIII, section 1, of the Constitution. Its effect is to make definite that which is implicit in the constitutional provision.

5. **Constitutional Law.** In construing a provision of the Constitution that is subject to more than one construction, the court should adopt the meaning which is consistent with rules of law and established legislative policy on the subject involved, unless a contrary intent is indicated by its terms, rather than a meaning in conflict therewith.

6. **Taxation.** Under the provisions of section 77-1240.01, R. S. Supp., 1955, the proceeds from the taxation of motor vehicles shall be allocated to the taxing units levying taxes on tangible personal property in which the motor vehicle had a tax situs in the same proportion that the mill levy on tangible personal property of each of such taxing units bears to the total mill levy on tangible personal property of all the taxing units in which the motor vehicle has its tax situs.

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

Townsend & Youmans, for appellant.

Russell E. Lovell, Donn C. Raymond, and *Loren G. Olsson,* for appellees.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* amicus curiae.

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

CARTER, J.

This is an action at law by the plaintiffs to recover from the defendant county treasurer certain money alleged to be due them because of his failure to distribute motor vehicle tax proceeds as the law requires. The trial court found for the plaintiffs and entered judgment in behalf of each against the defendant for the amounts found to be due. The defendant appeals.

The plaintiffs are the School District of Scottsbluff,

the Junior College District of Scottsbluff, and the City of Scottsbluff. The defendant is the county treasurer of Scotts Bluff County, Nebraska, and as such is the collector of all taxes levied on tangible personal property, including motor vehicles, within the county. No questions are raised on the appeal as to the joinder of parties, or the capacity of the parties to sue or be sued, as they were in the present action. We do not consider or determine any such questions.

The facts are admitted by the pleadings and stipulations made at a pre-trial conference. The defendant paid the sum of $14,555.50 into court for distribution in accordance with the final determination of the issues. Such amount was withheld from distribution by the defendant in such sum as would permit full compliance in the distribution of motor vehicle taxes to the plaintiffs for the period covered in the litigation whether the formula of the plaintiffs or that of the defendant was found to be the correct one by the court. The want of any dispute on the facts leaves only one question of law for determination by this court.

In 1952 Article VIII, section 1, of the Nebraska Constitution was amended to read as follows: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles; Provided, that such tax proceeds from motor vehicles taxed in each county shall be allocated to the state, counties, townships, cities, villages, and school districts of such county in the same proportion that the levy of each bears to the total levy of said county on personal tangible property. Taxes uniform as to class may be levied by valuation upon all other property. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall con-

tinue in effect until changed by the Legislature."

In 1953 the Legislature enacted section 77-1240.01, R. S. Supp., 1955, which provides: "Beginning January 1, 1954, in addition to the registration fees provided by Chapter 60, article 3, a motor vehicle tax is hereby imposed on motor vehicles registered for operation upon the highways of this state, except such motor vehicles as are exempt from taxation by section 77-202, which motor vehicle tax shall be in lieu of all ad valorem taxes to which such motor vehicles would otherwise be subject. Such motor vehicle tax shall be computed annually on the value of the motor vehicle as certified to the county assessor by the Board of Equalization and Assessment at a rate equal to the ad valorem rate for all purposes for the preceding year in the several taxing units of the state in which the motor vehicle is located and such motor vehicle tax as thus computed shall be collected annually by the county treasurer at the time of application for and before registration of the motor vehicle each year. The proceeds from such motor vehicle tax in each county shall be allocated to each taxing unit levying taxes on tangible personal property in the county in which the motor vehicle is located, in the same proportion that the levy on tangible personal property of such taxing unit bears to the total levy on tangible personal property of all the taxing units in which the motor vehicle is located."

It is the contention of the defendant that the constitutional provision cited, as it related to the apportionment and distribution of motor vehicle taxes, is a self-executing provision and, it being the highest law of the state, the method of distribution contained within its provisions must be followed. Collateral to this contention, the defendant asserts that the distribution provision contained in section 77-1240.01, R. S. Supp., 1955, is in conflict with Article VIII, section 1, of the Constitution, and therefore void. Plaintiffs assert that the distribution of motor vehicle taxes in all the counties

of the state have been made in accordance with section 77-1240.01, R. S. Supp., 1955, since the enactment of that statute in 1953, that the statute is not in conflict with the constitutional provision and, consequently, it is valid and sets forth the formula to be followed in distributing the proceeds of motor vehicle taxes.

It is the fundamental law of this state that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution. It is axiomatic therefore that the provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the state lodged in the Legislature. State ex rel. Atchison & N. R. R. v. Lancaster County, 4 Neb. 537, 19 Am. R. 641; State v Cheyenne County, 127 Neb. 619, 256 N. W. 67. It is just as fundamental that the power to tax and the power to provide for the disposition of taxes raised are identical and inseparable, and the Legislature is clothed with full power and control over the disposition of revenues derived from taxation, including those raised by political subdivisions of the state under authority of the state, subject only to constitutional restrictions. 85 C. J. S., Taxation, § 1057, p. 644.

The method of distribution of the revenues derived from motor vehicle taxes contained in section 77-1240.01, R. S. Supp., 1955, appears plain and unambiguous. The plain meaning of the statute is that such revenues shall be allocated to the taxing units levying taxes on tangible personal property in which the motor vehicle had a tax situs, in the same proportion that the mill levy on tangible personal property of each such taxing unit bears to the total mill levy on tangible units in which the motor vehicle was located. No difficulty exists in apportioning motor vehicle tax revenues by the formula provided by this provision of the statute.

The defendant asserts, however, that the statutory provision is in conflict with the formula set out in Article VIII, section 1, of the Constitution, which states:

"Provided, that such tax proceeds from motor vehicles taxed in each county shall be allocated to the state, counties, townships, cities, villages, and school districts of such county in the same proportion that the levy of each bears to the total levy of said county on personal tangible property."

The provision does not appear as clear to us as the defendant seems to regard it. Its meaning is dependent upon the ordinary meaning that should be given to the language used. In considering its meaning it is proper to consider the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply, and to give it such an interpretation as appears best calculated to effectuate the design of the Constitution. State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502; E. K. Buck Retail Stores v. Harkert, 157 Neb. 867, 62 N. W. 2d 288, 45 A. L. R. 2d 774. It should also be construed when the meaning is not clear to conform with fundamental principles of taxation in the levy and collection of taxes and in the apportionment and distribution thereof unless a contrary intent is indicated by its terms. The fundamental principle that the powers of the Legislature on matters of taxation are plenary except where clearly restricted by the Constitution, must also be considered. The powers of the Legislature on matters of taxation cannot be limited by implication or interpretation, and the restriction upon the legislative power must be clear and unequivocal. The construction given the constitutional provision by the Legislature and by administrative officers since its enactment must likewise be given the effect to which it is entitled.

Before rules of construction become available it must be demonstrated that the constitutional provision is not clear as to its meaning and that the intent of the people in adopting the provision can be determined only by construction. In this respect we point out that

all levies of taxes within a county are made by the county. The levy of taxes for school districts, townships, cities, and villages are levied by the county to raise the revenue required by these political subdivisions. The provision "in the same proportion that the levy of each bears to the total levy of said county on personal tangible property" could well mean in the same proportion that the levy of each bears to the total levy of said county on personal tangible property in the taxing units where the motor vehicle is located for tax purposes. We shall hereafter demonstrate the reasons for stating that the provision of the Constitution should be given the latter meaning.

The defendant's interpretation of the constitutional provision would require us to say in effect that the levy of a motor vehicle tax was for a county-wide purpose. The allocation of the proceeds of the motor vehicle tax proportionately to the state, counties, townships, cities, villages, and school districts is conclusive that a part of the proceeds were for a county-wide purpose and a part were not. Such a construction would violate the sound principle of taxation which prescribes that the benefits of taxation should be directly received by those directly concerned in bearing the burdens of taxation, so that a Legislature cannot divert taxes raised by one taxing district to the sole use and benefit of another district. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85; State ex rel. School Dist. v. Ellis, 160 Neb. 400, 70 N. W. 2d 320. It must be conceded that such a result could be accomplished by a clear provision of the Constitution so requiring, but in construing a provision not clear as to its meaning, a court should adopt the meaning that would not do violence to established principles unless a contrary intent is indicated.

The announced purpose of the legislation providing for the submission of the constitutional amendment to the people was not to change existing allocations of

motor vehicle taxes but to provide a different method of taxing them. Motor vehicles had previously been taxed as personal property the same as other tangible personal property was taxed, the taxing units where the motor vehicle was located getting the sole benefit of the revenue therefrom. We interpret the words "the total levy of said county on personal tangible property" contained in the constitutional provision to mean the total levy made by the county for all political subdivisions in which a motor vehicle has its taxable situs. We find nothing to indicate an intention to depart from such a distribution. In addition to that the officers of all 93 counties of the state have so construed the provision. No one disagreed with this interpretation until the defendant in this case raised the issue. The Legislature by enacting section 77-1240.01, R. S. Supp., 1955, confirmed the generally accepted meaning of the constitutional provision and clarified its meaning by legislative action in a manner not inconsistent with the Constitution and in accord with the fundamental rules of taxation.

We conclude that the intent of the provision in Article VIII, section 1, of the Constitution relating to the allocation and distribution of the proceeds derived from the taxation of motor vehicles is ambiguous and unclear, and therefore subject to construction. Section 77-1240.01, R. S. Supp., 1955, is not in violation of any clear restriction upon the plenary power of the Legislature relating to taxation. Such section is consistent with the fundamental rules relating to the levy of taxes and the allocation and distribution of the revenues derived therefrom. Its effect is to make definite that which is implicit in the constitutional provision. The legislative act, and the allocation and distribution of the revenues derived from the taxation of motor vehicles under it, is consistent with the interpretation placed upon the constitutional provision by the administrative officers of the state and its political subdivisions since the adoption of the con-

stitutional amendments in 1952 and 1954. For these reasons we sustain the holding of the trial court that the proceeds from the taxation of motor vehicles in Scotts Bluff County, Nebraska, during the period of January 1, 1957, to October 31, 1957, both inclusive, shall be allocated to the taxing units levying taxes on tangible personal property in which the motor vehicle had a tax situs, in the same proportion that the mill levy on tangible personal property of each of such taxing units bears to the total mill levy on tangible personal property of all the taxing units in which the motor vehicle was located. The trial court entered judgments for the plaintiffs and against the defendant in accordance with this interpretation of Article VIII, section 1, of the Constitution and the provisions of section 77-1240.01, R. S. Supp., 1955. The trial court was correct in so doing. The judgments entered on each of the three causes of action are affirmed.

AFFIRMED.

FREDERICK L. DELL ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
95 N. W. 2d 336

Filed March 13, 1959. No. 34499.

1. **Municipal Corporations.** Section 15-701, R. R. S. 1943, empowers the mayor and council of a city of the primary class by ordinance to open, widen, or otherwise improve, vacate, care for, control, name, and rename any street, avenue, alley or lane, parks, and squares within the limits of the city, and also to create, open, and improve any street, avenue, alley, or lane.
2. ———. The same section provides that when any street, avenue, alley, or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof.
3. **Courts: Evidence.** State courts of general jurisdiction will not, as a rule, take judicial notice of municipal ordinances or private statutes, unless required to do so by charter or general law.
4. **Appeal and Error.** Under section 25-1919, R. R. S. 1943, and

Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Reversed and remanded.*

Rollin R. Bailey, for appellants.

Ralph D. Nelson and *Norma VerMaas,* for appellee.

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

YEAGER, J.

In this action Frederick L. Dell and Jacquelyn Dell, husband and wife, are plaintiffs and appellants. The City of Lincoln, a municipal corporation, is defendant and appellee.

By petition filed in the district court for Lancaster County, Nebraska, the plaintiffs, to the extent necessary to set forth for the purpose of decision in this case, alleged that Woods Brothers Silo and Manufacturing Company, as owners of four lots of land in Havelock, Lancaster County, Nebraska, on or about January 14, 1918, platted and dedicated the same as an addition to the village of Havelock, and designated it as Woods Brothers Second Addition to Havelock, which dedication was accepted on January 18, 1918; that in 1930, the defendant annexed the village of Havelock after which the Woods Brothers Second Addition to Havelock became a part of the city of Lincoln; and that by warranty deed duly recorded on April 3, 1956, the plaintiffs became the record owners of Lot 8, Block 18, Replat of Blocks 18, 19, and 20, Woods Brothers Second Addition to Havelock. It is further pleaded that the property is a strip of ground 50 feet wide west and east and 142 feet in length north and south and lies east of and adjacent to the street platted as Sixty-ninth Street which street runs north and south and has a width of 60 feet; that Sixty-ninth

Street from Fremont Street north for 3 blocks to Seward Avenue has never been opened, used, or maintained; and that plaintiffs' property faces Benton Street.

It is not so stated but from the pleading it is indicated that there was a replat of Woods Brothers Second Addition to Havelock some time after the original platting and dedication.

It is further pleaded that on December 17, 1956, pursuant to a petition dated July 1, 1956, in which the plaintiffs joined, the defendant by ordinance vacated Sixty-ninth Street from the north edge of Fremont Street to the south edge of the alley between Seward Avenue and Colfax Avenue.

It is pointed out here that in this case there is no attack upon the power of the defendant, by ordinance, to vacate the street or the proceedings leading to passage of the ordinance. The attack is only upon a reservation or attempted reservation contained in the ordinance.

In the petition is pleaded what appears to be a description of the purpose and effect of the ordinance. This is followed by the ordinance itself. In the description appears the following: "An Ordinance vacating 69th Street from the north line of Fremont Street to the south line of the alley between Seward Avenue and Colfax Avenue, * * * reserving title to said street * * *."

The ordinance in its first section contains the following: "That 69th Street from the north line of Fremont Street to the south line of the alley between Seward Avenue and Colfax Avenue * * * is vacated, subject to title to said street so vacated remaining in the City of Lincoln."

The petition contains the following which, together with what has already been said with regard to pleadings, and the prayer, brings into focus the issue or issues tendered by the plaintiffs in their petition:

"That the defendant attempted to retain title to said real estate for the purpose of selling the same and not for any governmental use and the defendant now pro-

poses to sell the same by sealed bids and the defendant claims some right title, or interest in and to said street including that part of said street one-half of which lies west of and adjacent to Lot Eight (8), Block Eighteen (18), Replat of Blocks 18, 19 and 20, Woods Brothers Second Addition to Havelock, which is owned by the plaintiffs, which claim of right, title or interest has damaged the plaintiffs and has cast a cloud upon the plaintiffs' title to that portion of said street one-half of which lies west of and adjacent to the plaintiffs' real estate."

By the prayer of the petition the plaintiffs seek to have title quieted in them and to have the defendant enjoined from asserting any right, title, or interest in or to the one-half of that part of the street which was vacated and which adjoins the property of the plaintiffs.

To the petition the defendant filed a general demurrer on the ground only that the petition failed to state facts sufficient to constitute a cause of action. This demurrer was sustained and the action was dismissed. From the order sustaining the demurrer and the judgment of dismissal the plaintiffs have appealed.

It is to be observed that by their petition the plaintiffs have not made any reference to any basis or theory on which the defendant asserted its right to reserve to the city the title to the vacated portion of the street. And of course the demurrer likewise gave no information as to the source of this claimed right.

The plaintiffs insist that there is no such right and that accordingly they are entitled to the relief which they seek. They rely on section 15-701, R. R. S. 1943, and other statutory provisions as well as decisions and texts to sustain their position.

The only question before this court is that of whether or not the petition states a cause of action. In this light therefore, as will appear, none of the statutes and decisions referred to require consideration except section 15-701, R. R. S. 1943, and decisions and authorities interpretative of this section. The section, to the extent

necessary to set it forth here, is as follows:

"The mayor and council shall have power by ordinance to open, widen or otherwise improve, vacate, care for, control, name, and rename any street, avenue, alley or lane, parks, and squares within the limits of the city, and also to create, open and improve any street, avenue, alley or lane. Whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one half on each side thereof."

The city of Lincoln is of the primary class and this section sets forth the power of a city of this class to vacate streets and alleys. As an effect of the exercise of that power it declares that streets and alleys shall revert to the owners of the adjacent real estate, one-half on each side. The validity of this provision with its restriction does not appear to have been directly passed upon by this court, but in State ex rel. City of Lincoln v. Chicago, R. I. & P. Ry. Co., 93 Neb. 263, 140 N. W. 147, it was inferentially held valid. In Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N. W. 1002, this court directly upheld a like statutory provision relating to the village of Bellevue, Nebraska. Attention has not been called to any statutory provision which contains a contrary declaration.

The defendant does not contend that there is a statute which is to the contrary. It does however contend that this statute has no application in instances where this defendant vacates streets and alleys. It contends that this is so because there is a provision in its charter which permits it on vacation of streets and alleys to retain title to the streets and alleys so vacated. It contends that this provision supersedes the statutes insofar as the defendant is concerned.

The simple present answer to this contention is that this provision and no other provision of the charter of the city of Lincoln was presented by the record to the district court in any such manner as to become a basis

for a ruling favorable to the defendant on the general demurrer. It is not pleaded either directly or by reference in the petition and as is made clear it is not mentioned in the demurrer. The theory is argued in defendant's brief in this court but without any pretense that it was ever presented by pleading or any other validly recognizable basis to the district court or to this court.

In the light of this a basis for sustaining the demurrer and dismissing the action was nonexistent and the court should have overruled it pursuant to the statute which has been quoted herein, the validity and applicability of which is not questioned, if it is not superseded by the pretended charter provision.

There was and is now no basis for considering, at this time, the pretended charter provision for the reason that the district court may not take judicial notice of city ordinances and private statutes. The general rule as to private statutes is stated as follows in 31 C. J. S., Evidence, § 22, p. 538: "In the absence of a constitutional or statutory provision to the contrary, it is a general rule that private statutes of a state, as distinguished from public statutes, are not judicially noticed either by its own courts or by any other courts, and the same is true of private acts of congress."

As to ordinances the general rule is stated in 31 C. J. S., Evidence, § 27, p. 540, as follows: "The general rule is that ordinances or by-laws themselves are not judicially known to courts having no special function to enforce them, although the power of municipalities to pass ordinances or by-laws is judicially noticed by the courts within the state."

This general rule as to judicial notice of ordinances has been approved by this court. In Foley v. State, 42 Neb. 233, 60 N. W. 574, it was said: "Courts will not, as a rule, take notice of municipal ordinances, unless required to do so by special charter or general law."

In Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767, it is said: "While a municipal court

may take notice of a city ordinance, proof of its existence is ordinarily required in courts of general jurisdiction."

In this case there is neither pleading nor proof of the pretended provision of the charter or ordinance of the defendant on which the adjudication made by the district court was predicated. The adjudication was therefore erroneous and should be reversed.

It should be pointed out here that the basis of the decision herein by this court has not been assigned as error and considered in the briefs. The error is one which, however, is plain and not assigned. It is considered under authority of Rule 8 a2(4) of the rules of this court. Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482, contains the following: "Under section 25-1919, R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned." See, also, Romans v. Bowen, 164 Neb. 209, 82 N. W. 2d 13.

The order of the district court sustaining the demurrer and the judgment dismissing the action are reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

SAVE THE TRAINS ASSOCIATION, APPELLANT, V. CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLEE.

95 N. W. 2d 334

Filed March 13, 1959. No. 34510.

1. **Public Service Commissions: Judgments.** A judgment rendered by the Supreme Court on an appeal from the State Railway Commission reversing the action of the commission and making effective a previous order entered by the commission is a bona fide judgment upon which the successful party has a right to

rely and act. Such party is not in contempt of the State Railway Commission or this court by acting upon such judgment.

2. **Appeal and Error: Contempt.** A successful party acting upon a judgment rendered by this court, prior to the time of a ruling on the motion for rehearing filed by the opposite party and during the pendency thereof and until the rehearing is ruled upon and a mandate is issued, does take some risk in proceeding in accordance with the judgment, but is not necessarily in contempt of court in so doing.
3. **Appeal and Error.** A mandate is an order issued upon the decision of an appeal or writ of error, directing action to be taken or disposition to be made of the case, by an inferior court.
4. ———. The issuance of a mandate is a ministerial act only.

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

Viren, Emmert, Hilmes & Gunderson and *Don S. Bergquist, Jr.*, for appellant.

Neely & Otis, for appellee.

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

MESSMORE, J.

There is no dispute in the facts relating to this case. They are conclusively set out in our opinion in Chicago & N. W. Ry. Co. v. Save the Trains Assn., 167 Neb. 61, 91 N. W. 2d 312. Briefly stated, the State Railway Commission, hereinafter referred to as the commission, by its order of February 7, 1958, authorized the Chicago and North Western Railway Company, hereinafter referred to as the railway company, to discontinue trains Nos. 13 and 14 which were operated daily between Omaha and Chadron, as of March 15, 1958. The Save The Trains Association, hereinafter called the association, filed a motion for rehearing before the commission. On March 7, 1958, the commission granted the rehearing, and trains Nos. 13 and 14 of the railway company were ordered to be continued in service. Appeal was taken to this court by the railway company. This court rendered judgment that the order of the commission grant-

ing a rehearing was arbitrary and unreasonable, and reversed the order of the commission dated March 7, 1958, granting a rehearing, thereby leaving in effect the order of the commission of February 7, 1958, allowing the railway company to discontinue the operation of trains Nos. 13 and 14.

On July 14, 1958, the association filed a petition in the district court for Douglas County against the railway company. This petition alleged facts upon which the association contended that the railway company should be required to restore the operation of trains Nos. 13 and 14 in compliance with the order of the commission granting a rehearing and ordering trains Nos. 13 and 14 continued in service, and if the railway company refused to do so that it be held in contempt as required by section 75-420, R. R. S. 1943, and assessed a penalty as provided for therein. To this petition the railway company filed a motion to dismiss for reasons which need not be set out. This motion was sustained on July 18, 1958. The association appealed to this court from the order of dismissal of its petition.

As we view the case, the action is one brought in the district court for Douglas County for contempt on the part of the railway company and doubtless based upon the fact that a mandate had not been issued under the direction of this court to the commission.

A mandate is an order issued upon the decision of an appeal or writ of error, directing action to be taken or disposition to be made of a case, by an inferior court. See Egbert v. St. Louis & S. F. R. R. Co., 50 Okl. 623, 151 P. 228.

The issuance of a mandate is a ministerial act only. The railway company had a bona fide judgment rendered by this court. It had a right to rely upon that judgment and act upon it. It is true that during the pendency of, and until the motion for rehearing filed by the association was ruled upon in this case and a mandate issued, the railway company acted at its peril and as-

sumed any risk that might be incurred by an adverse ruling. However, it appears from the records of this court that the motion for rehearing was denied on September 26, 1958, and the mandate was issued out of this court on September 29, 1958.

The railway company was not in contempt of the ruling made by this court nor in contempt with the commission, but rather acted consistently within the confines of the judgment entered by this court.

In the light of the record we conclude that the contentions made by the association in this case are without merit. The judgment of the district court should be, and is hereby, affirmed.

AFFIRMED.

CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

95 N. W. 2d 357

Filed March 13, 1959. No. 34531.

1. **Taxation.** As a general rule, public property and the instrumentalities of government are immune from taxation, and municipalities cannot, in the absence of express legislative authority, tax a property or instrumentality of the state used in the exercise of its functions.
2. ———. Where a public corporation by virtue of statute is required to pay a specific sum in lieu of taxes, including occupation taxes, a city cannot impose an occupation tax on the public corporation for revenue purposes. A payment in lieu of taxes is in effect a substitute for the power to tax.
3. ———. A statute authorizing the payment of a determinable sum by public corporations in lieu of taxes is a matter of statewide concern. The provisions of a home rule charter of a city, and ordinances enacted pursuant thereto, must yield to such a statute.

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

Healey, Davies, Wilson & Barlow, for appellant.

Ralph D. Nelson and *Norma VerMaas,* for appellees.

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

CARTER, J.

This is an action for a judgment declaring that Consumers Public Power District is not subject to nor liable for the payment of an occupation tax levied by the city of Lincoln on the gross revenues derived from the sale of electricity within the city. A demurrer to the amended petition was sustained and Consumers stood on its petition. From a judgment of dismissal Consumers has appealed.

The city of Lincoln is a charter city of the primary class. Its city charter authorizes the city to levy an occupation tax on public service property or corporations and to raise revenue by levying and collecting a license or occupation tax. Pursuant to such authority the city levied an occupation tax of 3 percent on retail sales of electricity within the city with credit for payments made by the taxpayer in lieu of taxes.

Consumers is a public power district organized under Chapter 70, article 6, R. R. S. 1943. It is a public corporation and political subdivision of the state. Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 Neb. 584, 14 N. W. 2d 202, 155 A. L. R. 412; United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N. W. 2d 576. In 1941 Consumers became the owner of property previously belonging to the Iowa-Nebraska Light & Power Company. Since that date Consumers has annually paid approximately $21,300 to the city of Lincoln in lieu of taxes, including an occupation tax of $1,750. The payment of $21,300 in lieu of taxes is required by law and is based on the taxes paid by the

Iowa-Nebraska Light & Power Company as required by section 70-651, R. R. S. 1943.

Section 70-651, R. R. S. 1943, provides: "Whenever any such district shall purchase or acquire the plant or property of an existing privately owned public utility furnishing electrical energy for heat, light, power, or other purposes, for use within this state, such purchase shall be upon the condition expressed in the contract of purchase and instrument of conveyance that such district as long as it shall continue to be the owner of such property, shall annually pay out of its revenue, to the State of Nebraska, county, city, village and school district in which such public utility property is located, in lieu of taxes, a sum equal to the amount which the state, county, city, village and school district received from taxation, including occupation taxes, from such property or from the person, firm or corporation owning the same during the year immediately preceding the purchase or acquisition of such property by such power district. The directors of any such district shall not incur any personal liability by reason of the making of such payments." No question of constitutional validity is raised by this appeal. The only question is the right of the city to levy the occupation tax it did in view of the provisions of section 70-651, R. R. S. 1943.

We think the rule is clear in this state that a public corporation is not subject to taxation outside of the scope of the prohibition contained in Article VIII, section 2, of the Constitution, unless the power to tax is expressly conferred by the Legislature which has plenary power over it. Droll v. Furnas County, 108 Neb. 85, 187 N. W. 876, 26 A. L. R. 543; State v. Cheyenne County, 127 Neb. 619, 256 N. W. 67. The general rule is: "Although there is authority to the contrary, as a general rule taxes may not be imposed by a state on its own governmental agencies or instrumentalities, or on those of its municipal corporations, nor may taxes be imposed by a municipality on the agencies or instrumen-

talities of a state, unless a statute specifically renders them subject to tax." 84 C. J. S., Taxation, § 213, p. 410. See, also, Allied Contractors, Inc. v. Board of Equalization, 113 Neb. 627, 204 N. W. 374; City of Idaho Falls v. Pfost, 53 Idaho 247, 23 P. 2d 245; Newton v. City of Atlanta, 189 Ga. 441, 6 S. E. 2d 61. We have found no statutory provision expressly authorizing a municipality to levy an occupation tax against public corporations or other political subdivisions of the state.

On the other hand, section 70-651, R. R. S. 1943, provides that the amount paid out of its revenue in lieu of taxes shall be a sum equal to that which the state, county, city, village, and school district received from taxation, including occupation taxes, during the year immediately preceding the purchase or acquisition of the property of the power district. The amount to be paid annually in lieu of taxes was frozen at the designated amount except as provided in section 70-652, R. R. S. 1943. The act provided that the amount was to include occupation taxes. This clearly indicates that the amount to be paid in lieu of taxes is not to be increased by any taxes, including occupation taxes. The intent of the statute is clear that the amount paid was to be in lieu of all taxes, including occupation taxes. Where the law of the state requires the payment of an amount in lieu of taxes, a municipality is without authority to levy an occupation tax. This is particularly true where the occupation tax is specifically listed as a tax for which the amount in lieu of taxes is made. It follows that the ordinance purporting to levy an occupation tax is void and of no effect. Attorney General v. Common Council of Detroit, 113 Mich. 388, 71 N. W. 632; Wisconsin Telephone Co. v. City of Oshkosh, 62 Wis. 32, 21 N. W. 828; 1 Cooley on Taxation (4th Ed.), § 127, p. 304.

It is contended by the city of Lincoln that section 70-651, R. R. S. 1943, has no application to the city because of its status as a home rule charter city. There

is no merit to this contention. It must be remembered that the Legislature has plenary control over all municipalities. Municipalities have only such powers of taxation as are specifically granted by the Legislature. Where the power to tax is granted or withheld, it is a matter of state-wide concern which must apply to all cities of a class whether they be home rule cities or not. This appears so fundamental that a citation of authority seems unnecessary. This conclusion, however, is generally supported by our holdings in Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894, and Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862.

We necessarily hold that section 70-651, R. R. S. 1943, involves a matter of state-wide concern. The provisions of the Lincoln home rule charter and ordinances adopted pursuant to it must yield to the provisions of section 70-651, R. R. S. 1943.

We conclude that the levy of the occupation tax here complained of is inconsistent with the law of the state involving a matter of state-wide concern and is wholly void. Necessarily the levy of the occupation tax is void and the tax uncollectible.

The trial court erred in sustaining the demurrer to plaintiff's petition. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MESSMORE, J., participating on briefs.

CONSUMERS PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. VILLAGE OF HALLAM, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

95 N. W. 2d 361

Filed March 13, 1959. No. 34532.

1. **Taxation.** The amount to be paid in lieu of taxes, as required by section 70-651, R. R. S. 1943, precludes a municipality from

imposing on a corporation within the purview of the statute an occupation tax for revenue purposes.

2. ———. In such a case, assuming that the power to tax otherwise existed, the payment in lieu of taxes is a substitute for the power to tax. The power to tax is withheld as long as the payment in lieu of taxes is effective.

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

Healey, Davies, Wilson & Barlow, for appellant.

Wagener, Marx & Galter, for appellees.

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

CARTER, J.

This is an action for a judgment declaring that Consumers Public Power District is not subject to nor liable for the payment of an occupation tax levied by the village of Hallam on the gross revenues derived from the sale of electricity within the village. A demurrer to the amended petition was sustained and Consumers stood on its petition. From a judgment of dismissal Consumers has appealed.

The case is similar to Consumers Public Power Dist. v. City of Lincoln, *ante* p. 183, 95 N. W. 2d 357, with one exception. In the City of Lincoln case an occupation tax was levied and being paid by the Iowa-Nebraska Light & Power Company when it transferred its properties to Consumers. In the instant case the village of Hallam had no ordinance providing for the levy of an occupation tax until after Consumers acquired the property of Iowa-Nebraska in the village of Hallam. This is asserted as a factual difference requiring a result different from that at which we arrived in the City of Lincoln case.

The case is controlled by Consumers Public Power Dist. v. City of Lincoln, *supra,* except for the one dissimilar fact. We shall discuss only the one distingushing feature in this case.

The provision of section 70-651, R. R. S. 1943, to the effect "that such district as long as it shall continue to be the owner of such property, shall annually pay out of its revenue, to the State of Nebraska, county, city, village and school district in which such public utility property is located, in lieu of taxes, a sum equal to the amount which the state, county, city, village and school district received from taxation, including occupation taxes, from such property or from the person, firm or corporation owning the same during the year immediately preceding the purchase or acquisition of such property by such power district" means that the amount to be paid in lieu of taxes shall be in lieu of all taxes, including occupation taxes, which have been or may in the future be levied. The amount paid in lieu of taxes is in lieu of any such taxes that might otherwise be levied in the future and precludes the levy of all taxes within the scope of the provision. Payment in lieu of taxes is in effect a substitute for the power to tax. To hold otherwise would defeat the plain intent of the Legislature as expressed in the act, which is contrary to the rules of statutory interpretation.

The defendant cites Drainage District No. 1 v. Village of Hershey, 145 Neb. 138, 15 N. W. 2d 337, as authority for the rule that one governmental entity has the power to assess and tax benefits in another. We point out that the case involved special benefits that were specifically authorized by statute to be assessed against cities within drainage districts. It is not in point. In the instant case the public corporation was relieved of the payment of taxes and an amount in lieu of taxes substituted in its stead by legislative authorization.

The trial court erred in sustaining the demurrer and dismissing the action. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MESSMORE, J., participating on briefs.

EMILY S. APPLEGATE, APPELLEE, V. MARY E. BROWN ET AL., APPELLANTS.

95 N. W. 2d 341

Filed March 13, 1959. No. 34545.

1. **Wills.** The valid portions of a will are to be carried out in accordance with the intention 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.
2. **Powers: Trusts.** Powers of a trustee under a testamentary trust will be construed in this state according to the principles of the common law.
3. **Powers.** In the construction of powers, the cardinal principle is that the intention of the donor is controlling and such intention is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the instrument.
4. ———. The court will endeavor to place itself in the position of the donor, ascertain his intention and enforce it in all its parts, if it be lawful to do so.
5. ———. The donee of a power must keep within its terms, and where the donor prescribes the method of its execution, that method must be strictly followed, so far at least as may be necessary to give effect to the donor's intent and design.
6. ———. Where there is no prohibition or restriction in a power, everything which is legal and within its limits should be supported. But where there is a prohibition, limitation, or restriction, such provision will control and the donee will not be permitted to disregard the same.
7. **Trusts.** In order that there may be a finding of the existence of a valid trust there must be a trustee, an estate devised to him, and a beneficiary.
8. **Wills.** Where particular words in a will are followed by general, the general words are ordinarily restricted in meaning to provisions of like kind.
9. ———. The general rule is that the time for ascertaining the members of a class depends upon the intention of the testator, rather than upon technical language used in a particular clause of a will.
10. ———. In determining the time at which the members of a class to share in a gift are to be ascertained, where it is not fixed by the will itself and where the gift is immediate, the time is fixed at the death of the testator, and where it is postponed pending the determination of a preceding estate, it is fixed at the distribution of the estate.
11. **Trusts.** A trust can be created for any purpose which is not

against public policy or otherwise illegal. In order to uphold the trust, it is not necessary affirmatively to show that the purpose is one of the purposes for which a disposition of legal interests can be made; a trust can be created for any purpose unless it appears that the purpose is one which is illegal.

12. ———. Any provision in the terms of the trust is valid, unless it appears that such provision is illegal.

13. **Wills.** Generally a testator may by will confer upon another person the power to do any act with reference to the property of the testator which the testator could lawfully have done himself.

14. **Trusts.** A trust is not rendered invalid by the fact that the trustee is vested with discretion, if it is clear that a trust was intended and its terms are sufficiently certain to permit their enforcement.

15. **Wills: Trusts.** At termination of the trust under a will or by operation of law, the beneficiaries ordinarily take the property as provided in the will.

16. ———: ———. Generally where there is no disposition by will of the remainder of a trust estate the corpus of the trust property on the termination of the trust goes as intestate property to the testator's heirs, who are such as of the date of the termination of the trust.

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

Baskins & Baskins, for appellants.

Evans & Kelley, for appellee.

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

SIMMONS, C. J.

In Brown v. Applegate, 166 Neb. 432, 89 N. W. 2d 233, we had for consideration 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. We affirmed the order of the district court.

In the course of that decision we held: "The right to dispose of property by will at death is favored by the law; it is a valuable right which will be sustained when-

ever 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. * * * 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." Brown v. Applegate, *supra*.

This action is brought by the mother of the testator to have the will construed. She alleged that the trust was wholly void for the reason that it was too indefinite to be susceptible of enforcement and was violative of the rule against perpetuities. She sought a judgment determining that she is the sole heir at law of the deceased, and that all property of the estate be awarded to her.

She named as defendants the immediate relatives of the deceased "being his brothers and sisters, and nieces and nephews, and grand nieces and grand nephews," and all others who claimed an interest in the property. Mary E. Brown, a sister (named as a trustee in the will), and her five children, and Jeanette E. Quillin, a sister of the testator, and her three children, answered. The children of Mary E. Brown and Jeanette E. Quillin, answering, are nieces and nephews of the testator.

They admitted the probate of the will; that proceedings in the estate were pending; that by the terms of the will title to all of the estate was devised and bequeathed to Mary E. Brown and Ellen Ruth Applegate, as trustees, to be sold and applied to the purposes set forth in the will; that testator died unmarried, leaving no children; that plaintiff is the heir at law of testator if he had not died testate; and that testator's father died in 1944. They then denied generally and prayed that plaintiff's petition be dismissed.

It was stipulated that testator died leaving four sisters and three brothers, all of full age; that a sister and brother were unmarried; that a brother who was unmarried at the date of the death of testator has since married; that one brother and two sisters were married; and that one sister was widowed prior to the death of testator. It was further stipulated that testator had fourteen nieces and nephews, children of three sisters and one brother. It was further stipulated that testator had nine grandnieces and grandnephews, three of whom

were born subsequent to the death of deceased. Testator died September 7, 1956. The stipulation was signed June 2, 1958.

The trial court adjudged that all of the defendants, except those recited above as answering, were in default.

The trial court found that the trust which the will attempted to create was void and that the trust failed for the reason that it was generally indefinite in its terms and failed sufficiently to identify the beneficiaries thereof. It decreed that the title to the real estate vested in the plaintiff and ordered all money and personal property remaining for distribution paid and assigned to plaintiff. The above-named defendants appeal.

We reverse the judgment of the trial court and remand the cause with directions as provided hereafter in this opinion.

The provisions of the will here involved are:

"II. All of my property and estate, real, personal or mixed, and wheresoever situated, I hereby give, devise and bequeath to my sisters Mary E. Brown and Ellen Ruth Applegate in trust for the uses and purposes hereinafter specifically set forth.

"III. I hereby give to my executrixes (sic) hereinafter named full power and authority to sell, make deeds of conveyance, to all of my real estate and bills of sale to all personal property held or owned by me, and I direct my said executrixes (sic) to sell all real and personal property and estate of which I may die seized as soon as practicable after my death, with, however, no specific time limitation therefor, such authorization to sell and convey to continue until they have been discharged in due course as such executrixes (sic).

"IV. 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.

"V. 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. In the event of the death of either of said named trustees or their disability to act as such trustees, I desire that new appointments be made by a court of competent jurisdiction.

"VI. I hereby appoint Mary E. Brown of Sutherland, Lincoln County, Nebraska, and Ellen Ruth Applegate of Glendale, California as executrixes (sic) of this my last will and testament, and request that they be permitted to act without bond."

It is patent that the testator intended that all his estate be converted into money and that the proceeds thereof be held in trust by his named trustees, with a provision for the appointment of successor trustees. The parties here do not contend otherwise. The issues here revolve around the construction to be given to the provisions of paragraphs IV and V of the will.

The defendants contend that under the provisions of the will the nieces and nephews are to receive the income from the trust fund, share and share alike, subject to the right of the plaintiff (mother) to receive aid and assistance if needed and, secondarily, to the right of the brothers and sisters to receive aid and assistance if needed, with the corpus of the estate ultimately passing to the then heirs at law of testator. The plaintiff contends that the judgment of the trial court should be affirmed.

We construe the will somewhat differently than do either of the parties.

We are here dealing with the construction of the powers of appointment, contained in the will, given to trustees by the settlor of a trust.

We have held: "Powers will be construed in this state according to the principles of the common law. * * * In the construction of powers, the cardinal principle is that the intention of the donor is controlling and such intention is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the instrument. * * * The court will endeavor to place itself in the position of the donor, ascertain his intention and enforce it in all its parts, if it be lawful to do so. * * * The donee of a power must keep within its terms, and where the donor prescribes the method of its execution, that method must be strictly followed, so far at least as may be necessary to give effect to the donor's intent and design. * * * Where there is no prohibition or restriction in a power, everything which is legal and within its limits should be supported. But where there is a prohibition, limitation or restriction, such provisions will control and the donee will not be permitted to disregard the same." Massey v. Guaranty Trust Co., 142 Neb. 237, 5 N. W. 2d 279.

We have also held: "* * * in order that there may be a finding of the existence of a valid trust there must be a trustee, an estate devised to him, and a beneficiary." Jones v. Shrigley, 150 Neb. 137, 33 N. W. 2d 510.

In 96 C. J. S., Wills, § 1008, p. 522, the rule is stated as follows: "To create a trust by will the testator must indicate his intention to do so, must separate the legal from the equitable estate and transfer the legal estate to the trustee, and must designate the trustee, the beneficiaries, their interest in the trust, its purpose or object, and its subject matter."

The rule is stated in 1 Scott on Trusts (2d Ed.), §

54, p. 361, as follows: "A trust cannot be created by will unless the identity of the beneficiaries and of the trust property and the purposes of the trust can be ascertained either from the will itself, or from an instrument properly incorporated by reference in the will, * * *."

The first question is this: Are the beneficiaries here named with sufficient certainty?

We think they are. The first beneficiaries named are "*my* nieces and nephews." (Emphasis supplied.) The authorities are uniform that such a designation means the children of a brother or sister, or brothers or sisters, and does not include grandnephews and grandnieces. See, 66 C. J. S., Nephew and Niece, p. 5; 57 Am. Jur., Wills, § 1390, p. 925; 72 C. J. S., Powers, § 24, p. 417; 41 Am. Jur., Powers, § 58, p. 847; Restatement, Property, § 291, p. 1534, and § 291, p. 1543.

Clearly the beneficiaries are not limited to "my nieces and nephews" for the testator followed that language with "and such others of my relatives."

We have held: "Where particular words in a will are followed by general, the general words are ordinarily restricted in meaning to provisions of like kind." Dennis v. Omaha Nat. Bank, 153 Neb. 865, 46 N. W. 2d 606, 27 A. L. R. 2d 674.

In Woelk v. Luckhardt, 134 Neb. 55, 277 N. W. 836, 115 A. L. R. 437, we had for construction the words "any child or other relation of the testator." We held that "other relation" meant relations of the blood of the testator and did not mean relatives by affinity.

We accordingly hold that the words "my nieces and nephews and such others of my relatives" includes the mother, the brothers and sisters, and nieces and nephews. They are ascertainable. In fact the parties have here stipulated as to who they are. See, Pyne v. Payne, 152 Neb. 242, 40 N. W. 2d 682; Dennis v. Omaha Nat. Bank, *supra*.

In this connection we call attention to the rule stated

in Restatement, Property, § 294, p. 1557: "When an otherwise effective conveyance contains the limitation of an immediate gift in favor of a class described as 'children,' 'grandchildren,' 'brothers,' 'sisters,' 'nephews,' 'nieces,' 'cousins,' 'issue,' 'descendants' or 'family' of a designated person, then, unless a contrary intent of the conveyor is found from additional language or circumstances, such conveyance designates as the distributees thereunder all who are 'possible takers' within the group description found in such limitation and who (a) are conceived prior to the effective date of the deed or will containing the limitation; * * *."

The effective date of the will is stated in the text to mean the date of the death of the testator. The comment in the above section shows that this is a "rule of convenience": "It is probable that the results thus obtained are those which the conveyor would have intended if the problem had been considered by him. It is clear that the results thus obtained are more desirable, from the viewpoint of public interest, than the results obtainable by allowing the class to continue to increase after the effective date of the deed or will containing the limitation. By this earlier ending of the ability of the class to increase in membership, the available members of the class are forthwith enabled to enjoy and utilize to advantage the subject matter of the gift, distribution is unhampered by the otherwise necessary complex safeguards in favor of possible but as yet unconceived takers thereunder, and the early conclusion of the administration of the estates of decedents is facilitated. * * * Thus the convenience of this rule is great, it is as likely as not that it gives effect to the actual intent of the conveyor and, if the actual intent of the conveyor is, in some few instances, frustrated, the conveyor is himself at fault, as this is completely preventable by language in the conveyance clearly manifesting his intent that this rule of convenience shall not apply."

The stipulation here shows that there are no persons, added to those above listed, who could have been conceived prior to the death of the testator.

The next question arising is this: Is there one class or two or more classes of beneficiaries provided for in the will?

Defendants would construe the will so as to make the nieces and nephews a class free from the restrictions attached to "such others of my relatives as may in the discretion of my said sisters warrant and require financial aid and assistance." There is no indication in this paragraph of the will, grammatical or otherwise, to relieve the benefits to the nieces and nephews from the discretionary power of the trustees. We think the answer is found in the provisions of paragraph V where the testator specifically declares: "It is my intention that * * * the income and interest * * * be used for the benefit of such of my relatives as may require financial aid and assistance."

As above construed the testator had provided that his relatives who were beneficiaries of the trust were his mother, brothers, sisters, nieces, and nephews. In paragraph V he refers to all of them as "my relatives" and limits the benefits to such as may require financial aid and assistance. He puts them all in one class and applies the restriction clause to all.

The plaintiff argues here that this is a postponed gift in favor of a class and hence the members of the class are to be determined as of the time the gift is to take effect.

We think the gift is immediate. The testator directed that the income and interest of his estate be used for the financial aid and assistance of such of his relatives as required it.

By quotation from the authorities in Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713, we held: " 'The general rule is that the time for ascertaining the members of a class depends upon the intention of the tes-

tator, rather than upon technical language used in a particular clause of a will. As a general rule the class is to be determined as of the time the gift is to take effect.' * * * 'In determining the time at which the members of a class to share in a gift are to be ascertained, where it is not fixed by the will itself and where the gift is immediate, the time is fixed at the death of the testator (citing case), and where it is postponed pending the determination of a preceding estate, it is fixed at the distribution of the estate.' "

The time of the determination of the members of the class must be made as of the death of the testator for it is of necessity then that the discretion of the trustees to provide benefits must begin. The trustees must then ascertain to whom payments may be made. There is no intervening preceding estate.

In 1 Scott on Trusts (2d Ed.), § 17.2, p. 170, it is stated: "There is a tendency to construe with increasing liberality the language of the instrument in which the power is conferred, and to hold that the donee of the power has broad discretion as to the manner in which he shall exercise it in favor of the members of the class, unless it appears that the donor intended to restrict him."

We find no intent to restrict the exercise of the power in the will here. The same author states in section 59, page 513: "A trust can be created for any purpose which is not against public policy or otherwise illegal. In order to uphold the trust, it is not necessary affirmatively to show that the purpose is one of the purposes for which a disposition of legal interests can be made; a trust can be created for any purpose unless it appears that the purpose is one which is illegal. So too any provision in the terms of the trust is valid, unless it appears that such provision is illegal."

In Restatement, Property, § 324, p. 1843, the rule is stated: "The scope of the donee's discretion as to appointees and the time and manner of appointment is

unlimited except as the donor effectively manifests an intent to impose limits. * * * A power is presently exercisable unless the donor manifests an intent that exercise of the power shall be postponed."

Generally a testator may by will confer upon another person the power to do any act with reference to the property of the testator which the testator could lawfully have done himself. Budreau v. Mingledorff, 207 Ga. 538, 63 S. E. 2d 326.

Of course the trustees are to select those within the designated beneficiaries who are to receive the income under the conditions specified, and the amounts they are to receive. This is the very purpose of this kind of a trust. As was said in In re Will of Sullivan, 144 Neb. 36, 12 N. W. 2d 148: "The settlor of the trust prescribed that this was to be a duty of the trustees * * *."

In 96 C. J. S., Wills, § 1008, p. 524, it is stated: "The trust is not rendered invalid by the fact that the trustee is vested with discretion, if it is clear that a trust was intended and its terms are sufficiently certain to permit their enforcement; * * *." In section 1012, page 545, of the same source, it is stated: "A trust giving the trustee the discretion to select the beneficiaries from a designated class and determine the amounts they shall receive has been held valid and enforceable as long as the trustee must distribute the property to the class designated."

Plaintiff states: "The failure of definite ascertainment of such beneficiaries and persons (and consequently the time the Trust expires) is the fundamental ambiguity in this Will * * *."

The beneficiaries are ascertainable and ascertained. Obviously the trust created by the will expires with the death of the last of the beneficiaries.

The benefits need not be defeated because the testator failed to dispose of the corpus of the estate.

The rule is: Generally, where there is no disposition by will of the remainder, the corpus of the trust prop-

erty on the termination of the trust goes as intestate property to the testator's heirs. 96 C. J. S., Wills, § 1056, p. 688.

In Dennis v. Omaha Nat. Bank, *supra,* we held: "At termination of the trust under a will or by operation of law, the beneficiaries ordinarily take the property as provided in the will. However, as here, where complete disposition of the estate was made by the will which by language and necessity vested the whole of the fee in the trustee, defeasible only at termination of the trust, when it was to vest in a class, none of whom then or ever will exist, and the trust is terminated by operation of law for failure of purpose or accomplishment, then the trustee holds the trust estate upon a resulting trust implied by intention for the heirs of the testator *who are such as of the date of the failure of the trust.* To hold otherwise would give the will and the law of this jurisdiction, which testator was presumed to know when he executed the will, no force or effect whatever." (Emphasis supplied.) The reason of the rule is applicable here.

In In re Estate of Mooney, 131 Neb. 52, 267 N. W. 196, we approved the following from Restatement, Trusts, §§ 411, 430, pp. 1258, 1322: " 'Where the owner of property gratuitously transfers it and properly manifests an intention that the transferee should hold the property in trust but the trust fails, the transferee holds the trust estate upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust should arise or the intended trust fails for illegality. * * * If real property is devised upon a trust which fails and there is no provision in the will effectively disposing of the residue of the testator's real property, the devisee holds it upon a resulting trust for the heir of the testator. * * * Where the owner of property gratuitously transfers it upon a trust which is properly declared but which is fully performed without exhausting the trust estate, the trustee

holds the surplus upon a resulting trust for the transferor or his estate, unless the transferor properly manifested an intention that no resulting trust of the surplus should arise. * * * Where the owner of property devises or bequeaths it upon a trust which is fully performed without exhausting the entire property so devised or bequeathed, the devisee or legatee holds the surplus upon a resulting trust for the estate of the settlor.' The great weight of authority supports the view that upon the failure of an express trust as in this case, the trustee holds the trust estate upon a resulting trust for the heirs of the testator as of the date of the failure of the trust."

The judgment of the trial court is reversed and the cause remanded with directions to render a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

CHARLES BRADEHORST, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

95 N. W. 2d 495

Filed March 20, 1959. No. 34457.

Criminal Law. A bill of exceptions preserving the evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case, and the State's answer thereto, is a prerequisite to a review of the action of the trial court in overruling such plea.

ERROR to the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Schrempp & Lathrop, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for defendant in error.

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

CARTER, J.

The plaintiff in error, subsequently referred to as defendant, was convicted in the district court for Otoe County on the charge of breaking and entering. A sentence of 2 to 4 years in the Nebraska State Reformatory was imposed by the trial court. Defendant seeks a review in this court.

The only error assigned is that the trial court erred in overruling defendant's plea in abatement for the reason that the evidence was insufficient to justify the examining magistrate holding the defendant for trial in the district court.

There is no bill of exceptions. This court has consistently held that, to review a decision of the trial court on error proceedings in a criminal case on a question of fact, it is essential that such evidence be preserved in a proper bill of exceptions. The evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case and the State's answer thereto cannot be reviewed here unless preserved in a bill of exceptions. Burnham v. State, 127 Neb. 370, 255 N. W. 48. In the absence of a bill of exceptions the only issue that can be considered on review by this court is the sufficiency of the pleadings to sustain the judgment. Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82. The pleadings clearly sustain the judgment.

We conclude that defendant's contentions as shown by his assignment of error are not before us for consideration and the judgment of the district court should be affirmed.

AFFIRMED.

RAY H. LARSEN, APPELLANT, V. OMAHA TRANSIT COMPANY, A CORPORATION, FORMERLY KNOWN AS OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, ET AL., APPELLEES.

95 N. W. 2d 554

Filed March 20, 1959. No. 34473.

1. **Negligence.** Contributory negligence is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.
2. ———. Want of ordinary care and not knowledge of the danger is the test of contributory negligence.
3. **Automobiles: Negligence.** If a person in a place of safety sees and is aware of the approach of a motor vehicle in close proximity to him and suddenly moves from the place of safety into the path of the vehicle and is struck, his conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery by him.
4. **Negligence.** An issue concerning contributory negligence is one of fact if different minds may reasonably deduce various conclusions or inferences from the evidence or if there is a conflict of evidence relating to it.
5. **Trial: Appeal and Error.** It is not error to refuse a requested instruction if the substance of it is included in the instructions given.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Donald P. Lay, Frank C. Heinisch and *John J. Higgins, Jr.*, for appellant.

William P. Mueller and *Kennedy, Holland, DeLacy & Svoboda*, for appellees.

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

BOSLAUGH, J.

The petition, the basis for the recovery of damages by appellant from appellees resulting from injuries inflicted upon the former as the result of a collision of appellant and a bus of the Omaha Transit Company

because, as it is alleged, of the negligence of appellees, makes in substance the following statements: The Omaha Transit Company, hereafter referred to as the company, was on December 20, 1954, the owner of a bus operated by Edwin L. May, designated May herein, which collided with appellant at the intersection of Sixteenth and Douglas Streets in Omaha. May was an employee of the company and was acting within the scope of his employment. The collision severely and permanently injured appellant and the proximate cause thereof was the negligence of appellees consisting of failure to keep a proper lookout for pedestrians ahead as the bus of the company was moving from the north toward the south on Sixteenth Street; operating the bus so closely to the curb and sidewalk at the southwest corner of the intersection where the accident occurred when the operator knew or should have known that there were many people standing on the edge of the sidewalk and curb that the right-hand mirror which extended from the bus hit appellant; operating the bus at an unreasonable speed under existing conditions of 25 miles per hour; failure to keep the bus under proper control when by the exercise of due care by the operator thereof the accident could have been avoided; failure to operate the bus in such a manner as to have avoided a collision of it with appellant which could have been done by due care and caution of the operator of it; failure to warn appellant of the approach of the bus in the lane immediately adjacent to the curb; and failure to comply with an ordinance of the city of Omaha, No. 16274, in that the bus was put in motion and was being operated while there was a passenger standing forward of the marker line or strip in the bus in violation of the ordinance. The expectancy of appellant is 28.22 years. The items of damages claimed by appellant are stated in detail.

The answer of appellees admits the company was the owner of the bus and that May was operating it at the

time of the accident, denies all other claims made by appellant, and pleads new matter as follows: The bus, traveling south on Sixteenth Street, crossed Douglas Street on a green light and was proceeding toward the south. Appellant left the sidewalk on the west side of Sixteenth Street south of the east-and-west crosswalk and moved immediately into the path of the bus at a time when it was in such close proximity to appellant that a collision resulted. Any injuries appellant received were the proximate result of his negligence which was more than slight because appellant moved from a place of safety on the sidewalk into the immediate pathway of the bus in such close proximity thereto as to result in an impact between himself and the bus; appellant failed to look toward his left or the north when he stepped from the curb into the street and into the pathway of the bus; and appellant attempted to cross the street at the place he did at a time when the signal lights were red for east-and-west traffic. The new matter in the answer was controverted by a reply.

The verdict was for appellees. A motion for new trial was denied and judgment was rendered in harmony with the verdict. The judgment and denial of the motion for a new trial are the cause of this appeal.

The record contains evidence tending to establish the following matters: The accident occurred about 19 feet south of the southwest corner of the intersection of Sixteenth and Douglas Streets in the city of Omaha on the afternoon of December 20, 1954. Douglas Street is an east-and-west street and Sixteenth Street is a north-and-south street. The former was 60 feet wide west of Sixteenth Street and the latter was 60 feet from curb to curb. The crosswalk on the south side of Douglas Street across Sixteenth Street was 15 feet wide and the crosswalk on the west side of Sixteenth Street across Douglas Street was 18 feet wide. The boundaries of each of the crosswalks were identified and marked by white lines. It was about 19 feet from the south

curb of Douglas Street to the traffic light on the west curb of Sixteenth Street near the west end of the south boundary line of the crosswalk across that street. The traffic light was across the sidewalk to the east from the northeast corner of the Brandeis store building. There was a bench 5 feet long and 25 inches wide on the sidewalk 9 feet south of the traffic light and 3 feet west of the curb on the west side of Sixteenth Street. There were no traffic lane markings on Sixteenth Street.

Appellant was on the afternoon of December 20, 1954, in the Brandeis store and at about 3 o'clock he came out of the store through the north entrance for the purpose of going east to and across Sixteenth Street and to his car which was located some place to the east. There were many pedestrians in the area. There was a tank about 4 feet in diameter near the center of the intersection of the sidewalk on the south side of Douglas Street with the sidewalk on the west side of Sixteenth Street where funds were being solicited and received for the Salvation Army. Appellant walked to the curb on the west side of Sixteenth Street south of the traffic pole which was directly west of the line which marked the south boundary of the crosswalk across Sixteenth Street. The pole was to the left of appellant. He testified he was right against the pole. There was no one between him and the pole.

May had been a bus operator for the company in Omaha for 9 years. He was at the time of the occurrence which is the cause of this litigation in charge of and was operating a bus of his employer identified as bus No. 1406. The bus was at about 3 o'clock in the afternoon of that day proceeding south on the west side of Sixteenth Street north of Douglas Street. It made a stop between Dodge and Douglas Streets to discharge and take on passengers. It then traveled to the crosswalk on the north side of Douglas Street where it momentarily came to a stop or a near stop because of a red traffic light at which time the traffic light changed

to green and the bus proceeded into the intersection of Douglas and Sixteenth Streets. There were no vehicles parked on the west side of Sixteenth Street and the bus traveled near to the west curb of it. When the bus was in the intersection May observed persons standing off the curb on the south side of Douglas Street at or near the southwest corner of the intersection. The horn on the bus was lightly sounded and these persons moved back from the curb. The estimated speed of the bus when it approached the south side of Douglas Street was 10 to 12 miles per hour. About the time the bus approached or entered the crosswalk on the south side of the intersection May saw a man come quickly off, or as he expressed it, "dart off" the curb in the vicinity of the crosswalk. May immediately jammed on the air brakes of the bus and it came almost to a stop as the front of it came in contact with the pedestrian who was later identified as appellant. The brakes were applied with such force that May was brought up out of the driver's seat and over the driving wheel. May estimated the distance of the bus from the man when May saw him move into Sixteenth Street as about 17 or 18 feet. The distance the bus moved after it struck appellant was not more than 3 or 4 feet and there is evidence that it was a less distance. The speed of the bus at the time of the impact was not more than 3 to 5 miles per hour. There was a 4½ percent upgrade at that location and the bus was nearly stopped at the time the accident occurred. The right side of the bus at the time of the accident was estimated as having been from 18 inches to 4 feet east of the west curb of Sixteenth Street. The bus was parallel to the curb. When May first saw appellant he was coming off the curb toward the east into Sixteenth Street south of the south side of the crosswalk. He faced east and made no movement other than forward. The elapsed time after May saw him come into the street in the lane the bus was occupying until appellant contacted the bus

was difficult to measure or express. When the operator of the bus saw appellant he applied its brakes, the appellant was struck, and the bus stopped. There was no opportunity to make measurements or fix any period of time; "* * * it happened very quickly, all right now." The operator was asked: "Would you say as much as 5 seconds elapsed?" His answer was: "It couldn't have been that long." The place of contact of appellant with the bus was on the right front of it. The glass in the front signal light of the bus was broken. It was near the right front corner of the bus. When May suddenly and forcibly applied the air brakes of the bus he was brought up out of the seat he occupied and he saw appellant as he was struck by the right front of the bus and as he was forced from it where he fell near the west curb of Sixteenth Street. Severe injuries were inflicted on appellant and there is evidence that sustains the conclusion that he has some permanent disability.

May, as the bus approached the place of the accident, was in the seat in the bus near the left front of it. The seat is located on a base or platform and a post which supports the seat. The bottom of the seat is 28 inches above the floor of the bus. The driver has easy access to the controls. The bus is so arranged and equipped as to afford the driver unobstructed view in all directions. May was looking in front of the bus and was attentive to its operation and the surroundings before and at the time of the accident.

Dr. Oliver Paul Rosenau and his son of Eustis at about 3 p. m. the day of the accident walked east from Seventeenth Street on the north side of Douglas Street to Sixteenth Street and stopped on the north curb of Douglas Street. They proceeded south from the northwest corner of the intersection of Douglas and Sixteenth Streets. They were the first persons to move south when the traffic light changed to green. There were many people in that area but there was no one who

preceded them across Douglas Street. Dr. Rosenau testified as he approached the south side of Douglas Street he saw what appeared to him to be a number of green bills flying in the air to the east and landing in Sixteenth Street. Some of them landed 2 or 3 feet east of the west curb line and others as far east as the middle of the street. He was then within 3 or 4 feet of the curb on the south side of Douglas Street. About the time the bills landed in the street he saw a man start east off the curb and step east facing Sixteenth Street. He was in the street and the bus hit him. The man who was struck was appellant. He wore a gray topcoat and a gray hat. He was a well-built man but not fat. He was larger and taller than the witness who was 5 feet 8 inches tall. The witness said the man was in the street and was facing east when he was struck by the bus and he did not face in any other direction before he was hit. The bus was about even with the witness as he approached the south curb. It was less than 1 second from the time the man stepped to the east until he was hit by the bus. As the witness and his son came south across Douglas Street they were on the extreme left of the crosswalk with no one preceding them. They were facing the south in that position near the south curb when the accident happened. The witness testified the man stepped from the curb south of the crosswalk a short distance and the bus hit him and threw him toward the curb with his head to the south. The bus was near the west curb of Sixteenth Street.

The son of Dr. Rosenau testified he was in Omaha December 20, 1954, and was with his father on the southwest corner of Douglas and Sixteenth Streets with the intention of going south to the Regis Hotel. They had crossed Douglas Street walking south. The traffic lights for southbound traffic were green as they crossed Douglas Street. He and his father were the first persons to cross the street. They were on the left of the crosswalk. The witness noticed a man between the

traffic signal pole and the refuse box. He stepped out onto the street and almost instantaneously the bus came in contact with him. The witness and his father had reached and were at the curb on Sixteenth and Douglas Streets when the man stepped off the curb to the east and almost at the same time the bus struck him. The injured man was lying in the street after the accident. The witness and his father went to the injured man and witness' father examined him to ascertain if he had been dangerously injured. The bus concerned in the accident stopped almost immediately. It was not going fast at all. It traveled only about 4 feet after the collision. When the injured man went into the street he was facing east and he did not move in any other direction than to the east until he was struck by the bus. The witness was asked how long it was from the time the man left the curb until he was hit and the answer of the witness was that it seemed to be almost instantaneous.

A witness who had lived in Omaha 28 years and who was in charge of mortgage loans and property management for a life insurance company testified he was at Douglas and Sixteenth Streets at about 3 o'clock or a little after on the afternoon of the day of the accident, participating in the Salvation Army Kettle Day Drive for the Junior Chamber of Commerce. He was at about the center of the intersection of the sidewalk on the south side of Douglas Street with the sidewalk on the west side of Sixteenth Street. The number of pedestrians in the area at that time was about average. He testified he looked toward the southeast and he saw the bus and a man stepping off the curb at approximately the same time. The bus was a few feet to the north of the man that was hit and he stepped off of the curb into the right corner of the bus. He moved to the east and he appeared to be looking straight ahead, that is, due east. The witness located the place where the man stepped from the curb into Sixteenth Street as several

feet, probably 4 or 5 feet, south of the south line of the crosswalk. The bus was about even with the traffic light pole when he first saw it and the man who was injured. The bus was then 3 or 4 feet from the man. The bus stopped immediately after the man was struck by the bus and he was thrown to the south. The right side of the bus was near the west curb on Sixteenth Street and the front end of the bus was estimated by witness to have been north of the transit bench on the sidewalk which was south a short distance from the traffic signal light.

A witness who was and had been for several years manager of the membership service department of the Omaha Chamber of Commerce was at the time of the accident at approximately 3 p. m. in the trailer on the east side of Sixteenth Street near the south side of the crosswalk referred to above. The trailer was the headquarters of the Junior Chamber of Commerce during its participation in the Salvation Army Kettle Day. The witness looked through a window to the west from the inside of the trailer and he immediately saw a man struck by the right side of an Omaha Transit Company bus. The man, when the witness saw him, was in a position as if he had been stopped in motion while in the act of stepping. He was facing northeast, more east than any other direction. He was struck by the right front side of the bus and it looked like he got hit on the head. The bus was moving due south and it stopped immediately.

Appellant made a statement on the afternoon of December 21, 1954, reported by a court reporter, in which appellant said he was a manufacturer's representative and sold various lines of candy. He said that he was not working on the kettle drive the day of the accident. He was asked about the accident involving him and a bus and in response thereto he said: "Well, I'll tell you, I just don't think I could tell you anything about it. I got my attorney, Frank Heinisch, on this; I told

my attorney to check into it." Appellant asked the representative of the company who was present at the time to talk with Mr. Heinisch. He said that Mr. Heinisch was not connected with the Mecham office but had his own office in the City National Bank Building. Appellant said he was blank as to what happened at the time of the accident and he would not be able to tell his attorney any more about it than he had included in his statement made to the court reporter and the representative of the company.

This appeal is the second appearance of the case in this court. Larsen v. Omaha Transit Co., 165 Neb. 530, 86 N. W. 2d 564. The disposition of the first appeal is not important to any matter presently at issue.

The jury resolved the issues of the case in favor of appellees. In considering and deciding the sufficiency of the proof to sustain the verdict for them it must be viewed most favorably for them, controverted matters must be decided in their favor, and they must have the benefit of reasonable inferences deducible from the proof. This court is not accorded the duty or authority in reviewing an action at law to resolve conflicts or evaluate evidence. It is presumed in such litigation that all controversy of fact was decided by the jury for the successful party and the finding of a jury on conflicting evidence will not be disturbed unless clearly wrong. Crunk v. Glover, 167 Neb. 816, 95 N. W. 2d 135; Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913. It is because of this that the evidence tending to support the verdict is noted in the foregoing recitation and generally the evidence contradictory to it has been disregarded.

Appellant claims the giving of instruction No. 3 was prejudicial error because it contains in substance the language that defendants (appellees) allege that after the bus operated on Sixteenth Street had crossed Douglas Street and was proceeding south, the plaintiff (appellant), leaving the sidewalk on the west side of Six-

teenth Street at a point a short distance south of the south crosswalk, moved immediately into the path of the bus at a time when the bus was in such close proximity to plaintiff that a collision inevitably resulted and that any injuries suffered by plaintiff were proximately caused by his negligence consisting of his moving from a place of safety on the sidewalk into the pathway of the bus in such close proximity thereto as to result in the impact between him and the bus; his failing to keep a proper lookout toward the north when he stepped into the pathway of the bus; and his attempting to cross the street at the place where he did when the signal traffic lights were red for east-and-west traffic. This instruction advised the jury the defenses of appellees as pleaded in their answer. The charge to the jury informed it that what the court told it as to the pleadings was merely the statements and contentions made therein by the parties to the case and, except as to any admissions therein, were not to be taken by the jury as evidence in the case. It is not claimed by appellant that the trial court incorrectly interpreted or misstated the contents of the answer of appellees. The argument in this regard is that there is lack of competent evidence tending to establish the allegations of the pleading of appellees as set forth in the instruction and that it is prejudicial error to include in a charge to a jury allegations of a pleading concerning which there is no supporting evidence.

Likewise appellant challenges one paragraph in instruction No. 15 to the effect that if one being in a place of safety sees or by the exercise of ordinary care should see an approaching vehicle in close proximity to him, suddenly and voluntarily moves therefrom into the path of the approaching vehicle and is immediately struck by it, his conduct constitutes negligence or contributory negligence in a degree which, as a matter of law, precludes recovery for any injuries he sustained. Also one of the several paragraphs in instruction No.

17 is assigned as error by which the court charged the jury that if it found the plaintiff was negligent and that his negligence was the sole, proximate cause of the accident, the verdict should be for defendants. Finally, appellant asserts that the giving of instruction No. 20 was erroneous. It stated the doctrine of comparative negligence of this state as applied to this case and as interpreted by the trial court. The comment of appellant concerning this instruction is that it "was the standard instruction on comparative negligence, as the doctrine exists under the laws of the State of Nebraska." This analysis of the instruction precludes the necessity of any defense of its appropriateness as a statement of the law of comparative negligence.

The objection of appellant to these instructions is that they were each inappropriate because there was no evidence to which they could have been applied by the jury. Appellant insists that there was no evidence of any negligence on his part and that the issue of contributory negligence should not have been submitted to the jury. The detailed recital of the evidence made above demonstrates that there was substantial evidence, direct and circumstantial, tending to establish contributory negligence of appellant as to each of the specifications of negligence made in the answer of appellees. The trial court was correct in submitting the issue concerning negligence to the jury.

Strnad v. Mahr, 165 Neb. 628, 86 N. W. 2d 784, states: "Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of."

Want of ordinary care and not knowledge of the danger is the test of contributory negligence. Farag v. Weldon, 163 Neb. 544, 80 N. W. 2d 568.

In Travinsky v. Omaha & C. B. St. Ry. Co., 137 Neb.

168, 288 N. W. 512, the court said: "The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision." See, also, Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614.

Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144, declares: "When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery."

Crunk v. Glover, *supra,* states: "If there is evidence which sustains a finding for the litigant who has the burden of proof in an action at law, the trial court may not determine it and decide the case as a matter of law."

The version of the events culminating in the accident, as stated by appellant, was that he came out of the Brandeis store about 3 o'clock p. m. on the day of the accident with the intention of going east across Sixteenth Street. He went to the curb on the west side of that street and stood right against the traffic light pole. He was to the south of it. The traffic light at that time was red for east-and-west traffic. He stopped and "* * * I had a sudden push behind me." He was asked: "You don't know who or anything?" His answer was: "No." He said because of this he went out about two steps into what is spoken of as the parking lane, the one closest to the curb, and when he came to a halt he was off balance and more stooped but he did not fall down. He said he saw a bus coming from the north in the driving lane which was east of the parking lane and about one-half of the bus or the front 20 feet of it was in the intersection. Appellant started backing up toward the curb and he got back with one

foot on the curb and was struck by the bus. The next thing he remembered was that evening. He was then in the hospital. He said there was a large number of people on the sidewalk. It was very crowded and he had to work his way through the crowd from the street to the curb. There was no one produced as a witness to corroborate appellant in any particular concerning his story of the happenings before and at the time of the accident. No witness saw him pushed or saw him backing up from about two steps out in Sixteenth Street to the curb. If appellant saw the bus when the front 20 feet of it were in the intersection, the bus was then not less than 59 feet north of appellant and he was, according to his own testimony, then on his feet and only two steps from safety. He assigns no reason for attempting to back up to the curb and into a crowd which he would like to have believed propelled him from the sidewalk and about two steps out into Sixteenth Street. The purpose of this recitation is to demonstrate that there was a controversy as to the facts concerning the accident. The essentials of an issue of fact existed concerning the contributory negligence of appellant. Reasonable minds could have reached different conclusions from the evidence in the case. Issues of negligence, contributory negligence, and degrees of negligence are, when the evidence is conflicting, for determination by a jury. It is said in Owen v. Moore, 166 Neb. 239, 88 N. W. 2d 768: "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."

Appellant tendered and requested four instructions discussing the duty of a motorist operating a vehicle in a congested area. The predominant theme of these is that it is the duty of a driver of a motor vehicle to

exercise reasonable care in its operation; and if pedestrians are numerous and traffic is congested, the degree of care required must be commensurate with the danger reasonably to be anticipated. The charge given to the jury included all the essentials of these though not in the identical language. Instruction No. 11 given by the trial court advised the jury that the following rules of law are applicable to all drivers of motor vehicles in this state and then stated the following: "A driver of a motor vehicle should at all times keep a reasonably careful lookout and have his motor vehicle under such reasonable control as will enable him to avoid collision with pedestrians, assuming that the pedestrians will exercise due care. 'Reasonable control' by drivers of motor vehicles is such control as will enable them to avoid collision with pedestrians who are without negligence in streets or intersections * * *. It is the duty of a driver of a motor vehicle to keep a constant lookout in the direction of anticipated danger. The duty to keep a lookout implies a duty to see that which is in view and to act with due care in accordance with the circumstances." The court also said in instruction No. 13: "* * * the operator of the bus had the duty to keep a constant lookout in the direction of anticipated danger, to see that which was in his view, and to have the bus under such reasonable control as to enable him to avoid collision with pedestrians assuming that they would exercise due care for their own safety; in short, it was his duty to exercise due care for his own safety and for the safety of others under all the surrounding circumstances and conditions existing. Unless and until he had warning, notice or knowledge of danger of a collision with pedestrians, and especially the plaintiff, or by the exercise of due care should have had such warning, notice or knowledge, he had the right to govern his actions accordingly so long as he continued to exercise due care under the surrounding circumstances. It is for you to determine from the evidence what the

surrounding circumstances and conditions were at the time and place of this accident and whether the operator of the bus exercised such care and caution as a reasonably careful and prudent person would have exercised under the same circumstances and conditions. If you find that he failed to exercise such due care, he was negligent."

It is not error to refuse a requested instruction if the substance of it is included in the instructions given. Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677; Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677.

An objection is made because instructions Nos. 5 and 13 tendered and requested by appellant were refused. The first of these included the matter of the operation of a motor vehicle at a reasonable rate of speed and the second of these proposals concerned the duty of the operator of a motor vehicle to give warning of its approach. The record in this case did not justify the giving of either of these. There was no evidence by appellant of any rate of speed of the bus and no proof of any unreasonable speed by it. The comment in the opinion in the former appeal in this case, Larsen v. Omaha Transit Co., *supra,* is appropriate: "At this point it is pointed out that the third and sixth specifications do not, on the record made, present a basis for recovery. The third charges that the bus was operated at an unreasonable rate of speed but there is no evidence of speed and none from which a reasonable inference of speed could be drawn. As to the sixth, there was nothing which could have required the giving of a warning prior to the time the plaintiff emerged into the street, and thereafter he knew of the position of the bus, * * * therefore the warning could have availed plaintiff nothing."

There was a request by appellees in the presence of the jury that it be allowed to view the bus which was involved in the accident, the subject of this litigation. Appellant argues that the manner and place of the re-

quest was improper and prejudicial. There was no objection thereto made by appellant at the time of the request on the ground that it was made in the presence of the jury; likewise there is no assignment of error in the motion for new trial in this respect. The request was made by appellees and counsel for appellant immediately stated that he had no objection to the request if some person was during the inspection of the bus standing with his hand over the token box. The court rejected that suggestion and appellant then objected to the request of appellees because there were photographs and a diagram of the bus in evidence in the case and a view of the bus by the jury would only be an accumulative type of evidence; and that the bus did not reflect the condition and view at the time it was in the accident. The court permitted the jury to view the bus in a street adjacent to the courthouse. The jury was in charge of the bailiff of the court and the jurors were not permitted to talk with anyone or among themselves while the bus was being viewed. The court properly advised and admonished the jury and the bailiff before they left the courtroom to make the inspection.

The record shows that it was established before the view of bus No. 1406 that there had been no change of any kind in it since the date of the accident. It is provided by statute that the court may in its discretion permit the jury, when it is believed proper, to view property the subject of litigation or the place in which any material fact occurred. The jury must be conducted in a body in charge of an officer and the view made in the presence of a person appointed by the court for that purpose. § 25-1108, R. R. S. 1943. This statute was observed in this instance and it was approved practice to permit such an inspection by the jury under the circumstances of this case. In Denison v. Omaha & C. B. St. Ry. Co., 135 Neb. 307, 280 N. W. 905, this court said: "Section 20-1108, Comp. St. 1929, gives the court the right to permit a jury to view property in litigation, or

the place where a material fact occurred. Under this law, it was proper for the jury, properly cautioned, to go in a body, in charge of the bailiff, to view the mechanism of a street car for closing the rear door, the same being on a track adjacent to the courthouse."

The record exhibits nothing from which it could be properly concluded that appellant was prejudiced because of the view by the jury of the bus. It must affirmatively appear from the record, to warrant the reversal of a judgment, that the action with respect to which error is alleged was prejudicial to the rights of the complaining party. Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151.

The judgment should be and it is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

IN RE APPLICATION OF WALLACE C. WALKER, DOING BUSINESS AS MODERN BODY SHOP, SCOTTSBLUFF, NEBRASKA. WALLACE C. WALKER, DOING BUSINESS AS MODERN BODY SHOP, APPELLEE, V. MORGAN DRIVE AWAY, INC., APPELLANT.

95 N. W. 2d 564

Filed March 20, 1959. No. 34496.

Public Service Commissions. Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Story, Pilcher & Howard, for appellant.

Richard S. Wiles, Harrison F. Russell, Holtorf & Hansen, and *Charles F. Fitzke,* for appellee.

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

SIMMONS, C. J.

This is an appeal from an order of the Nebraska State Railway Commission granting a certificate of public convenience and necessity to Wallace C. Walker, doing business as Modern Body Shop.

The intervener protestant, and appellant here, is Morgan Drive Away, Inc., of Elkhart, Indiana. The above entities will be referred to herein as the commission, Walker, and Morgan.

Walker's application for a certificate was filed on June 1, 1956. It was granted September 18, 1956. Morgan moved for rehearing on the ground that it was entitled to and had received no notice of the application. The commission considered that matter and, on September 23, 1957, sustained Morgan's objections and set the matter for rehearing. During this period Walker was operating under his certificate. Evidence as to those operations during that period was offered at the rehearing. Its admission by the commission is assigned here as error. We consider and determine that issue adverse to Morgan.

On May 28, 1958, the commission granted a certificate. Morgan moved for rehearing. The motion was overruled on June 20, 1958. Morgan appealed to this court from that order. Certified copy of the notice of appeal was filed here on July 3, 1958.

On June 30, 1958, application was filed with the commission to transfer the certificate to a partnership signed jointly by the partnership and Walker. Notice of hearing on this application was sent out by the commission on July 9, 1958. On July 15, 1958, the commission entered an order issued against Walker to show cause why the certificate should not be revoked. On September 17, 1958, the commission sustained the order to show cause and cancelled the certificate of Walker. On the same day it granted a certificate to the partnership.

Walker contends here that the issue involved in this

appeal is now moot as a result of the cancellation of his certificate. We do not deem it necessary to decide that question. We consider the issues presented otherwise and affirm the order of the commission.

The certificate of public convenience and necessity provided:

"A. SERVICE AND ROUTE OR TERRITORY AUTHORIZED: Wrecked or disabled motor vehicles by winch or tow truck between points and places within a 40-mile radius of Scottsbluff, Nebraska, and, between points and places within said radial area on the one hand, and, on the other hand, points and places in the State of Nebraska, over irregular routes.

"B. SERVICE AND ROUTE OR TERRITORY AUTHORIZED: New and used house trailers by winch or tow truck between points and places in the State of Nebraska, over irregular routes.

"RESTRICTION: Terminals shall not be established and or motor vehicle equipment stationed in any place other than Scottsbluff, Nebraska."

Morgan challenges here that part of the certificate that relates to "new and used house trailers by winch or tow truck between points and places in the State of Nebraska, over irregular routes."

It is a matter of common knowledge that the panhandle area of Nebraska is roughly 400 miles or more from the heavily populated industrial areas of the eastern part of the state. The evidence is that Scottsbluff, in the panhandle, is 450 miles from the metropolitan city of Omaha. In that area there has been in the last half century extensive irrigation development, and improvement of dry land farming methods; the livestock industry in the ranch areas has grown; and considerable oil production has developed. As a result of these things there has been a large industrial development and population growth in that part of Nebraska. This geographical situation presents problems of common carrier service to the commission that might not arise were it not

for the intervening distances between the two parts of the state.

The evidence here is that there are between 3,000 to 5,000 mobile homes in the panhandle area. They are used extensively by employees in the oil industry. That segment of owners are so employed that when need arises they require prompt, efficient, and economical service. Other homes are often moved from parking area to parking area, and in, to, and from that section of the state. All desire prompt, efficient, and economical service when the time to move occurs. This sort of towing also has its seasonal aspects.

Movements of trailers are described as initial and secondary. The initial movements are those from point of manufacture to point of destination. All other movements are secondary movements.

There are mobile home businesses conducted at Alliance, Kimball, and Scottsbluff. They desire and use initial and secondary movements. Home owners repeatedly contact them for common carrier service in secondary movements. Insurance company representatives need and use secondary movement service in hauling mobile homes to a place for repair or estimate of damages.

Walker produced evidence that these people need and desire common carrier service with a terminal in that area. The witnesses generally testified that the need is one of quick service; and service where they can, by direct contact with a carrier, make all needed arrangements.

The weather also enters into consideration. Road conditions delay movements. Western Nebraska has its own adverse weather problems, separate and distinct at times, from those of eastern Nebraska.

We refer later herein to Morgan's system of handling this business. We point out now that generally tractors for movements of this kind in western Nebraska are dispatched from Omaha. If eastern Nebraska is

subject to adverse weather conditions and western Nebraska is not, service could be delayed under circumstances that would not delay a western Nebraska based carrier.

Western Nebraska users of this type of carrier service point out also that there is on occasion damage to homes in transit, and that those claims can more easily be adjusted with a carrier based in western Nebraska.

The commission had full authority to weigh all these factors in exercising its judgment in the matter.

Walker operated a body repair shop. He had three employees and one truck equipped to tow trailers.

Walker testified that he had towed trailers beginning on September 18, 1956. He was then asked to describe the territory of his operations. Morgan objected on various grounds, finally stating that it wanted "copies of his billings, point of origin to point of destination, the commodity hauled, and the tariff charged."

Walker testified that his records were in the hands of an auditor for income tax purposes. After prolonged objection, it was agreed that he would furnish the information to the commission after the hearing was closed before the examiner.

Walker then filed copies of 18 statements of account rendered to customers, each giving the exact information which Morgan stated it wanted, plus the name of the party served. This is referred to as "Late filed Exhibit 6." As we see it, Morgan got exactly what it asked for and is in no position to complain. It first uses the exhibit here as a ground of impeachment of testimony of Walker's witnesses. Having done so, it then argues error in the admission of the evidence.

Neither party here undertakes to advise us as to the power of this court to review rulings on evidence made by the commission. We do not determine the assignment on that basis, but rather on the fact that, putting "Late filed Exhibit 6" aside, there is ample evidence in this record to sustain the order of the commission.

Walker testified, over objection of Morgan, that he had requests for towing of trailers two or three times a week; that they involved secondary hauls out of the state, but most of the requests were for intrastate hauls within a radius of 80 miles of Scottsbluff; and that between September 18, 1956, and September 23, 1957, he towed approximately one mobile home a week.

Morgan argues here that the commission had no authority to consider this hauling during the period Walker held the certificate that was later cancelled. Here again we do not determine our power to review rulings of the commission and, assuming that the commission considered this evidence, it is patent that it had a right to do so. The evidence went not to the question of the legality of the hauls, but to the fact of the hauls as it related to the issue of public convenience and necessity. See, Crichton v. United States, 56 F. Supp. 876; St. Johnsbury Trucking Co. v. United States, 99 F. Supp. 977.

The evidence is that there was no other common carrier in the Scottsbluff area authorized to perform the service here involved. There is evidence that there was one such certificate holder at Sidney.

Morgan has a terminal at Loveland, Colorado. The evidence is, however, that tractors assigned to that terminal have no Nebraska intrastate authority. Morgan has its principal Nebraska terminal at Omaha, and another at Falls City, from which points apparently it operates both intrastate and interstate. Morgan also has one tractor stationed at Grand Island, where it has a driver-agent. This one tractor terminal is maintained at Grand Island either exclusively or primarily for initial haul service originating at a factory at Grand Island. Morgan offered testimony that it was not economically justifiable to station more equipment at Grand Island and that it had no intention of doing so under existing conditions. Neither did it have any intention of establishing an "office" at Scottsbluff.

Morgan's method of handling business originating in the panhandle area is generally as follows: Prospective shippers could telephone collect to Loveland, in which event the call would be relayed to the Omaha terminal, or they could telephone collect to Omaha and place the order. Morgan would then dispatch a tractor to western Nebraska from Omaha to perform the service. The normal time involved from the call to delivery of a tractor at point of service was at least 22 hours. To this there are two exceptions:

If Morgan had a tractor making a delivery in western Nebraska, the driver before returning to Omaha was expected to call the Omaha terminal. If there were then business that the tractor had license authority to handle, it would be directed to perform the service. That might shorten the elapsed time between the call and the service. The evidence contains no indication as to the extent of the expedited service thus furnished.

The other exception is that, if weather or other unusual conditions existed, the dispatch of a carrier to perform the service might be delayed. Just how often this occurred does not appear.

The commission then had to decide whether to issue a certificate to a person ready, willing, and able to serve with a terminal at Scottsbluff in the area where the service was required, or to deny the certificate and compel shippers to accept the service which Morgan deems adequate. It decided to authorize the service requested by Walker. It had full authority to do so.

Morgan relies on our decisions antedating Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464. The fact situation there presented was similar to the problem here. We there reviewed the statutory authority of the commission and some of our decisions. We held: "In this instance there appears no order of the commission requiring the existing carriers to provide adequate service. Such an order was not required for here the certified carriers able to render adequate service clearly

indicated an unwillingness to furnish the required service except under conditions as to time of service, cost, and adequacy which the carriers desired to control or unless otherwise they could find assurance of profitable operations. The commission accepted the alternative and issued a certificate to an applicant found, and shown without dispute, to be fit, willing, and able properly to perform the service required by the shipping public. Its decision in this regard cannot be held to be unreasonable or arbitrary."

We followed that decision in Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310; in Johnson v. Peake, 163 Neb. 18, 77 N. W. 2d 670; and in Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915. We adhere to that decision.

We restate the holding: "Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily." Dalton v. Kinney, *supra.*

Morgan assigns as error the granting of authority to Walker to transport house trailers in initial movements and in granting state-wide authority. Morgan gives brief attention to these assignments in its argument. Error is not demonstrated.

The order of the commission is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

ROSALEE SCHALK, APPELLANT, V. EDWIN SCHALK, APPELLEE.
95 N. W. 2d 545

Filed March 20, 1959. No. 34520.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evi-

dence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

2. **Divorce.** Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" as defined in section 42-302, R. R. S. 1943.
3. ———. Where a husband, having sufficient ability, without just cause, fails and absolutely refuses to contribute anything to the support of his wife, the court may grant her a decree of divorce.
4. **Husband and Wife: Domicile.** A wife is not prevented, for good cause shown, from having a domicile or residence separate and apart from that of her husband.
5. **Divorce.** It is the duty of the husband to provide for the reasonable support and maintenance of his wife during the continuance of the marriage relation; and, when the husband without just cause fails to provide for the support and maintenance of the wife, she may maintain an action against him for reasonable maintenance, unless by her own act of abandonment of the husband's domicile, or some other act wholly inconsistent with her duty as his wife, she has forfeited her right to such maintenance.
6. ———. To defeat a wife's claim for support and maintenance on the ground of voluntary abandonment of the husband's domicile, the fact of such abandonment must be established by cogent proof.
7. ———. 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.
8. ———. 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.
9. ———. 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.
10. ———. The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.

11. ———. In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse.
12. **Parent and Child.** The fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children.

APPEAL from the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Reversed and remanded with directions.*

Wellensiek & Morrissey, for appellant.

Moran & James, for appellee.

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

CHAPPELL, J.

Plaintiff, Rosalee Schalk, filed a petition in the district court for Otoe County, seeking an absolute divorce from defendant, Edwin Schalk, and the custody of their minor children, together with an allowance for their support, alimony, attorneys' fees, and costs. Plaintiff's petition alleged in substance that defendant had been guilty of extreme cruelty by continuously quarreling with, abusing, and using abusive language toward plaintiff; and that defendant had failed and refused to support her and the children after telling plaintiff to leave their home and never return. A hearing on plaintiff's motion for temporary allowances followed, and on January 25, 1958, the trial court ordered defendant to pay $10 a week as child support until further order of the court, and ordered defendant to pay $15 suit money and $50 temporary attorneys' fees.

Thereafter, defendant filed an answer, the substance of which was to deny generally and deny that he had failed to support plaintiff and the children up to the time plaintiff voluntarily left their home. Defendant also alleged that any quarrels with plaintiff were justi-

fied as the result of conduct of plaintiff in associating with unnamed persons over objections of defendant, which associations were not in the best interests of their children, whose interests would allegedly be best served by giving their custody to defendant. However, defendant's prayer was simply for dismissal of plaintiff's petition. Plaintiff's reply was a general denial.

After a trial on the merits, a decree was rendered which found and adjudged that plaintiff had failed to prove a cause of action for divorce, and dismissed her petition. Costs of suit were taxed to defendant, but plaintiff was denied any allowance of additional fees for the services of her attorneys. Plaintiff's motion for new trial was overruled, and she appealed, assigning and arguing that the trial court erred in denying plaintiff a divorce and other relief sought by her for the reason that the charges made by plaintiff were amply sustained by the evidence. We sustain the assignment.

It is now elementary that: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786. However, in that opinion we called attention to the fact, as we do here also, that: "* * * the version accepted must be supported by credible evidence."

There are other well-established rules which we should consider in disposing of the issues presented in this case. In that connection we recently reaffirmed in Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, that: "Any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair

the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes 'extreme cruelty' as defined in section 42-302, R. R. S. 1943."

We have also held that: "Where a husband, having sufficient ability, without just cause, fails and absolutely refuses to contribute anything to the support of his wife, the court may grant her a decree of divorce." Svanda v. Svanda, 93 Neb. 404, 140 N. W. 777, 47 L. R. A. N. S. 666.

In that connection, a wife is not prevented, for good cause shown, from having a domicile or residence separate and apart from that of her husband. Wray v. Wray, 149 Neb. 376, 31 N. W. 2d 228.

Also, in Price v. Price, 75 Neb. 552, 106 N. W. 657, this court held that: "It is the duty of the husband to provide for the reasonable support and maintenance of his wife during the continuance of the marriage relation; and, when the husband without just cause fails to provide for the support and maintenance of the wife, she may maintain an action against him for reasonable maintenance, unless by her own act of abandonment of the husband's domicile, or some other act wholly inconsistent with her duty as his wife, she has forfeited her right to such maintenance.

"To defeat a wife's claim for support and maintenance on the ground of voluntary abandonment of the husband's domicile, the fact of such abandonment must be established by cogent proof."

In Studley v. Studley, 129 Neb. 784, 263 N. W. 139, it was held, quoting from Peyton v. Peyton, 97 Neb. 663, 151 N. W. 150: " 'A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce, even if the conduct of the other party has been grossly more culpable. In such case the court will deny relief to either.' "

In Egbert v. Egbert, 149 Neb. 227, 30 N. W. 2d 669, after quoting from section 42-304, R. R. S. 1943, and cit-

ing authorities, this court held that: "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."

However, long ago this court held that: "Mere austerity of temper and petulance of manners of the wife are not sufficient to defeat a divorce on the ground of extreme cruelty of the husband by blows inflicted by him on her." Boeck v. Boeck, 16 Neb. 196, 20 N. W. 223.

Also, as recently as Stephens v. Stephens, 143 Neb. 711, 10 N. W. 2d 620, this court held that: "Misconduct on the part of the plaintiff in an action for divorce, not amounting to a statutory ground for divorce, affords no justification for punishment inflicted upon such plaintiff by the defendant in retaliation out of all proportion to such misconduct."

In Hefti v. Hefti, 166 Neb. 181, 88 N. W. 2d 231, we held that: "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."

In that connection, in Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300, we held that: "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."

Also, in Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361, we held: "The proper rule in a divorce case, where the custody of minor children is involved, is that the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of fit, proper, and suitable parents.

"In awarding the custody of minor children, the court looks to the best interests of such children, and those of tender age are usually awarded to the mother. Other

considerations being equal, it is usual to award the custody of children to the innocent spouse."

With regard to the support of minor children, this court concluded in Geary v. Geary, 102 Neb. 511, 167 N. W. 778, 20 A. L. R. 809, that: The fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children. See, also, section 42-311, R. R. S. 1943; York v. York, 138 Neb. 224, 292 N. W. 385; and Dier v. Dier, 141 Neb. 685, 4 N. W. 2d 731, which give authority and point out the factors or elements to be considered by the court in decreeing just and proper support and maintenance of minor children of the parties.

In the light of the foregoing rules, we have examined the record. As summarized, it discloses the following facts which were either without dispute or were adduced by plaintiff and amply corroborated by the two younger children of the parties, by a neighbor woman who had long been a friend of plaintiff, and by plaintiff's physician. At time of trial, plaintiff was 37 years old. The parties were married April 14, 1936. Three boys and one girl were issue of the marriage. The oldest son was 20 years old and self-supporting at time of trial. He had enlisted in the United States Air Force in Texas on April 4, 1955, when he was 17 years old. At that time he had refused to return to the family home and had so enlisted because of his father's abuse whether the boy was right or wrong and because he could not get along with his father. The next oldest son was 15 years old, the daughter was 14 years old, and the youngest son was 12 years old at time of trial.

The parties had lived on farms as tenants or employees before moving to Nebraska City on August 27, 1950. There they moved into a home which had just previously been purchased in the names of plaintiff and defendant. It had been purchased for $2,700 with cash accumulated during the marriage and a $1,200 mortgage loan. Sometime later the property was improved at a cost of about

$1,200. Both plaintiff and defendant had assisted in the purchase and improvements of the property. At time of trial there was a balance of about $400 still owing on the mortgage, which was payable $30 a month, and a balance of about $600 still owing on improvements, which was payable $42.61 a month. Both parties had helped make such payments and provide for the children as well until in August 1957, when plaintiff took the two youngest children and left the home, as commanded by defendant. In that connection, after August 1957, defendant made no effort to personally contact plaintiff, and from that time until ordered by the trial court to do so on January 25, 1958, defendant admittedly contributed nothing for the support and maintenance of plaintiff and the two youngest children.

At time of trial plaintiff was earning about $42 a week and defendant was earning about $50 to $60 a week. Each party then owned almost identical Chevrolet cars which were paid for. Also, the aforesaid home, purchased by the parties, was well furnished with good furniture and equipment which had been purchased by them. In that connection, when plaintiff left that home in August 1957, she took a few necessaries with her. They are of no consequence here.

The parties had been having marital difficulties of one kind or another for almost 10 years. They had more serious trouble during the last 5 years. Defendant was ill for a time with a blood clot at the back of his head. He was unable to work for some time and they had financial difficulties with family bills accumulating and accumulated, and they had no money to pay them. In that situation, plaintiff wanted to get employment as was required in order to provide for the family, but defendant objected on the ground that plaintiff should borrow the necessary money, telling her that she just wanted to get away from him. Nevertheless, plaintiff did obtain employment and provided for the family until defendant was able to work again. In that con-

nection, there was not then enough money available to meet family expenses, so plaintiff continued to work, and until August 1957, she helped make payments on the home and pay the family expenses.

In the meantime, after defendant's illness he recovered physically but gradually become sexually incompetent and the family relationship went from bad to worse. Defendant in that condition berated himself to himself and others in the home and elsewhere. He was violently critical of plaintiff on numerous occasions for making the children work around the home and for disciplining the children, which had to be done but defendant refused to do so. Without cause he accused plaintiff of abusing the children and told them they did not need to do what plaintiff told them to do.

Two or three times a week or oftener defendant would become angry and tell plaintiff she was no good; that she had no brains; and to get out of the house and stay out. Defendant used abusive and profane language to plaintiff and called her vile names in the presence of the children and others. Such language was too profane and vile to speak to anyone anywhere, and certainly too profane and vile to repeat here. Defendant himself testified that he didn't think he ever called plaintiff such names in the presence of the children, but he didn't know whether he did or not.

Defendant struck plaintiff in anger on two occasions. He slapped her once. He struck her with his fist and knocked her against a door which skinned her shoulder on another occasion. At another time he attempted to and admittedly did choke plaintiff. Once defendant made a suicide attempt. Plaintiff would awaken at night in fear because defendant would be standing in the door looking at her. He threatened plaintiff on many occasions until she became afraid. She became so nervous and emotionally upset during their quarrels and when defendant would tell her to get out that she would leave the house crying and go over to the home of

one or the other of two women friends. There she would pour out her troubles, or she would go uptown to drink a little to quiet her nerves until defendant had quieted down or retired, when she would return to their house. Several times defendant locked her out of the house and she had to awaken the family or even crawl through a window to get back into the house. Defendant objected to plaintiff inviting her women friends to their home for social gatherings. The few times that she did so, defendant sat staring, sullen and silent in their presence, and when they left he made uncomplimentary remarks about them, so plaintiff had no more such company.

Repeatedly defendant told plaintiff: "'Somebody's going to get hurt. You just better watch out, somebody's going to get hurt.'" Defendant admittedly told plaintiff that, but testified that he meant some person other than plaintiff. Be that as it may, he also told plaintiff: "'You are going to get hurt,'" and "'* * * I am going to choke you,'" which defendant admittedly did do.

Defendant told his youngest son to leave and get out. He repeated that just before plaintiff left, after defendant had repeatedly told plaintiff to get out, to stay out, and never come back. In that situation, plaintiff looked for an apartment so she could get out as he had demanded, but found no suitable apartment. However, in August 1957, plaintiff found a suitable house which rented for $40 a month. Plaintiff then moved into that house with the two youngest children, where plaintiff paid the rent and provided for herself and the two children. Such children had chosen to go with plaintiff, but the next oldest son had chosen to stay with his father in the family home. In that connection, as a witness called by his father, that son, who would never mind his mother, admitted that he saw his father angrily slap his mother once, but "Not too awful hard." However, he testified that they had arguments but he never heard his father call his mother names; that he never

heard him tell his mother and brother to leave; and that he never saw his mother leave crying, all of which was simply equivocal negative evidence and contrary to the positive testimony of his mother, his sister, and his brother, and was contrary in part to the positive testimony of another witness called by plaintiff.

As a result of their arguments and marital difficulties, plaintiff became so nervous, sleepless, and upset with emotional anxiety that she began taking aspirin, smoking cigarettes, and drinking a little, but never too much, in an effort to escape her anxiety. She consulted a physician who gave her shots in the arm and sedatives. In 1955 he advised her to get away to improve her condition, so she took the children and went to her brother's home in Texas where she stayed 6 weeks. Upon becoming somewhat improved, she returned with their children except the oldest 17-year old son who refused to return and joined the Air Force for reasons heretofore stated.

Upon her return, plaintiff immediately went back to work, but her nervousness and emotional anxiety became worse as her marital difficulties and arguments became more numerous. When that occurred and defendant told her to get out of the house she would again and again, from one to five times a week, leave and go nervous and crying to the homes of women friends and pour out her troubles. Once while at one of such homes she laid down to recuperate and went to sleep and didn't awaken until morning, which resulted in a violent angry quarrel and accusations by defendant.

Plaintiff and defendant worked different hours and at different places. Her work was farther away and they had trouble about meeting each other in going to and from work with one car, whereupon defendant would become angry and his usual abuse and accusations would follow. To avoid that difficulty, plaintiff bought a Chevrolet car for her own use in February 1956, but their troubles continued about its use and other matters.

Since leaving the home plaintiff has quit smoking, drinks but little, and her nervous condition and emotional anxiety have subsided. Plaintiff and the two younger children, who chose to live with plaintiff, are happy and for the first time they are at peace in their new home. Defendant himself admitted that their old home was never a happy one during the last few years and that the parties had marital difficulties over a long period of time.

Defendant repeatedly over the years has charged plaintiff with associating with other men, but strange as it may seem he testified that he wanted a reconciliation, although admittedly he had made no effort to obtain a reconciliation. As a matter of fact, he had not even talked with plaintiff since August 1957. At the trial, defendant testified that their troubles were caused by plaintiff staying out late at night and associating with other men, and that he had seen plaintiff with other men a half dozen times. He named six such men but gave no evidence of where or when he saw them, or what they were doing, or that plaintiff had been guilty of any misconduct with them. Defendant's general theory was that if plaintiff was in a tavern with women friends where men were present, or was in a place of business where there were other men, that plaintiff was associating with such men. One such man was the party who delivered fuel oil to their home at required intervals as long ago as 1951. On one other occasion, he had stopped at their home to borrow a spade and on another he had stopped to borrow a chain while plaintiff and the children were there. Another party was foreman at the place where plaintiff had worked. Another was the foreman where she worked at time of trial. That person also owned the home rented by plaintiff. He was the husband of one of plaintiff's best friends with whom she often consulted about her marital difficulties, and who informed plaintiff that the house could be rented by her. Another such party was at their

home on occasions because his family and the parties herein had been close personal and social friends. Admittedly, defendant himself had once asked such man to take plaintiff home and he did so. In that connection, the chief of police testified as a witness for defendant that on January 26, 1957, at 11:55 p. m., he saw plaintiff in the company of that man driving along the streets of Nebraska City, and that at another unspecified time he saw plaintiff stop her car, whereupon another named man got in and they drove on. He also testified that he had seen plaintiff driving her car around town alone late at night, but he had also seen other women doing so. He had also seen plaintiff in the bank and the store buying groceries, but he had never seen plaintiff in a tavern.

Neither the chief of police nor any other witness testified that plaintiff had been guilty of any specific misconduct, or that she was not a good woman or mother, or that she was unfit to have the custody of their children. As a matter of fact, there is ample evidence that plaintiff was a good woman and mother who was fit to have their custody. Simply being seen in a place of business where other men were present, or simply driving her car with a man other than her husband in it, or riding in a car driven by a man other than her husband, cannot be said under the evidence in this case to be misconduct. As a matter of course, we are not convinced that plaintiff was guilty of any misconduct under the circumstances appearing in this record. Evidently defendant simply had an unjustifiable suspicion that plaintiff was guilty of some misconduct which caused him to be inexcusably and unjustifiably guilty of extreme cruelty to plaintiff. The evidence in this record is wholly insufficient to support defendant's contentions or to sustain the judgment of the trial court on any theory. Rather, the evidence overwhelmingly supports plaintiff's contentions and sustains her right to the relief sought by her. We are convinced that the object

of this marriage has been destroyed beyond repair by defendant's own inexcusable and unjustifiable conduct.

For reasons heretofore stated we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to grant plaintiff an absolute divorce and award her the custody, care, and control of the two youngest children with right of reasonable visitation by defendant, together with an allowance of $10 a week to be paid to the clerk of the district court by defendant for their maintenance and support until each and both children reach their majority or are self-supporting. The custody of the next oldest son, now 16 years old, who has chosen to stay with defendant, shall be awarded to defendant with right of reasonable visitation by plaintiff and the other children. Plaintiff shall also be awarded absolutely all the furniture and household equipment now in the home owned by plaintiff and defendant, and plaintiff shall be immediately awarded the exclusive possession and use of the home now owned by plaintiff and defendant for the use and benefit of plaintiff and the two youngest children until the majority of each and both of them, or until they are self-supporting, or until plaintiff remarries. Upon the happening of any such event, their said home, unless theretofore disposed of by agreement of the parties, shall be sold at the best price obtainable and the proceeds therefrom divided equally between plaintiff and defendant. In the meantime, defendant shall each month when due timely pay to the clerk of the district court for plaintiff's benefit $36.31, which is one-half of the respective monthly balances of $30 due on the home loan and one-half of the respective monthly balances of $42.61 due on the improvements thereof, until all said monthly balances due are paid in full. In that connection, plaintiff shall collect from the clerk of the district court such respective payments aforesaid ordered paid by defendant to the clerk of the district court, then timely add thereto

the other respective one-halves or $36.31 which plaintiff shall be required to pay out of her own funds, and remit the full monthly balances so paid each month to the respective mortgagee of the loan on their home and creditors who furnished the improvements, until all the monthly payments due are paid in full. All costs, including an additional allowance of $350 as attorneys' fees for the services of plaintiff's attorneys in the district court and this court, shall be and are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF JAMES E. NELSON, DECEASED.
ALEX PESTER AND HARRY LEHR, ADMINISTRATORS OF THE ESTATE OF EDWARD PESTER, DECEASED, APPELLANTS, V. JAMES NELSON AND AUGUST GRASSMICK, ADMINISTRATORS OF THE ESTATE OF JAMES E. NELSON, DECEASED, APPELLEES.
95 N. W. 2d 491

Filed March 20, 1959. No. 34522.

1. **Automobiles: Negligence.** By the terms of section 39-740, R. R. S. 1943, the owner or operator of a motor vehicle shall not be held liable for damages to a passenger or person riding in such vehicle as a guest or by invitation and not for hire, unless the damage is caused by the driver being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such vehicle.
2. ———: ———. Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree.
3. **Negligence.** There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances in each case.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Townsend & Youmans, for appellants.

Wright, Simmons & Harris and *Neighbors & Danielson,* for appellees.

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

YEAGER, J.

This is an action based on a claim filed in the county court of Scotts Bluff County, Nebraska, by Alex Pester and Harry Lehr, administrators of the estate of Edward Pester, deceased, in the estate of James E. Nelson, deceased, the administrators of which are James Nelson and August Grassmick. The claim was disallowed. From the order of disallowance the administrators of the estate of Edward Pester appealed to the district court. For the purposes of this opinion the administrators of this estate will be referred to as plaintiffs and the administrators of the estate of James E. Nelson as defendants. Edward Pester will be referred to as Pester and James E. Nelson as Nelson.

For the purpose of the case after appeal from the county court the action will be treated as one for damages by plaintiffs against the defendants. The case was tried in the district court, and at the conclusion of the evidence of plaintiffs the defendants moved for a directed verdict. The action was for damages on the ground of alleged negligence. The basis of the motion was that the evidence failed to show that Nelson was guilty of gross negligence; that it did show that Pester as a guest in the automobile operated by Nelson was guilty of such contributory negligence as to bar a recovery; and that the evidence was insufficient to establish a cause of action in favor of the plaintiffs. The motion was sustained. Thereafter, following the filing of a motion for new trial which was overruled, the plaintiffs appealed to this court.

By the petition on which the case was tried it is alleged, to the extent necessary to set forth herein, that on January 21, 1957, Nelson was the owner of and was

operating a truck in an easterly direction on a highway about 3 miles west of the city of Scottsbluff, Nebraska, west of the right-of-way of the Union Pacific Railroad Company which intersects the highway on an angle from the southeast to the northwest; that at the time Pester was a passenger in the truck; that as the truck approached this intersection a train was also approaching from the southeast; that Nelson caused the truck to collide with the train causing the death of Pester; that the proximate cause of the death was the gross negligence of Nelson; and that the gross negligence was as follows: Operation of the truck at a rate of speed in excess of that which was reasonable and prudent under the circumstances, failure to keep a proper lookout, failure to have the truck under control, failure to stop before the collision with the train engine, and operation of the truck head-on into the train engine. The petition does not so allege but Nelson was also killed in the accident.

To the extent necessary to state herein the answer contains a general denial after which it is alleged affirmatively that Pester was a guest in the truck and as such was guilty of carelessness, negligence, and failure to exercise due care for his own safety in that he failed to keep a proper lookout for the railroad crossing and the approaching train, that he failed to warn Nelson of the approach of the train, and that he failed to protest the manner in which Nelson was operating the truck.

Before proceeding further it is pointed out that the parties have stipulated that Pester was a guest passenger in the truck operated by Nelson which was the truck involved in the collision.

From the testimony adduced by the plaintiffs it appears that on January 21, 1957, at about 10 a.m., Nelson was driving a pick-up truck eastward on a highway which leads into the city of Scottsbluff, Nebraska. The highway at the place of concern is paved. About 3 miles west of the city this highway is crossed by a track

of the Union Pacific Railroad Company over which trains move. This track extends from southeast to northwest. The surrounding area is practically level and there are no obstructions to obscure vision over a broad area. This was a clear day. On this day a train approached the intersection from the southeast. The engineer on the train testified that the headlight on the engine was lighted and that about one-fourth mile before reaching the intersection he started sounding the whistle on the engine. When he was about halfway between the point where he started sounding the whistle and the intersection he saw Nelson's truck which he said was about the same distance as the train from the intersection. The train was moving at a speed of 50 miles an hour and he estimated the speed of the truck at about the same rate as the train. He did not observe that the speed of the truck was lessened until just before the truck and the train collided when Nelson swerved to the right off the highway in an effort to avoid the collision. The truck collided with the left front corner of the engine. The train was stopped some distance to the northwest. This engineer never left his engine after the collision.

There were two other witnesses to the accident, one of whom testified. He said that he was in a truck back of and going in the same direction as Nelson. He estimated his own speed at 50 to 60 miles an hour and that he had the impression that Nelson was going at a higher rate of speed. He did not notice any slackening of speed before Nelson turned to the right, immediately after which the collision occurred.

By other evidence adduced by the plaintiffs it was made to appear that about 145 feet west of the intersection a tire mark started and extended to the point of collision. All of the mark except about the last 10 feet was on the pavement. The truck in which Pester and Nelson had been riding came to rest about 290 feet northwest of the intersection and on the west side of

the railroad right-of-way. It appears that the two men were killed instantly.

This it is thought is a fair summary of the evidence as it appears in the record relating to the causation of the collision and of the consequent death of these two men. It was on this evidence that the defendants based their motion for a directed verdict.

The parties having stipulated that Pester was a guest in the truck of Nelson, the determination of the question of whether or not the trial court erred in sustaining the motion must depend upon an analysis of the evidence and an application thereto of section 39-740, R. R. S. 1943, commonly referred to as the "guest" statute, which is the following: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser."

Under this statute, it is to be observed that no recovery may be had in this case unless Nelson was guilty of gross negligence. Gross negligence, within the meaning of this statute, is defined as follows in Holliday v. Patchen, 164 Neb. 53, 81 N. W. 2d 593: "Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty." See, also, Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716.

There is no fixed rule for the ascertainment of what is gross negligence, but whether or not gross negligence exists must be determined from the facts and circumstances in each case. See, Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041; Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310.

Also what, under certain circumstances, might amount to only slight negligence may, under different circumstances, amount to gross negligence. See Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

Although reference to and application of these rules is required in the present case, precedent appears to furnish the pattern for the disposition of the matters under consideration.

The case of Bishop v. Schofield, 156 Neb. 830, 58 N. W. 2d 207, presents such a parallel in point of facts with this one, as they relate to sufficiency of evidence for submission to a jury of the question of whether or not there was here prima facie proof of gross negligence, that little more is necessary to arrive at a decision herein than to delineate the comparison. This is true unless the following appearing in the opinion in that case is to be rejected: "There is a reasonable inference arising from the evidence adduced that appellant was guilty of negligence in failing to maintain a proper lookout for trains as he approached this private crossing and, as a result thereof, drove onto it without seeing the train approaching from the north which caused the accident. However, in view of the standards which this court has applied in guest cases, we do not think his negligence in this regard arises to the degree of gross negligence within the meaning of the statute."

No reason which impels a departure from this pronouncement becomes apparent.

In delineation of the comparison it is found that in Bishop v. Schofield, *supra,* a host driver of an automobile with a guest to his right approached and drove onto a railroad track into the path of and was struck

by a train which was approaching from the right which could readily have been seen in time, in the exercise of ordinary care, to avoid a collision. Vision was not obstructed. There was no evidence of excessive speed and no reason or excuse for being struck by the train except inattention and failure to look and to see that which was in plain view. The guest was injured in the collision between the automobile and the train.

All of these things were true in the instant case except here the host and guest were killed. There was no evidence that the host in either instance was driving in excess of a statutory speed limit. It is probable under the evidence that the driver in the instant case was driving at a higher rate of speed as he approached the intersection than was true in Bishop v. Schofield, *supra,* but there was no apparent difference in the opportunity to see the approaching train. There was a difference which however had no controlling legal significance. The difference was that the driver in Bishop v. Schofield, *supra,* was driving on a private road which was intersected by the railroad right-of-way and track whereas the driver in the present case was operating on a public highway of the state.

In the light of this it appears that what was said in Bishop v. Schofield, *supra,* is equally applicable to the conduct of Nelson in this case. If there was no evidence of gross negligence in that case it can hardly be said on comparison that there was in the present case.

It follows that it may not be said here that Nelson was guilty of gross negligence and in consequence of this the judgment of the district court is correct and proper, and should be affirmed.

AFFIRMED.

MARY BUCK, APPELLEE, V. VILLAGE OF DAVENPORT, APPELLANT.

95 N. W. 2d 488

Filed March 20, 1959. No. 34527.

1. **Actions: Equity.** If a cause of action for equitable relief and a legal cause of action at law are joined in a cause and equitable relief is entirely denied, the court is without authority to determine the issue of personal liability and render a judgment on the cause of action at law.
2. **Actions.** In such a situation the cause of action at law must be determined as any other law action and should be retained by the court and tried to a jury.

APPEAL from the district court for Thayer County: STANLEY BARTOS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

W. O. Baldwin and *John L. Richards,* for appellant.

Keenan & Corbitt, for appellee.

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

BOSLAUGH, J.

This is an appeal from an adjudication that denied appellee an injunction but awarded her a money judgment against the village of Davenport for damages. The defendants in the district court were the village, the members of the board of trustees, and two employees of the village whose duties concerned the maintenance and operation of the sewer system of the village. The only parties to this appeal are the village as appellant and appellee. The mention herein of allegations made in the causes of action concerning the village must be understood to have been made in the amended petition against all defendants in the trial court.

The first cause of action of the amended petition contains these statements: Appellee is the owner of two described lots in Davenport. The village owns, operates, and maintains a sewer system within its cor-

porate territory. The property of appellee is connected by a lateral to the main sewer line which is located in front of her property. The lateral has an opening in the basement of the home of appellee and extends from there to the main sewer. This connection was made in 1938. The village collects and appellee pays a monthly sewer use charge to the village. It has exclusive control of the operation and maintenance of its sewer system and is charged with the proper and sufficient operation and maintenance of it. The main sewer line of the village, because of the negligence and indifference of the village, was permitted to become and be stopped up, and the sewer on November 24, 1955, flooded the basement in the home of appellee located on the lots owned by her. The flooding of the basement caused extensive damage thereto. Appellee notified an employee of the village whose duties were concerned with the operation and maintenance of the sewer system that there were indications on her property that the sewer was becoming obstructed 3 days before the flooding occurred. The village made no effort to ascertain the condition of the sewer or to correct it but negligently and carelessly permitted and allowed the main sewer line to become and it was completely obstructed for a period of 8 hours on November 24, 1955. The contents of the sewer system backed up, entered, and flooded the basement to a depth of about 2 feet. The floor and walls of the basement were covered with filth which gave off foul odors and noxious gases. The odors therefrom have continued and permeate the entire home of appellee. The obstruction in the main sewer line and the damages sustained by appellee were caused by the negligence of the village because of its failure to properly maintain the sewer when it knew or should have known that it was out of operating condition and in permitting it to become and remain completely obstructed. Appellee alleged in detail the damage she claims to have sustained.

The second cause of action incorporated the allegations of the first cause of action by reference thereto and contains these additional statements: The village, with knowledge of an obstruction in the main sewer line below the connection with it of the lateral from the property of appellee, did not correct the condition and permitted the sewer to again be wholly obstructed and the sewage from it backed up a second time into the basement of appellee on June 14, 1956. The basement was again coated with filth and slime, and the village was negligent in failing to remove the obstruction in the sewer promptly after notice and knowledge of it. Appellee specified the damages she claims on account of the second flooding by the sewer of her property. The improper condition of the sewer has not been repaired or corrected, and it constitutes a continuing and recurring threat of flooding the property of appellee. Appellee has no adequate remedy at law and is entitled to a mandatory injunction requiring the village to repair and maintain its sewer system so that the property of appellee will not be flooded by it and so that it will perform the function for which it exists. The prayer of appellee is for an injunction and a judgment for the damages alleged by appellee.

The answer was in substance a denial of the charges made by appellee in her amended petition and a plea that any damages sustained by appellee as mentioned therein were caused or were contributed to by her negligence. A reply in substance denied the new matter in the answer.

The district court found that appellee was not entitled to an injunction but that appellee was entitled to damages in the amount of $600 against the village of Davenport. A judgment denying an injunction and awarding appellee a money judgment for $600 against the village was rendered. A motion for a new trial was denied and the village prosecutes this appeal.

Appellee joined a cause of action for injunction with

causes of action for damages. She sought, on the basis of her request for an injunction, equitable relief. It was because of this that the trial court denied a request for a jury trial made by appellant and heard and decided the case without the participation of a jury. The trial court found there was a failure to establish any basis for the granting of the injunction appellee sought. The effect of this was the trial court found and adjudicated that appellee was not entitled to any equitable relief in the case and because thereof the court was without authority to determine the legal causes of action alleged by appellee without the presence of a jury. If a cause of action for equitable relief and a cause of action at law are joined in a cause and equitable relief is entirely denied, the court is without authority to determine the issue of personal liability and render a judgment in the cause of action at law. In such a situation the cause of action at law must be determined as any other law action and should be retained by the court and tried to a jury. The decision and disposition of this appeal is dictated and made mandatory by the opinion of Gillespie v. Hynes, *ante* p. 49, 95 N. W. 2d 457. In accordance with that decision the trial court, when it concluded appellee had presented no basis for equitable relief, should have continued the case and retained it for trial of the issue as to damages to a jury as any other law action is tried.

There is no claim that appellant consented to trial of the issue as to damages by the court without a jury. Appellant requested a trial by jury in the action and this was refused. Its conduct was consistent with that attitude during the subsequent proceedings. At the close of the case of appellee and again when the parties rested appellant sought by motion a dismissal of the case. Neither of these motions was decided by the court. The case was taken under advisement and later by a single act and contemporaneously equitable relief was denied and a money judgment was rendered.

There was no waiver of trial of the issue of damages by a jury. The action of the trial court denying an injunction was correct because of the insufficiency of evidence in that regard.

The part of the judgment denying an injunction should be and it is affirmed and the part thereof granting appellee a money judgment against appellant is reversed and the cause is remanded with directions to the district court for Thayer County to try the issue of damages involved in this case to a jury as in any other law action.

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

MESSMORE, J., participating on briefs.

SIMMONS, C. J., dissenting.

Here again a trial court is held to have committed prejudicial error in following a long line of decisions of this court.

For the applicable reasons given in my dissent in Gillespie v. Hynes, *ante* p. 49, 95 N. W. 2d 461, I dissent here.

JOHN J. MCGRATH, APPELLANT, V. PAUL LOGAN MOTOR COMPANY, A PARTNERSHIP, ET AL., APPELLEES.
95 N. W. 2d 543

Filed March 20, 1959. No. 34538.

1. **Chattel Mortgages.** Where an owner of personal property is in default on a note secured by a chattel mortgage thereon the holder of the mortgage is entitled to possession of the property to enforce the payment of the note when the chattel mortgage so provides.
2. **Bills and Notes.** An agreement to extend the time of payment of a note must possess all the elements essential to the execution of a valid contract.
3. ———. Such an agreement must be supported by a good and sufficient consideration in order to be binding upon the parties.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellant.

McCown, Wullschleger & Baumfalk, for appellees.

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

CARTER, J.

This is a replevin action instituted by the plaintiff to recover possession of a 1952 Studebaker two-ton truck. The trial court found as a matter of law that defendants were entitled to the possession of the truck. The plaintiff has appealed. Other matters determined by the judgment entered by the trial court are not in issue on this appeal if the judgment awarding the possession of the truck to the defendants is correct.

On May 15, 1957, the plaintiff purchased the truck, which is the subject of the action, from the defendants for the sum of $1,400. Defendants agreed to take plaintiff's older truck as a part payment in the amount it could be sold for, over and above the cost of reconditioning, but not less than $300. Plaintiff executed a note and chattel mortgage on the truck for $1,100, bearing interest at 8 percent and due on August 15, 1957. The evidence shows that plaintiff was entitled to credit for his old truck in the amount of $300.

In October 1957, plaintiff discovered that the truck's differential was defective. Plaintiff contended that defendants warranted the truck to be in good condition, and asserted that it was not. The dispute was resolved on or about November 12, 1957, by an agreement that defendants would repair the truck and each would pay one-half the cost. The defendants repaired the truck at a cost of $102.52, the plaintiff agreeing to pay $51.26 thereof. When the repairs were completed plaintiff offered to pay the $51.26 as his share of the repairs. The defendants refused to accept the money and release the truck until the balance due on the note and

chattel mortgage was paid. Plaintiff claimed that the note had been extended for 6 months and that there was nothing due thereon. Defendants denied that the note was extended. The plaintiff thereupon commenced this action and took possession of the truck on a writ of replevin.

It is clear that if the note was past due, the defendants were entitled to the possession of the truck under the terms of the chattel mortgage. It is true, also, that if the due date of the note had been extended beyond the date the defendants attempted to take or retain possession under the mortgage, the defendants would have no right of possession of the truck by virtue of their chattel mortgage. The only question for determination is whether or not the note was extended as claimed by the plaintiff.

There is evidence in the record that defendants orally agreed to extend the due date of the note for 6 months. Defendants contend, as the trial court found, that plaintiff's evidence shows there was no consideration for any extension of time for the payment of the note and that any purported agreement to extend was therefore void for that reason.

The plaintiff paid the defendants $547.24 on October 23, 1957. The defendants state in their brief that $500 was to be applied on the principal of the note, $39.34 in payment of interest, and $7.90 as payment of an open account owing to defendants. The $500 and $39.34 were amounts due under the note. It is claimed that the item of $7.90 was in payment of a separate obligation and was entirely separate from the note transaction. If this be true, the plaintiff paid nothing that was not then due on the note to secure an extension. Plaintiff asserts that the record does not support a finding that the $7.90 was in payment of a separate obligation. Even so, it is not a controlling factor in the present case. The burden of proof is upon the plaintiff and not the defendants to show a valid extension of the note. He

has not carried that burden and we find that the evidence does not show any consideration for the purported extension agreement.

The plaintiff urges that evidence of an oral agreement to extend the time of payment of the note is not in violation of the parol evidence rule. This is, of course, a correct statement. The subsequent oral agreement to extend the time of payment must however possess all the elements essential to the execution of a valid contract. It must be supported by a good and sufficient consideration if it is to have a binding effect upon the parties. We find nothing in the evidence that constitutes the consideration necessary to a binding agreement. 8 Am. Jur., Bills and Notes, §§ 293, 294, pp. 34, 35.

We conclude that defendants were entitled to the possession of the truck under the terms of their chattel mortgage, the note being in default of payment in accordance with its terms. The claim that the due date of the note had been extended for 6 months fails for the reason that plaintiff's evidence fails to show a consideration for the purported extension agreement. The trial court properly directed a verdict for the defendants on the question of the right of possession of the truck.

AFFIRMED.

IN RE THOMAS E. BARKUS, A MINOR.
STATE OF NEBRASKA EX REL. EUGENE F. FITZGERALD, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, APPELLEE, V. THOMAS E. BARKUS, APPELLANT.
95 N. W. 2d 674

Filed March 27, 1959. No. 34438.

1. **Appeal and Error.** Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed,

except that the court may, at its option, note a plain error not assigned.

2. **Courts: Evidence.** In a hearing before the juvenile court the customary rules of evidence must be adhered to and a finding of fact may not rest upon hearsay or unsworn testimony.
3. ———: ———. Reports of an ex parte investigation made by a county attorney or a probation officer are not competent evidence and may not properly be considered by the court in determining issues of fact in a contested proceeding before a juvenile court in the absence of proper foundation.
4. **Courts.** The essential processes, rules, and procedure of the law established and observed to aid courts in the investigation and adjudication of contested issues of fact are not discarded or permitted to be disregarded because a pertinent statute refers to the proceeding as a summary one.

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

Schrempp & Lathrop, for appellant.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for appellee.

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

YEAGER, J.

This was an action which was commenced on September 10, 1957, in the district court for Douglas County, Nebraska, juvenile division, entitled "An Inquiry into the case of Barkus, Thomas E., a Minor Child," wherein by petition it was charged that Barkus, under the age of 18 years, was a delinquent in that on or about August 16, 1957, he trespassed on the railroad right-of-way of the Union Pacific Railroad Company near Ninety-sixth and F Streets, Omaha, Douglas County, Nebraska, and that he placed a cement block or slab on the track of said railroad which was later struck by a moving Union Pacific train.

On this petition a hearing was had in the juvenile court on September 17, 1957. The case was taken under advisement and on October 29, 1957, Barkus was ordered

committed to the Boys Training School, Kearney, Nebraska, until he reaches the age of 21 years, unless sooner paroled or otherwise disposed of according to law.

On October 29, 1957, a motion for new trial was filed based upon numerous alleged assignments of error. This motion was heard on February 14, 1958, at which time evidence was adduced on behalf of Barkus. The motion was overruled. From the order overruling the motion Barkus has appealed. There is one assignment of error. It is the following: "The Court erred in committing the minor child to the State Training School when the said child had committed one foolish or indiscrete (sic) act, and was not a habitual violator, and needed no further correction."

This assignment of error in and of itself would not furnish a basis for any disturbance of the order. The record however is of such a character that in the interest of justice and the rights of persons who have not attained the age of 18 years, error not assigned requires careful consideration. This record will be reviewed therefore in the light of the following rule: "Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8 a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned." Dell v. City of Lincoln, *ante* p. 174, 95 N. W. 2d 336. See, also, Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482; Romans v. Bowen, 164 Neb. 209, 82 N. W. 2d 13.

In clarification of this premise it should be said that if what was received and considered by the court as proof of the guilt of Barkus was proper to be considered there would be nothing of which just complaint could be made here, except possibly the severity of the order. This is true since the literal purport and effect thereof was in proof of the allegations of the petition.

In truth statements of Barkus which came before the court admitted the acts charged.

In this case however the question of primary importance is that of whether or not the procedure employed to obtain the evidence and the manner of presentation were such as to be so violative of established rules relating to trials as to render the order invalid and to require a reversal of the order of commitment. In other words, the primary question is that of whether or not Barkus had a fair trial and not that of whether or not there was evidence of Barkus' guilt.

In the recent case of Krell v. Mantell, 157 Neb. 900, 62 N. W. 2d 308, 43 A. L. R. 2d 1122, this court called attention to and condemned certain procedural incidents as destructive of the right to a fair trial and on that account reversed an order of the juvenile court committing Anthony Mantell to the Boys Training School at Kearney, Nebraska. One of these incidents was the use of hearsay and unsworn testimony of witnesses for the complainant over objection of the defendant.

As to this incident of hearsay and unsworn testimony this court quoted with approval in Krell v. Mantell, *supra,* the following from In re Matter of Hill, 78 Cal. App. 23, 247 P. 591: "The relations of parent and child should not be severed or disturbed unless the facts justify it, and the interests of all parties concerned require that these facts be shown by evidence whose verity has been carefully and legally tested. And so, while the exact truth should be searched out and all mere technicalities of procedure as distinguished from the rules which protect substantial rights should be disregarded, the regular processes of the law provided to produce evidence, and the ordinary rules established to aid courts in testing and weighing it, are not scrapped because the proceeding is a summary one."

As to procedure in general related to trials of juveniles, this court, in the same case, quoted with

approval the following from People v. Lewis, 260 N. Y. 171, 183 N. E. 353, 86 A. L. R. 1001: "To serve the social purpose for which the Children's Court was created, provision is made in the statute for wide investigation before, during and after the hearing. But that investigation is clinical in its nature. Its results are not to be used as legal evidence where there is an issue of fact to be tried. When it is said that even in cases of lawbreaking delinquency constitutional safeguards and the technical procedure of the law may be disregarded, there is no implication that a purely socialized trial of a specific issue may properly or legally be had. The contrary is true. There must be a reasonably definite charge. The customary rules of evidence shown by long experience as essential to getting at the truth with reasonable certainty in civil trials must be adhered to. The finding of fact must rest on the preponderance of evidence adduced under those rules."

In the present case unsworn statements of three witnesses were admitted as testimony and, according to remarks contained in the bill of exceptions, they were considered by the trial judge in arriving at the judgment. These statements were not taken at any legally recognizable hearing. They were in the form of questions propounded by a deputy county attorney with answers of the purported witnesses. They were taken in the presence of a probation officer, not in court, and they do not purport to be depositions. In the record the statements have been referred to as evidence taken at a preliminary hearing. This is not true since when they were taken no charge had even been filed against Barkus. They were taken on August 22, 1957, whereas, as pointed out, the petition was not filed until September 10, 1957. No legal foundation whatever was laid for the admission of the statements. They were nothing more than reports of an ex parte investigation and inadmissible. As to such reports this court, in Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151, said: "Re-

ports of an ex parte investigation made by investigators from the police department and the Child Welfare Department are not competent evidence and may not be considered by the court in the hearing and decision of a disputed issue of fact."

It is true that no objection was made to the admission of the statements. It is also true that Barkus was not represented at the trial. His mother, a widow, was present. The order of commitment recites that the mother had been summoned as provided by law but there is nothing in the transcript to disclose the issuance of summons or service thereof on her as required by law. Section 43-206, R. R. S. 1943, requires that on filing a complaint summons shall issue requiring the person having custody or control of the child to appear at the time stated in the summons, which time shall not be less than 24 hours after service. There is no information as to whether or not Barkus or his mother had an opportunity to obtain or desired representation at the hearing. Likewise there is no information as to whether or not they had any advice from the county attorney or anyone connected with the juvenile court as to their legal rights or the consequences which could flow from the proceeding.

Apparently without informing Barkus or his mother of their rights at the trial Barkus was called by the deputy county attorney as the first witness to testify against himself. His evidence thus adduced was the only evidence to support the participation of Barkus in the incident charged in the petition except that contained in the statements taken on August 22, 1957, and introduced in the manner hereinbefore described.

Presumably the trial was conducted in the manner described under the mistaken notion that it was permissible under the terms of section 43-206, R. R. S. 1943, in part as follows: "* * * the court shall proceed to hear and dispose of the case in a summary manner." It was clearly pointed out in Krell v. Mantell, *supra,*

that the provision of the statute imported and implied no such legislative intention. It was pointed out in unmistakable terms that "to hear and dispose of the case in a summary manner" did not mean that trials could be had in the juvenile court in such manner as to destroy the traditional and constitutional safeguards of a trial. The Legislature did not intend that trials should be had without the benefit of testimony of witnesses given under the sanction of oath or affirmation. It did not mean to say that the liberty of a child has less sanctity than that of an adult.

In Ripley v. Godden, *supra*, it was said: "The essential processes, rules, and procedure of the law established and observed to aid courts in the investigation and adjudication of contested issues of fact are not discarded or permitted to be disregarded because a pertinent statute refers to the proceeding as a summary one."

The record here manifests the same type of intolerable disregard for the rights of persons under the age of 18 years in proceedings in and under the processes of the Juvenile Court Act as was condemned in positive and unequivocal terms in Krell v. Mantell, *supra,* and Ripley v. Godden, *supra.* The conclusion inevitably reached therefore is that the processes employed were so violative of the intent of the Legislature in the adoption of the Juvenile Court Act, and the legal, constitutional, and traditional rights incident to a fair trial that the judgment of commitment rendered in this case cannot be allowed to stand. Accordingly it is reversed.

REVERSED.

MESSMORE, J., participating on briefs.

POLLY ANNA LUDLOW ELLINGROD, APPELLANT, V. O. D. TROMBLA ET AL., APPELLEES.

95 N. W. 2d 635

Filed March 27, 1959. No. 34476.

1. **Statutes.** The provisions of a uniform act must be construed together to give effect to the whole act.
2. **Property: Statutes.** In construing a uniform act, such as the Uniform Property Act, the meaning of which is not clear, the intention of those who drafted it, if ascertainable, should be given controlling consideration.
3. ———: ———. The enactment of a uniform property act is within the general legislative power of the Legislature to fix the policy of the law as it relates to the conveyance of property in this state.
4. ———: ———. Upon the enactment of the Uniform Property Act, its provisions supersede conflicting provisions of the law of property existing prior to the effective date of the act.
5. **Estates.** Under section 76-113, R. R. S. 1943, of the Uniform Property Act, a devise to a person and "to his descendants" creates a life estate in such person and a contingent remainder in his descendants as a class.
6. **Vendor and Purchaser.** When a party enters into a contract to sell certain real estate and agrees to furnish a warranty deed conveying a good and merchantable title thereto, he is not entitled to the specific performance of the contract where it appears that he has only a life estate in such property.

APPEAL from the district court for Webster County: EDMUND NUSS, JUDGE. *Affirmed.*

Clifford H. Phillips and *Howard S. Foe,* for appellant.

Cline, Williams, Wright & Johnson, for appellees Trombla et al.

William A. Letson, for appellees Ellingrod et al.

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

CARTER, J.

This is a suit to obtain specific performance of a contract for the sale of real estate. The trial court denied the prayer of plaintiff's petition and the plaintiff has appealed.

The sole question involved is whether a devise of the real estate contained in the will of Mildred Ludlow, the mother of the plaintiff, vested a fee simple title or a life estate with a remainder in her descendants. The devise provided: "To my daughter, Polly Anna Ludlow, and her descendants, I will the quarter section of about 162 acres of farm land, SE¼ 4-2-11 in Webster County, Nebraska." There is no other language within the four corners of the will to indicate the intention of the testatrix other than the foregoing provision.

The testatrix died in 1948. The will was executed about 3 months prior to her death. The will was in the handwriting of the testatrix and was evidently made without the assistance of one skilled in the drafting of wills. At the time of the death of testatrix Polly Anna Ludlow was unmarried and had no children. She was married in 1950 and at the time of trial had two children, Holly and Ruth Ellingrod, ages 5 and 2 years, respectively.

On July 25, 1957, plaintiff entered into a contract to sell real estate to O. D. Trombla, Robert A. Dobson, and Adna A. Dobson. The latter contend that the title is not merchantable by reason of the provisions of section 76-113, R. R. S. 1943, which provides: "When an otherwise effective conveyance of property is made in favor of a person and his 'children,' or in favor of a person and his 'issue,' or by other words of similar import designating the person and the descendants of the person, whether the conveyance is immediate or postponed, the conveyance creates a life interest in the person designated and a remainder in his designated descendants, unless an intent to create other interests is effectively manifested." This section must be construed with section 76-110, R. R. S. 1943, by which fees simple conditional and fees tail are abolished and any attempt to create such estates is stated as creating a fee simple title in the person who would have taken a fee

simple conditional or a fee tail. The latter section specifically provides that: "Nothing herein contained shall affect the operation of sections 76-111, 76-112 and 76-113 of this act."

The foregoing sections are a part of a single legislative enactment. All are a part of a uniform property act and therefore must be construed together to give effect to all. It will be noted by section 76-110, R. R. S. 1943, that fees simple conditional as they existed under the law of England prior to the "statute de donis" are no longer permitted. The statute also prohibits the creation of fee tail estates. Since by the adoption of the "statute de donis" a fee simple conditional became a fee tail, the inhibiting provisions of the statute have the effect of prohibiting the creation of fee simple conditional and fee tail estates, and any attempt to create them results in a fee simple title in the person who would otherwise take a fee simple conditional or a fee tail estate. We point out that the pertinent language of the will creates a fee tail estate under the common-law doctrine of Wild's Case, 6 Coke 16b, and except for section 76-113, R. R. S. 1943, the fee tail estate in plaintiff would be converted into a fee simple estate by section 76-110, R. R. S. 1943. But we must take notice of the fact that section 76-110, R. R. S. 1943, is inapplicable by its own terms to conveyances that fall within the scope of section 76-113, R. R. S. 1943.

By section 76-113, R. R. S. 1943, the Legislature has provided that a conveyance of property in favor of "a person and his 'children,' or in favor of a person and his 'issue,' or by other words of similar import designating the person and the descendants of the person," creates a life interest in the person and a remainder in his descendants in the absence of a contrary intent manifested in the will. When the testatrix devised the property "to my daughter, Polly Anna Ludlow, and her descendants," the devise came within the scope of section 76-113, R. R. S. 1943, which is the applicable pro-

vision rather than section 76-110, R. R. S. 1943, by reason of the express terms of the latter section. The words "and her descendants" contained in the devise are words of similar import within the meaning of that term contained in section 76-113, R. R. S. 1943. Godden v. Long, 104 Neb. 13, 175 N. W. 655; Wilkins v. Rowan, 107 Neb. 180, 185 N. W. 437; Seybert v. Seybert, 118 Neb. 246, 224 N. W. 1; Salmons v. Salmons, 142 Neb. 66, 5 N. W. 2d 123.

We necessarily come to the conclusion that under section 76-113, R. R. S. 1943, plaintiff would take a life estate and her descendants would take a fee simple interest as a class if there were descendants in being at the death of testatrix, the effective date of the will. This interpretation of section 76-113, R. R. S. 1943, is admittedly in conflict with Restatement, Property, § 283(a), p. 1483. In the special note to section 283, Comment a, this is made clear. By the enactment of section 13 of the Uniform Property Act by the Legislature as section 76-113, R. R. S. 1943, the life interest and remainder construction was adopted in this state and it applies to all cases which are within either the rule stated in (a) or (b) of Restatement, Property, § 283, p. 1483. See, also, 5 American Law of Property, § 22.26, p. 306, and note 9, p. 310; Simes and Smith, Law of Future Interests (2d Ed.), § 701, p. 173. The question then arises as to the nature of the estate conveyed when the devise is to a named person and her descendants and there are no living descendants on the effective date of the will, as in the present case.

We think the rule is correctly stated in the Restatement of the Law of Property as follows: "When a conveyance limits property in favor of 'B and his children' or by other words of similar import, then, unless a contrary intent of the conveyor is found from additional language or circumstances, * * * (b) if B has no child at the time when this conveyance becomes effective, the named parent is not a member of any class, but the

conveyance is construed to limit a life interest in favor of such named parent and a class gift in favor of the children of such parent." Restatement, Property, § 283, p. 1483. See, also, 5 American Law of Property, § 22.20, p. 294, and footnote 5, p. 295, and § 22.21, p. 297, and footnote 12, p. 299; Simes and Smith, Law of Future Interests (2d Ed.), § 692, p. 157, and footnote 7, p. 160.

It is important, we think, to discuss the historical background of the Uniform Property Act, now sections 76-101 to 76-123, R. R. S. 1943. In this respect we point out that the Uniform Property Act was prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute acting jointly. The act received years of study on the part of a dozen or more of the best-known authorities on the law of property to be found in America. The act was drawn primarily to abolish anachronisms in the law of property, to abolish many out-of-date characteristics which have come down to us from the early feudal law of England, and which are out of place in the law of today, and also to correct many characteristics which have crept into the law from improper application of the early law and which can be gotten rid of today only by statutory enactment. See Commissioners' Prefatory Note, 9B Uniform Laws Annotated, p. 403. The purpose and policy of the Uniform Property Act is to make the law a much more modern and effective instrument in administering the law of property and to free courts and lawyers of the present from being compelled in cases involving the title to real property to wander in a labyrinth of ancient learning. The modernization of our real property law, including antedated provisions that serve no purpose in our modern era, was long overdue when the Legislature enacted the Uniform Property Act into the statutory law of this state in 1941. The power of the Legislature to meet the need is not questioned. Its very purpose was to change the old order insofar as the

conveyance of property was concerned. This is evidenced by the terms of the law which it enacted. By section 76-121, R. R. S. 1943, it enjoined upon the courts the duty to construe the act so "as to effectuate its general purpose to make uniform the law of those states which enact it." From this it is made clear that the act is to be interpreted, where doubt as to its meaning exists, in conformity with the intentions of the drafters of the act. If this were not so, and courts undertook to interpret the act without considering the intentions of its drafters, one of its main purposes would be defeated before it shed its swaddling clothes. In People's Savings & Trust Co. v. Sheboygan Machine Co., 212 Wis. 449, 249 N. W. 527, 88 A. L. R. 1306, the court in discussing the interpretation to be given a uniform act said: "The act was drafted by the Commission on Uniform Laws, submitted as drawn to the legislature, and adopted by the latter without amendment. In construing a uniform law the meaning of which is not clear, the intention of those who drafted it, if that intention may be ascertained, should be given controlling consideration, else the desired uniformity will not result. Futile indeed is the passage of uniform laws by the several states if the courts are to construe them differently."

It is argued that section 76-113, R. R. S. 1943, is not clear and that we should follow the rule announced in Lacy v. Murdock, 147 Neb. 242, 22 N. W. 2d 713, which states: "Since a will speaks from the date of the testator's death the number of the class will, in the absence of anything in the will showing a contrary intention, be determined upon the death of the testator." We point out that the Uniform Property Act was not applicable to the facts in that case for the reason that testator died prior to August 24, 1941, the effective date of the Uniform Property Act. But, in any event, the Lacy case does not specifically hold that contingent future interests in real property are not recognized in this state.

In fact, they have been recognized for many years. Wilkins v. Rowan, *supra;* DeWitt v. Searles, 123 Neb 129, 242 N. W. 370; Drury v. Hickinbotham, 129 Neb. 499, 262 N. W. 37. In the Wilkins case this court said: "The policy of the law has always been to look with favor upon the early vesting of estates, and a remainder will never be held to be contingent if it can reasonably be held to be a vested remainder." In the DeWitt case we said: "Contingent remainders, however, are not necessarily void." In the Drury case we approved the following: " 'Whenever it is possible the future interest will be construed as vested, and hence alienable and devisable by the remainderman. It is not so much the certainty or the uncertainty of the enjoyment of the fee in remainder after the life estate ends as the uncertainty of the person who has a present right to enjoy the future estate if the particular estate came to an end now, which determines the character of the remainder. A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. The fact that his enjoyment is postponed, and, on a certain event, as on his death, may never take place at all, does not make the remainder contingent. But where there is no person now in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman, if the particular estate were to terminate, the remainder is contingent.' 2 Underhill, Law of Wills, sec. 860."

It is clear therefore that prior to the enactment of the Uniform Property Act it was the policy of the law of this state to look with favor upon the early vesting of estates, and a remainder would never be held to be contingent if it could reasonably be held to be a vested remainder. Contingent remainders were recognized, and where there is no person in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman, if the particular estate were to ter-

minate, the remainder would be recognized as a contingent one.

But whether or not the law declared by the courts of this state prior to the enactment of the Uniform Property Act conflicts with the latter act, and whether or not contingent future interests were then recognized, the legislative enactment of the Uniform Property Act makes it the controlling law of property in this state. The enactment of the Uniform Property Act into the law of this state was a proper exercise of the legislative power and the courts are obliged to adhere to its provisions. Any failure by the courts to apply the plain provisions of the act would amount to an encroachment upon the powers of the Legislature to fix the policy of the state in this field.

The intended meaning of section 76-113, R. R. S. 1943, as hereinbefore stated, is to provide that a devise in terms which falls within this section, whether or not children, issue, or descendants are in being when the testator dies, the life estate and remainderman construction applies. In the case before us the daughter, Polly Anna Ludlow, takes a life estate with the remainder in her descendants. There being no descendants in being at the time of the death of the testatrix, the remainder interest is a contingent one. By section 76-107, R. R. S. 1943, of the Uniform Property Act, it was made clear that contingent future interests were to be recognized by the use of the following language: "The conveyance of an existing future interest, whether legal or equitable, is not ineffective on the sole ground that the interest so conveyed is future or contingent."

We conclude that the devise in the present case conveys a life estate to Polly Anna Ludlow and a contingent remainder to her descendants as a class. The trial court came to the same conclusion and supported it by an able memorandum opinion found in the record. We necessarily hold that Polly Anna Ludlow does not have a merchantable fee title to the property which she con-

tracted to sell to the defendants. The decree of the district court denying the specific performance of the contract of sale is correct.

AFFIRMED.

GENE DURFEE ET AL., APPELLEES, V. RALPH KEIFFER ET AL., APPELLANTS.

95 N. W. 2d 618

Filed March 27, 1959. No. 34523.

1. **Appeal and Error.** This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties.
2. **Trial.** Trial courts should not permit a record to be made of testimony referring to exhibits without requiring counsel and witnesses to identify for the record that about which they testify.
3. **Boundaries: Waters.** The boundary between Missouri and Nebraska fluctuates with the changes of the channel of the Missouri River where that alteration is gradual and imperceptible; but when by a sudden variation the stream seeks and makes for itself an entirely new course and abandons the old channel, the boundary remains along the line which constituted the center of the old channel.
4. **Waters.** Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner.
5. ———. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
6. ———. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.
7. ———. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.
8. ———. Where the accretion commences with the shore of an island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the

island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact.

9. ———. Where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around intervening land which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increases from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.

10. **Quieting Title.** Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary.

11. **Landlord and Tenant.** An occupant is one who occupies; an inhabitant; especially one in actual possession, as a tenant, who has actual possession, in distinction from the landlord who has legal or constructive possession.

12. **Statutes.** It is to be presumed that the Legislature in using language in a statute gave to it the significance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute.

13. **Notice.** Actual possession or occupancy are synonymous and mean actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession.

14. ———. Possession of land is notice to the world of the possessor's rights therein.

15. ———. Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry.

16. **Process.** By the provisions of section 25-321, R. R. S. 1943, the proof of service by publication in accord with sections 25-517 and 25-518, R. R. S. 1943, is conclusive against all persons except those in actual possession of the property and whose ownership of, interest in, right or title to, or lien upon such property does not appear of record.

17. ———. The right of such persons to avoid the conclusive effect of such service is limited to strict compliance of proof of actual possession in the literal meaning of those words.

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

Pettijohn & Eiser and *Wiltse & Wiltse,* for appellants.

Ross & O'Connor and *Alfred A. Fiedler,* for appellees.

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

SIMMONS, C. J.

This is an action to quiet title to land. As originally brought it involved a claim to land lying on both sides of an old chute in the Missouri River. At the area involved the Missouri River runs generally in an east and west direction. The land lying east and north of the chute appears to have been owned by defendant Nellie N. Duke, she having a life estate, with remainder in three children. The land lying south and west of the chute was claimed by the defendant, Julia E. Duke.

Issues were made and trial was had resulting in a decree that plaintiffs were the owners of the land involved lying south and west of the middle of the chute. Defendants appeal. There is no cross-appeal by plaintiffs. Hence the appeal here involves only the lands claimed by defendant Julia E. Duke. We, then, consider it as an appeal in an action brought against defendant Julia E. Duke, hereinafter called defendant, and her tenants.

Plaintiffs alleged in their petition the ownership of the land; that they were owners under and by virtue of a deed executed and delivered as the result of a tax foreclosure proceeding in Richardson County; that the land was situated wholly in the State of Nebraska; that it was west of the meander line of the middle of the channel of the Missouri River as established by a United States government survey in 1855-1856; that the Mis-

souri River by avulsion in 1916 changed its course to its present channel west and south of the land involved; and that the boundary between the states remained as it existed at the time of the 1855-1856 survey.

Defendants answered and alleged that the lands were wholly in the State of Missouri and not within the jurisdiction of the court. They then denied generally, admitted possession, and claimed ownership. They prayed for a dismissal of the plaintiffs' petition.

At the trial defendant testified that she based her claim of title on a swamp land patent from the State of Missouri.

On appeal here defendant argues that she proved ownership by adverse possession. Plaintiffs contend that such a claim must be affirmatively pleaded and cannot now be raised. It does not appear that such a contention was advanced to the trial court. Defendant's testimony negatives it. Claim of ownership by adverse possession is advanced here for the first time.

The rule is: This court will dispose of a case on appeal on the theory on which it was presented to the trial court by the parties. See O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

This cause is here for trial de novo subject to the rule that: In equity cases 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. See Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

Both parties here introduced a large number of aerial photographs, maps, and charts of the area where the land in dispute is located. The record is replete with the testimony of witnesses who referred to locations of land, buildings, fences, dikes, streams, etc., by general statements of "here" and "there," and "indicated" to

the trial court the reference to the location they were testifying about. In many instances we are unable to determine with any degree of certainty to what they refer, and in some instances even the exhibits mentioned cannot be identified. Trial courts should not permit a record to be made of testimony referring to exhibits without requiring counsel and witnesses to identify for the record that about which they testify. Where such a record is made we have no recourse but to apply the above equity rule, and do so here.

It is advisable at this point to state the rules of law that are to be considered here. The parties here are not in disagreement that the boundary between Missouri and Nebraska at the time of the admission of the states to the Union was the center of the channel of the Missouri River. We have held: " 'That boundary may and does fluctuate with the changes of the channel of that stream where the alteration is gradual and imperceptible; but, when by a sudden variation the stream seeks and marks for itself an entirely new course and abandons the old path, the boundary remains along the line which constituted the center of the old channel.' " Lienmann v. County of Sarpy, 145 Neb. 382, 16 N. W. 2d 725.

"Where the main channel of the river changes by accretion and decretion, the boundary between the two states follows the channel. * * * Where the main channel of the river changes by avulsion to a new course, the boundary does not change but becomes fixed along the line which constituted the center of the old channel. * * * Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off." Lienmann v. County of Sarpy, *supra*.

"Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. * * * Accretion is the process of gradual and

imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of the surface level from any cause. * * * Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. * * * The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. * * * Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact." Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57.

"Avulsion is the sudden and rapid change in the course and channel of a boundary river. In Nebraska v. Iowa, 143 U. S. 359, 12 S. Ct. 396, it was said: 'It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion.'" Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538.

We here refer to the banks of the Missouri River as the left bank and as the right bank, as they appear looking down stream.

We find the following factual situation from the record.

During annual flood periods the river ran over a wide area in the location in question. At normal and low

water flow it followed a fairly well defined main channel.

Prior to 1855, the main channel of the Missouri River flowed some distance to the north and east of the location of the land in question. The 1855-1856 survey shows that the main channel of the river had moved west and south, but was still east and north of the land in question. The evidence is ample that thereafter the main channel of the river for many years was along the course of the "old chute" to which witnesses refer and to which the trial court referred in its decree.

About 1887 a railroad bridge was built across the river a short distance above the area in question. The open span was near the right bank of the river. An extended dike led to the bridge on the left side of the river. The construction of the bridge had the effect of shifting the main channel of the river to the west and south. Sand bars and shallow water appeared to the east and north of the new channel and west and south of the former main channel. The land involved here began as an island in that area. It grew by accretion.

At least by 1930, it was sufficiently established to be claimed by a person who quitclaimed it to a Mr. Slagle in 1932. At that time there was a defined channel west and south of the island. However, the evidence of eyewitnesses is that the main channel of the river continued its course along what is now the "old chute."

Mr. Slagle had a cabin on the island, fenced parts of it and kept livestock on it, and had an employee on it at times. He continued in possession of it until 1943, and paid taxes to Richardson County on it until 1944. In 1933 or 1934 the United States government began the work of channel control on the river. In the next few years as a result of that work the main channel of the river was moved to the west and south. As a result of silting in times of flood the island increased by accretion.

In 1943 or 1944, defendant entered upon the island from the old left bank across the old chute, burned grass

and underbrush, built a fence along the chute, and undertook to do some plowing. When the river was in high water stage, water flowed through the old channel where the chute now is located. Recurring annual floods prevented much development until 1954 or 1955 when over 200 acres of land were cleared by defendant and put to crops.

If the river shifted by avulsion from its first position to the main channel as it was and where the chute now is, that shift would avail defendant nothing for the boundary between the states would remain where it was before the avulsion. If, however, that moving of the channel to the west and south was by accretion, it would avail the defendant nothing for the land here involved is not accreted land to the old left bank of the river.

We are here dealing with an island that formed in the river west of the main channel of the river when it ran where the chute now is. That island grew by processes of accretion and finally by reliction. The boundary of the mainland and that of the island meet at the thread of the old chute.

The left bank of the river did not move west and south by accretions to the river bank. Rather, as a result of the works of man and the forces of the water, the river established a new main channel to the west and south of the island.

The question is: Is the island in Missouri or Nebraska?

The effect of the trial court's finding is that it is in Nebraska.

We think it patent that we cannot apply the rule of accretion to the changed course of the stream. Rather it is a situation to which the rule of avulsion applies.

In Whiteside v. Norton, 205 F. 5, 45 L. R. A. N. S. 112, the court was presented with a similar fact situation and held that the cutting of a new channel was analogous to avulsion.

In James v. State, 10 Ga. App. 13, 72 S. E. 600, the

court had a somewhat similar problem to solve. The court held that there was no evidence of a change "by the sudden and violent process of avulsion," yet the act of the United States government in changing the course of a river to improve navigation was analogous to a change caused by avulsion and not by accretion, and that the boundary line was not affected.

In State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782, we had a quite similar set of facts and decided this precise question by applying the rule of avulsion. We quoted with approval this language from Commissioners v. United States, 270 F. 110: "'* * * where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.'"

The above decision is controlling here. We hold that the land involved in this appeal, lying south and west of the old chute, is within the State of Nebraska; that the trial court had jurisdiction of the cause; and that defendant's swamp land patent from the State of Missouri conveyed no title to her.

This decision is not to be construed as deciding in any way the jurisdictional location of the land east and north of the old chute, as that land is not involved in this action as it comes to us here.

Defendant, assuming that we might find that the land involved is in the State of Nebraska, relies on the rule that: Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary. See Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486. She contends that plaintiffs have not met their burden of proof.

Defendant here contends that the sheriff's deed under which plaintiffs claim title was void.

It is not claimed by defendant that there was any residence on the land where service at the usual place of residence could have been had. It is not claimed that defendant was a resident of Nebraska. In fact the evidence shows that she was a resident of Missouri. It is not claimed that there was anything of record in Richardson County that showed the defendant had or claimed any title or interest in this land.

The foreclosure action named the Slagles as defendants. It named John Doe and Mary Doe and all persons having or claiming to have any interest in any part of the described real estate. As to John Doe and Mary Doe the sheriff's return showed that they were not found in Richardson County.

Defendant's claim rests upon that part of section 25-321, R. R. S. 1943, regarding service upon unknown defendants which provides: "Judgments and decrees against persons so designated and made defendants and served by publication as herein provided shall be conclusive as against all persons who are not in actual possession of such property and whose ownership of, interest in, rights or title to, or lien upon such property does not appear of record in or by their respective names in the county wherein such property is situated."

Defendant contends that she was in "actual possession" and hence entitled to the protection of the act. Defendant makes no charge of irregularities in the proceedings other than the above.

It is to be remembered that when defendant entered upon the land in 1943 or 1944, to the limited extent shown, she entered as a trespasser. After 1946, she claimed under and by virtue of the Missouri land patent. She made no claim to a right of possession otherwise.

The petition of foreclosure was filed August 23, 1955. The sheriff made return of service on August 26, 1955. The decree was rendered on December 15, 1955. The sale was confirmed and the deed to plaintiffs issued and recorded on February 24, 1956.

The question, then, relates to defendant's claim of possession during the above period.

As to that the evidence is extremely meager. The evidence is that there were 220 acres of growing crops on the land in 1955. Defendant testifies that she was in "possession," and received no summons or notice of the foreclosure proceedings. The nearest she comes to defining her possession is to refer to "the land I was supposed to be in the operation of."

A Mr. Keiffer testified that he started farming for defendant on this land in 1954; that "I had about 200 acres" and a good crop growing there in August 1955; and that he was not served with summons. A Mr. Nauman testified that in 1955 he "worked" for Mr. Keiffer. No one undertook to testify as to the nature of the arrangements whereby Keiffer farmed for defendant. In her brief here defendant refers to Keiffer and Nauman as "her tenants." Whether that relates to the time of the tax foreclosure action or the time the instant action was started is not certain.

Neither Keiffer nor Nauman is named as defendant in the tax foreclosure action. They are named as defendants in the instant action brought in November 1956, as parties in possession of a part of the premises. Their answer filed jointly with the Dukes admits possession and alleges ownership in the Dukes. Neither Keiffer nor Nauman is here claiming any invasion of

his rights. The contention here is solely that of the defendant.

We find nothing in the record that even suggests that there was anyone resident on the land or even working on the land when this action began upon whom service of summons could be had. The sheriff's return, which imports verity, negatives any such a conclusion. There is no suggestion that anyone going to the land could have found anyone or anything there that would have suggested where inquiry could be made to determine who, if anyone, claimed any interest in the land. In fact there is no evidence as to where the defendant or her "tenants" were during the period here involved. They make no showing that they were on the land, or in the area of the land, or were either in the State of Missouri or State of Nebraska.

The defendant's position rests solely on the fact that Mr. Keiffer farmed the land for her and that there were over 200 acres of growing crops thereon.

Does that establish "actual possession" within the contemplation of the statute? What did the Legislature intend when it used the term "actual possession"?

In Parsons v. Prudential Real Estate Co., 86 Neb. 271, 125 N. W. 521, 44 L. R. A. N. S. 666, where the tax laws required service of notice upon "every person in actual occupancy of" the lands, an attack was made on a tax deed upon the ground that one Parker was in "actual occupancy" of the premises and that no notice was served on him. Parker was a trespasser and did not live on the land, but cropped the ground. We accepted the following definition: " 'Occupant' * * * 'One who occupies; an inhabitant; especially, one in actual possession, as a tenant, who has actual possession, in distinction from the landlord, who has legal or constructive possession.' " We held that Parker was not an actual occupant of the land.

That decision was filed March 10, 1910. The part of the statute here involved was enacted in 1921. See Laws

1921, c. 226, § 1, p. 815. So we had defined the term before the Legislature adopted it.

The rule is: It is to be presumed that the Legislature in using language in a statute gave to it the significance that had been previously accorded to it by the pronouncements of this court unless a different meaning has been provided by the context of the statute. See Gomez v. State ex rel. Larez, 157 Neb. 738, 61 N. W. 2d 345.

We adhered to the above definition in Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

We construed Parsons v. Prudential Real Estate Co., *supra,* in Kuska v. Kubat, 147 Neb. 139, 22 N. W. 2d 484. The court said: "In that case service of notice to redeem was given to nonresidents only by publication, as in the case at bar. At that time there was a person in actual possession or occupancy of the property but he was a trespasser. No personal service of notice to redeem was had upon him. This court held that none was necessary. In construing the Constitution and applicable statute, it was held that 'occupants' and 'actual possession or occupancy' were synonymous and meant actual, open, visible possession or occupancy in fact, exactly that and nothing less, as distinguished from constructive possession. It was also held that the actual possession or occupancy must be by one claiming an interest in the property either in privity with or adversely to the owner as distinguished from a mere trespasser."

Defendant relies here on Harris v. Heeter, 137 Neb. 905, 291 N. W. 721, 128 A. L. R. 111. There we merely applied the rule of actual possession to the facts. The facts of that case are so dissimilar to the facts here that no comment is required.

It necessarily follows that defendant's attack upon plaintiffs' title by the tax deed has no merit.

We arrive at the same conclusion by another line of reasoning.

It will be noted that section 25-321, R. R. S. 1943, in summary requires an allegation in the petition or other pleading that there are persons who claim to have some interest in the property; that it does not appear of record; that diligent investigation and inquiry have been made; and that the person in whose behalf the investigation has been made does not know the names, whereabouts, or residence of such persons. Section 25-518, R. R. S. 1943, requires an affidavit supporting the allegation. Section 25-517, R. R. S. 1943, requires a court order for service by publication after the court is satisfied that sufficient investigation has been made. It is obvious that such a procedure was intended to establish a "conclusive" record in accord with the facts shown and established to the satisfaction of the court, as against all persons except those "in actual possession" (§ 25-321, R. R. S. 1943), whose interest in the property does not appear of record.

In Draper v. Taylor, 58 Neb. 787, 79 N. W. 709, we stated this rule: Possession of land is notice to the world of the possessor's rights therein.

This holding was followed in Blum v. Voss, 139 Neb. 233, 297 N. W. 84, and Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99.

There is a companion rule stated in Talich v. Marvel, 115 Neb. 255, 212 N. W. 540, followed in Marshall v. Rowe, 126 Neb. 817, 254 N. W. 480, and Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, which is: Where one is put upon inquiry, he is to be charged with notice of all such facts as he would have learned by reasonable inquiry.

It must be assumed that the Legislature had these rules in mind in making the requirements of allegations, proof by affidavit, and court finding and order.

It is obvious that what the Legislature intended was that a party against whom such service by publication had been had could, by proof of actual possession at the time involved, disprove the truth of the showing

upon which the court had permitted the service by publication to be made. The Legislature limited that right to strict compliance with proof of actual possession in the literal meaning of those words. It did not permit the opening up of the conclusive effect of the service by publication except upon a showing of that condition in fact. The showing here is patently insufficient to meet this test.

Defendant advances a further contention based upon the following from Maryland v. West Virginia, 217 U. S. 1, 30 S. Ct. 268, 54 L. Ed. 645: "Where possession of territory has been undisturbed for many years a prescriptive right arises which is equally binding under the principles of justice on States and individuals."

There again the facts are so dissimilar that we see no reason for discussing the case here.

The judgment of the trial court is affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

CHARLES F. ADAMS, APPELLANT, V. BOARD OF EQUALIZATION OF HAMILTON COUNTY, NEBRASKA, ET AL., APPELLEES.
95 N. W. 2d 627

Filed March 27, 1959. No. 34534.

1. **Taxation: Appeal and Error.** An appeal to the district court from action of the county board of equalization is tried as in equity and upon appeal therefrom to this court it is tried de novo.
2. **Taxation.** Ordinarily the valuation by the assessor is presumed to be correct. However, if the assessor does not make a personal inspection of the property but accepts a valuation thereof fixed by a professional appraiser, the presumption does not obtain and in such case the burden is upon the protesting party to prove that the assessment is excessive.
3. ———. The presumption that a board of equalization in making an assessment acted upon sufficient evidence to justify its action disappears when there is competent evidence on appeal to the contrary and thereafter the reasonableness of the valuation fixed

by the board is one of fact to be determined from the evidence, unaided by presumption, and the burden of showing such valuation to be unreasonable is upon the complaining party.

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

Charles F. Adams, for appellant.

John W. Newman and *Homer G. Hamilton,* for appellees.

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

BOSLAUGH, J.

This litigation involves a controversy concerning the value on March 1, 1956, of Lots 7 and 8, Block 2, Ernst Addition to the city of Aurora, for taxation purposes. The lots were owned by appellant and were improved by a house constructed thereon. A valuation of $31,524 was placed on the property and this was sustained by the district court. The trial of this appeal from that adjudication is de novo as an equitable proceeding. Matzke v. Board of Equalization, 167 Neb. 875, 95 N. W. 2d 61.

The county assessor testified that he observed an excavation for and the construction of the residence on the lots. He did not testify that he was at any time on the premises. He did state that he was not in the house at any time. A memorandum, described in the record as a card, filled out by a representative of a professional appraiser, was delivered to the assessor who examined and checked it for mathematical accuracy. He found no error in the card made in reference to the property involved in this case and he made no change in it. He accepted the replacement cost as stated thereon less 6 percent thereof as the value of the building on the lots. The assessor stated that he took the amount shown on the card as replacement value less 6 percent

as market value, computed 74 percent of that, and called the result the basic value. He said that was the formula he followed. The resolution of the county board of equalization of the county, hereafter referred to as appellee, provided that the basic value of real property assessed in that county was determined to be 70 percent of actual or market value. The assessor, in disregard of this, used in this matter 74 percent.

Generally, the valuation by the assessor is presumed to be correct. If he does not make a personal inspection of the property but accepts the valuation thereof fixed by a professional appraiser, this presumption does not obtain. However, in such a situation the burden rests upon the protesting party to prove that the valuation, and hence the assessment, is excessive. Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489. There is no presumption, under the circumstances of this case, that the valuation accepted by the assessor was correct.

Appellant produced evidence of the market value of the real estate on March 1, 1956. P. J. Refshauge had resided and been a real estate dealer in Hamilton County for 51 years. The last 40 years he had resided and maintained a place of business in the city of Aurora. He had been a licensed real estate broker since the state provided by law for such a license. He had during his residence in Hamilton County owned, bought, sold, leased, and managed real estate of all kinds in that county and in the city of Aurora and he also had experience in reference to the sale, purchase, and dealing in real estate in several other counties of the state. He had examined and was familiar with the real estate of appellant involved in this case. He testified that in his opinion the fair market value of the property of appellant was on March 1, 1956, the sum of $25,000.

Paul C. Huston had been in the real estate business in the city of Grand Island as a member of a firm from 1922 until 1952 and since then has operated as an individual. The firm of which he became a member in 1922

had been in the real estate business there since 1889. In addition to conducting a general real estate business in Grand Island and that territory, the witness had since 1934 been engaged in appraising real estate throughout Nebraska for various banks, insurance and loan companies, individuals, firms, and organizations. He was familiar with the real estate and its value in Hamilton County and the city of Aurora. He had examined and appraised about 50 residence properties in the city of Aurora. He examined the real estate of appellant concerned in this case and testified in his opinion that the fair market value of it on March 1, 1956, was $27,143.97.

W. Ed Coblentz, an officer of a bank in Aurora who had been president of a company engaged in buying and selling real estate, making real estate loans, and appraising real estate, testified that he had been a licensed real estate broker in Aurora for 6 years and had been active in the real estate business during that time; that he had on an average sold two or three pieces of property each month at public auction; that he had made many private sales of real estate in Aurora, in Hamilton County, and Polk County; and that he has and does own real estate in the city of Aurora and Hamilton County. He was acquainted with the property of appellant. He testified that in his opinion the Adams property involved herein was on March 1, 1956, of the fair market value of $24,500.

It was stipulated that Joseph V. Cunningham of York, Nebraska, would testify in this case, if called as a witness, that he was actively and continuously engaged in the real estate business since 1930; that he was appraiser for Home Owners Loan Corporation from 1935 as long as it was in business; that he had been an appraiser and compliance inspector for the Veterans Administration since April 1944, and had made many appraisals in York of existing homes and new construction since that time; that he was engaged in the general practice as appraiser for states, corporations, individuals, and local govern-

mental bodies; that he has had experience in developing new residence areas and in selling, building, and remodeling homes in York, Nebraska, and neighboring counties; that he has examined and is familiar with the property of appellant involved in this case; and that in his opinion the fair and reasonable market value of the property on March 1, 1956, was $24,700.

Appellant testified that the property involved in this case had a fair market value on that date of $24,500.

The evidence of appellee is substantially as follows: A representative of an appraisal firm by fixed formula arrived at an amount which he described as the replacement cost of the building on the lots of appellant. This amount was stated as $32,300. It was entered on the card by the representative as "REPLACEMENT VALUE." He testified that by a formula based on the matters shown by a book he arrived at a reproduction cost which was the amount stated above; that the replacement cost was the result of a mathematical computation he made; and that the amount stated would be required to replace the house on the lots. He said he applied to the replacement cost the depreciation listed in the manual which was 6 percent, a purely arbitrary percentage, and this resulted in a figure of $30,360 which was described as the physical value. The result was necessarily an arbitrary one. There is no evidence to justify the deduction or depreciation of 6 percent of the alleged replacement cost. That deduction supports an inference that the replacement cost was neither the actual nor fair market value. The last amount stated was the one turned over by the representative to the county assessor. The representative was not examined as to his qualifications to form or express an opinion as to the actual or market value of the property as a unit but he was asked by appellee if he had an opinion as to the fair and reasonable market value of the premises and the representative answered that on March 1, 1956, the actual value would remain as $30,360 which was

what he had given as replacement cost of the house, without the lots, less 6 percent. He exhibited no foundation or qualifications for an opinion as to the market value of the real estate involved in this case and he gave none. He testified that he gave no attention to market value; he just figured the replacement cost less 6 percent of the building on the lots. This was the computation the county assessor accepted as the value of the building. The value of the lots, concerning which there is no dispute, was added to $30,360, making a total of $31,524 which was the valuation placed on the real estate of appellant in this case.

The chairman of the county board testified that after the objection and complaint of appellant were heard by appellee, the board and the assessor drove around and looked at the house, did not enter the premises but felt that the house was de luxe, and they left it as it was. The other members of the board concurred in the testimony of the chairman but contributed nothing additional. The record is clear that appellee merely accepted the valuation adopted by the assessor.

It is presumed that a board of equalization has properly performed its official duties and in making an assessment it acted upon sufficient legal evidence to justify its action. However, the presumption disappears when there is competent evidence on appeal to the contrary and thereafter the reasonableness of the valuation made by the board becomes one of fact to be determined upon the evidence, unaided by presumption, with the burden upon the party contesting to establish that an improper and unreasonable valuation has been placed on the property involved in the litigation. Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307; K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N. W. 2d 381; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Matzke v. Board of Equalization, *supra*.

The issue in this case is whether or not the value of

the real estate of appellant as fixed by appellee is an amount substantially in excess of its actual or fair market value. That issue must be determined as an issue of fact upon competent evidence as any issue concerning the value of real estate is determined in other litigation. Generally, an issue of the actual or fair market value of real estate is determined from the testimony of persons qualified to express an opinion on the subject. This case does not present a contention that the value of the real estate has not been fairly and proportionately equalized with all other property, resulting in a discrimination and an unjust and unfair assessment. Such a contention was made in Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47, cited and relied upon by appellee. Therein it is said: "In fact no complaint is made that the property is overvalued. The only objection is that its assessed value is too high in proportion to the values placed on other business properties in the city of Lexington." The two classes of cases are distinguishable and should not be confused.

The appellant has satisfied the burden placed upon him in the present case. His real estate involved herein was overvalued for taxation purposes as of March 1, 1956. The actual or fair market value of the property as of that date is determined to be the sum of $25,500.

The judgment should be and is reversed and the cause is remanded with directions to the district court for Hamilton County to render a judgment in this cause in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES F. ADAMS, APPELLANT, V. BOARD OF EQUALIZATION OF HAMILTON COUNTY, NEBRASKA, ET AL., APPELLEES.
95 N. W. 2d 631

Filed March 27, 1959. No. 34535.

APPEAL from the district court for Hamilton County:

H. EMERSON KOKJER, JUDGE. See Adams v. Board of Equalization, *ante* p. 286, 95 N. W. 2d 627. *Reversed and remanded with directions.*

Charles F. Adams, for appellant.

John W. Newman and *Homer G. Hamilton,* for appellees.

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

BOSLAUGH, J.

This litigation involves a controversy concerning the value on March 1, 1957, of Lots 7 and 8, Block 2, Ernst Addition to the city of Aurora, for taxation purposes. The lots were owned by appellant and were improved by a house constructed thereon. A value was placed on the property of $31,524 and this was sustained by the district court. This is an appeal from that adjudication.

Cases Nos. 34534, 34535, 34536, and 34537 in this court were consolidated for purposes of trial in the district court. The evidence was produced and received in that court as though the four cases were one. A separate judgment was rendered in each case but only one bill of exceptions was prepared and filed in this court. The cases were consolidated for hearing and submission in this court.

The record in case No. 34534 and this case, No. 34535, is identical except the former concerns the value of the property involved on March 1, 1956, and the latter concerns the value of the property on March 1, 1957. The identical property is involved in each of the cases and the evidence is that the value of the property was the same on March 1, 1956, and March 1, 1957. The opinion in case No. 34534 dictates and controls the decision in this case.

It is therefore determined that the actual or fair market value of the property on March 1, 1957, was the sum of $25,500.

The judgment should be and is reversed and the cause is remanded with directions to the district court for Hamilton County to render a judgment in this cause in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN E. SHAFER ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF HAMILTON COUNTY, NEBRASKA, ET AL., APPELLEES.

95 N. W. 2d 632

Filed March 27, 1959. No. 34536.

APPEAL from the district court for Hamilton County: H. EMERSON KOKJER, JUDGE. See Adams v. Board of Equalization, *ante* p. 286, 95 N. W. 2d 627. *Reversed and remanded with directions.*

Charles F. Adams, for appellants.

John W. Newman and *Homer G. Hamilton,* for appellees.

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

BOSLAUGH, J.

This litigation involves a controversy concerning the value on March 1, 1956, of Lots 10, 11, and 12, Coblentz Addition to the city of Aurora, for taxation purposes. The lots were owned by appellants and they were improved by a house constructed on them. The valuation of $26,469 was placed on the property and this was sustained by the district court.

The county assessor testified that he observed the construction of the residence on the lots. He did not testify that he was at any time on the premises. He did state that he was not in the house at any time. A memorandum, described in the record as a card, filled out by a representative of a professional appraiser, was

delivered to the assessor who examined and checked it for mathematical accuracy. He found no error in the card made in reference to the property involved in this case and he made no change in it. He accepted the replacement cost or value as stated thereon less 6 percent thereof as the value of the building on the lots. The assessor stated that he took the amount shown on the card as replacement value, less 6 percent, as market value, computed 74 percent of that, and called the result the basic value. He said that was the formula he followed. The resolution of the county board of equalization of the county, hereafter referred to as appellee, provided that the basic value of real property assessed in that county was determined to be 70 percent of actual or market value. The assessor, in disregard of this, used in this matter 74 percent.

The persons who were witnesses and testified as to the value of the Adams property in case No. 34534, except Charles F. Adams, testified as to their opinion of actual or fair market value of the property of appellants on March 1, 1956, as follows: P. J. Refshauge, $20,000; Paul C. Huston, $20,376.73; W. Ed Coblentz (who owned all of Coblentz Addition to the city of Aurora except the property of appellants), $21,000; and Joseph V. Cunningham, $19,250. John E. Shafer testified that the value of the property of appellants was on that date $19,000.

The representative of an appraisal firm mentioned in the opinion in case No. 34534 and who was a witness therein also testified in this case, No. 34536. The testimony was identical as to each case except as to the amounts of the computations he made and the figures he stated. He said that the testimony he gave in the Adams case, No. 34534, was applicable to this case, No. 34536, except as to amounts. He said the same procedures were used in reference to the appraisal of the Adams property and the appraisal of the property of appellants.

The amount determined by the representative of the appraisal firm as the replacement value or cost of the building on the lots of appellants was $26,900. He applied to that the depreciation according to the manual of 6 percent and this resulted in $25,285, which was called the physical value. This was the computation the assessor accepted as the value of the building on the lots. The conceded value of the lots was added to $25,285 and this produced a result of $26,469 which was the valuation placed on the real estate of the appellants in this case. The assessor accepted this valuation of the property and the board of equalization left it as it was. The record is clear that the assessor accepted the valuation furnished by the professional appraiser and the board of equalization merely accepted the valuation adopted by the assessor.

What is said in case No. 34534 concerning the acts and testimony of the representative of the professional appraiser is applicable to this case. The decision in this case is dictated and controlled by the opinion in case No. 34534.

Appellants sustained the burden placed on them in this case. Their real estate was overvalued for taxation purposes as of March 1, 1956. The actual fair market value of the real estate of appellants as of that date is determined to be the sum of $20,000.

The judgment should be and it is reversed and the cause is remanded with directions to the district court for Hamilton County to render a judgment in this cause in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN E. SHAFER ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF HAMILTON COUNTY, NEBRASKA, ET AL., APPELLEES.

95 N. W. 2d 634

Filed March 27, 1959. No. 34537.

APPEAL from the district court for Hamilton County: H. EMERSON KOKJER, JUDGE. See Shafer v. Board of Equalization, *ante* p. 294, 95 N. W. 2d 632. *Reversed and remanded with directions.*

Charles F. Adams, for appellants.

John W. Newman and *Homer G. Hamilton,* for appellees.

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

BOSLAUGH, J.

This litigation involves a controversy concerning the value on March 1, 1957, of Lots 10, 11, and 12, Coblentz Addition to the city of Aurora, for taxation purposes. The lots were owned by appellants and were improved by a house constructed on them. A valuation was placed on the property of $26,469 and this was sustained by the district court. This is an appeal from that adjudication.

The record in case No. 34536 and in this case, No. 34537, is identical except the former concerns the value of the property involved on March 1, 1956, and the latter concerns the value of the property on March 1, 1957. The identical property is involved in each of the cases and the evidence is that the value of the property was the same on March 1, 1956, and March 1, 1957. The opinion in case No. 34536 dictates and controls the decision in this case.

It is therefore determined that the actual or fair market value of the property on March 1, 1957, was the sum of $20,000.

The judgment should be and is reversed and the cause is remanded with directions to the district court for Hamilton County to render a judgment in this cause in harmony with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, AND THE DEPARTMENT OF BANKING OF THE STATE OF NEBRASKA, APPELLANT, V. ASSOCIATES DISCOUNT CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES, THEODORE L. RICHLING, RECEIVER, APPELLANT.

96 N. W. 2d 55

Filed April 3, 1959. No. 34398.

1. **Usury.** The installment loan statutes include all persons or parties violating any of the inhibitory provisions thereof whether they be licensees or nonlicensees.
2. ———. Courts in usury cases must look through the form to the substance of transactions by unlawful money lenders.
3. ———. In cases of this character courts will look through the form to the substance of the transactions in order to determine whether there have been bona fide time sales or loans.
4. **Evidence.** A fact, relation, or state of things once shown to exist is presumed to continue until the contrary appears.
5. ———. In this respect a practice, if well established, will be presumed to have been followed until the contrary is shown.
6. **Usury.** An automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan.
7. ———. In order to have the foregoing principle apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price.
8. ———. However, these rules do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute.
9. **Contracts.** The rule is that the contract should be supported if possible, rather than defeated. There is no presumption against the validity of contracts.

10. ———. Within the scope of the foregoing rule each case must depend upon its own facts and circumstances.
11. **Usury.** If a contract is usurious in its inception no subsequent transaction will cure it. Hence, when a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation.
12. **Interest.** In the absence of any statute or provision in a contract providing for the method of applying payments, the rule is that interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal.
13. **Statutes: Pleading.** In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours. However, there is no such presumption where the local statute prescribes penalties and forfeitures.
14. **Usury.** Where a debt is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the debt at a usurious rate for the time of the extension, the renewal note is tainted with usury.
15. **Injunction.** Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance.
16. **Equity.** The relief ordinarily granted in equity is such as the nature of the case, the law, and facts demand, not at the beginning of the litigation, but at the time the decree is entered.
17. **Receivers.** A receiver, as an officer of the court appointing him, is required to account to the court for the receipts and disbursements of all money and property received by him as a receiver.
18. ———. As it is the duty of the receiver to account to the court whose officer he is, so there is the correlative duty to examine and rule upon the account.
19. ———. Compensation of a receiver should be fixed at an amount that will be fair and reasonable for the services rendered and the question as to what is fair and reasonable is always one of fact in each case.

20. ———. Ordinarily the compensation should not be greater than what would be reasonable compensation for doing the same amount and character of work if employed in the usual course of private business.

21. ———. In fixing such compensation certain recognized factors enter into the determination. Consideration should be given to the nature, extent, and value of the property administered. The complications and difficulties encountered should be noted. The responsibilities involved, and assumed by the receiver, and the diligence and thoroughness which he displays are weighty elements. The knowledge, experience, labor, and skill required of the receiver and devoted by him to the receivership must be taken into account. Then, too, the time properly required to be spent is an important consideration.

22. ———. In making such allowance the court is not confined to evidence formally introduced, in respect to the matter, but may act on its own knowledge and judgment as to the reasonableness of the charge in connection with what has been done by the receiver in discharge of the duties of his receivership, and the nature, extent, and value of the services rendered.

23. **Attorney and Client.** Reasonable fees for necessary legal services performed by attorneys for a receiver may be properly allowed as an expense of a receivership.

24. ———. A reasonable attorney's fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned.

25. ———. The opinion evidence of expert witnesses, as to the value of an attorney's services, is not conclusive or binding on the court. Such evidence is to be taken into consideration, with all the other evidence in the case, in arriving at a conclusion as to the just value of the services performed.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

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

Shotwell, Vance & Marchetti, for appellant Richling.

John W. Delehant, Jr., for appellees.

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

WENKE, J.

This appeal involves an action commenced in the district court for Douglas County on July 7, 1955, by the State of Nebraska ex rel. Clarence S. Beck, Attorney General, and the Department of Banking of the State of Nebraska against Associates Discount Corporation, a foreign corporation, and Jack F. Kemnitz.

The early history of this litigation can be found in two of our opinions dealing with a former appeal of this cause. The first opinion is reported as State ex rel. Beck v. Associates Discount Corp., 161 Neb. 410, 73 N. W. 2d 673. Therein we overruled the motion of defendants, appellees therein, to vacate and dissolve our temporary restraining order of December 3, 1955, which order restrained defendants from performing certain acts therein enumerated. Our order of December 3, 1955, also appointed a receiver to take charge of the defendant Associates Discount Corporation's assets, which we had ordered to be impounded. The clerk of this court approved the bond tendered by the receiver we appointed and the receiver thereupon took possession of the assets of Associates Discount Corporation on December 12, 1955, and is still in possession thereof. The second of our opinions dealing with this first appeal is reported as State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215. Therein we determined that the plaintiff, appellant therein, was a proper party to maintain the action and that its amended and supplemental petition stated a cause of action. We thereupon ordered the cause to be tried upon the merits and remanded it to the trial court for that purpose. In doing so we also granted plaintiff, appellant therein, a temporary injunction and continued the receivership in full force and effect. The law therein announced is here controlling as the law of this case.

Thereafter plaintiff sought to amend paragraph VI and the prayer of its amended and supplemental petition. Its request to do so should have been granted. In its amended and supplemental petition, as thus amended, plaintiff alleged:

"That the defendants and each of them have failed to procure a license to conduct an installment loan business in the State of Nebraska and, with the intent of evading the usury laws of the state, have engaged in a devise (device) and subterfuge by means of which they have exacted excessive, unlawful, exorbitant, unconscionable and usurious charges for the making of installment loans to purchasers of automobiles, as hereinafter more specifically set forth.

"That for the purpose of carrying out said devise (device) and subterfuge the defendant, Associates Discount Corporation, purports to be engaged solely in the business of purchasing, at a discount, from automobile dealers, notes and mortgages and conditional sales contracts covering the sales of automobiles; that, in fact, none of these contracts represent bona fide time sales transactions but constitute direct loans by the defendant, Associates Discount Corporation, to the purchasers of such automobiles."

Plaintiff then goes on to allege in detail the technique or methods used by the defendants to accomplish their purpose and, by reason thereof, allege: "That all of the loans made by defendants in violation of law, as hereinbefore set forth, are void and uncollectible." For a full statement of these details, and our discussion thereof, see State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215. The plaintiff then goes on to allege that the defendants have, in making such loans, violated the Installment Loan Act in many ways. We shall not here set out each separate claim in that respect but will refer thereto whenever the evidence adduced is sufficient to support such contention.

The prayer, insofar as here material, asks that the

"court order, adjudge and decree that the defendants and each of them have been operating an installment loan business in the State of Nebraska wrongfully and in violation of the law; that the method of doing business by the defendants is a device and subterfuge engaged in by the defendants with the intent of evading the usury laws of this state; that the defendants have made excessive, unlawful, exorbitant, unconscionable and usurious charges upon loans; that the notes and mortgages and other instruments of indebtedness taken by the defendants are void and uncollectible and should be cancelled; that the method of doing business used by the defendants is contrary to the public policy of the state; * * * that upon final hearing a permanent injunction be entered enjoining the defendants from engaging in the installment loan business in the State of Nebraska in the manner set forth in this petition or in any other manner in violation of the laws of the state; * * * that defendants be required to account to this Court for all the monies coming into their hands upon the contracts which are the subject of this action, subsequent and pursuant to the order of this Court entered herein on July 19, 1955, and to and including December 3, 1955, and that defendants be ordered and directed to pay to the Receiver herein all monies so collected; and that the receiver be ordered to refund to all borrowers who have made payments on such void loans after the commencement of this action the money so paid * * * and for such other and further relief as equity may require."

Trial on the merits was had commencing on January 30, 1957, and extending through March 7, 1957. The trial court rendered its decision on December 11, 1957. Plaintiff filed a motion for new trial and has taken this appeal from the overruling thereof.

The trial court's findings and orders are many and detailed. In equity cases we consider the record de novo and, in so doing, apply the usual principles applicable

in such cases. See, McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1; Uptegrove v. Elsasser, 161 Neb. 527, 74 N. W. 2d 61. Such principles include the following: "In the consideration of an equity suit on appeal, if there is an irreconcilable conflict in the testimony on a material issue, this court will, in determining the weight of the evidence of witnesses who appeared in court to testify, consider the fact that the trial court observed them and their manner of testifying, and must have accepted one version of the facts rather than the other." Uptegrove v. Elsasser, *supra*. This being an equity action, we will consider the record accordingly and come to our own conclusion as to what the rights of the parties are. In view thereof nothing would be gained by setting out in detail the findings and orders of the trial court.

While the decree of the trial court is generally favorable to the appellees there are, however, certain parts thereof which are favorable to the appellant. Appellees have not cross-appealed. In view of that fact the following principle is applicable: "The right of an appellee in an action to have reviewed a portion of a judgment or decree against him depends upon whether or not he has perfected a cross-appeal and has assigned error in relation thereto agreeable to the provisions of statute and the rules of this court." Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492.

For convenience we shall herein refer to the appellant as the state and to the appellees as such except as we may refer to them separately. In the latter situation we shall refer to Associates Discount Corporation as Associates and to Jack F. Kemnitz as Kemnitz. The primary question presented is, were the appellees unlawfully engaged in the operation of an installment loan business without having procured a license to do so?

Associates, an Indiana corporation, is a wholly owned subsidiary of Associates Investment Company, also an Indiana corporation. We shall herein refer to Associates

Investment Company as the parent company. The parent company has its principal place of business in South Bend, Indiana. Sometime in 1947 Associates, being then qualified to do business in the State of Nebraska as a foreign corporation, opened a branch office in Omaha, Nebraska, ostensibly for the purpose of engaging in the business of purchasing, at a discount, purchase money notes, mortgages, and contracts covering time sales of automobiles from car dealers in Omaha and the surrounding territory. Sometime in 1949 Kemnitz became the resident manager and general supervisor of Associates' Omaha branch, which was located at 216 W.O.W. Building at Fourteenth and Farnam Streets. Kemnitz continued in that capacity and was such on July 7, 1955, when this action was instituted by the state. Associates ceased its buying operations sometime shortly after July 7, 1955, following the institution of this action, and left the State of Nebraska in June of 1956, thus closing its Nebraska operations as the Omaha office was its only place of business in the state.

At the time this action was started Associates had at its Omaha branch office some 1,175 contracts, or rewrites thereof, involving the sale of automobiles. These contracts Associates had acquired through or from some 58 different car dealers. Most of them had been acquired from or through car dealers in Omaha and the territory immediately surrounding it in Nebraska and Iowa. However, Associates owned a few contracts that had apparently been acquired through or from dealers beyond that territory but in the continental United States.

As herein used a contract refers to the note and mortgage given by a buyer of a car, in connection with the purchase thereof, to the dealer from whom he was buying it. Such note and mortgage were made out to the dealer. The note and mortgage were then assigned by the dealer, without recourse, to Associates. They would always be accompanied by a certificate of title

to the car or truck purchased on which certificate of title a lien for the amount of the indebtedness, evidenced by the note and chattel mortgage, was endorsed. These contracts were of two types, being either level payment or balloon. The level payment type of contract provided for equal monthly payments usually over a period of either 24 or 30 months. The balloon type usually provided for 12 or 18 monthly payments, the first 11 or 17 of which would be equal but the last of which would be a large or balloon payment. A rewrite of any such contract would arise whenever the time for payment of any part of the debt owing was extended. Refinancing was accomplished by executing a new note and mortgage for the amount of the unpaid balance of any contract, after a finance charge and usually insurance premiums, had been added thereto.

If the foregoing contracts, or any part thereof, can be said to have been loans then neither of the appellees had authority to make them for it is admitted that neither of them ever had a license to operate an installment loan business in the State of Nebraska.

Emmco Insurance Company, an Indiana corporation with its principal place of business at South Bend, Indiana, but licensed to do business in Nebraska since 1940, is also a wholly owned subsidiary of the parent company except as the directors thereof may hold qualifying shares. The Emmco Insurance Company is only authorized to write automobile property and collision insurance. Property insurance included fire, theft, and comprehensive coverage. Of the 1,175 contracts that Associates held at the time of this action 695 included policies of insurance issued by Emmco Insurance Company.

Old Republic Credit Life Insurance Company, later changed to Old Republic Life Insurance Company, is a corporation licensed to do business in Nebraska. We shall herein refer to this company as Old Republic. On August 3, 1953, Old Republic entered into a contract

with the parent company whereby Old Republic agreed to insure, subject to certain limitations therein provided for, the lives of the latter's installment contract debtors. At the same time these same parties, subject to certain limitations therein provided for, entered into a contract of the same nature covering credit health and accident insurance. These contracts continued in force and effect until on and after July 7, 1955, and, by their terms, covered the debtors of any or all associated, affiliated, or subsidiary companies or corporations of the parent company. Of the 1,175 contracts held by Associates on July 7, 1955, 624 either had all or some form of credit life, health, or accident insurance. Practically all of these policies were issued under and pursuant to the policies entered into by the parent company with Old Republic.

On the same day, August 3, 1953, Old Republic entered into a reinsurance treaty with Alinco Life Insurance Company whereby the latter would, with certain exceptions therein provided for, reinsure 18 percent of the credit life insurance written by Old Republic upon individual lives. On July 1, 1954, this was increased to 27½ percent, and again on July 1, 1955, it was further increased to 58½ percent. Alinco Insurance Company is also a wholly owned subsidiary of the parent company.

It thus becomes apparent that the parent company would receive, either directly or indirectly, some benefit from the sale of these policies of insurance by Associates since it was and is the sole owner of both Emmco Insurance Company and Alinco Insurance Company.

The installment loan statutes include all persons or parties violating any of the inhibitory provisions thereof whether they be licensees or nonlicensees. See, State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; Nelson v. General Credit Corp., 166 Neb. 770, 90 N. W. 2d 799. As stated in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215: "* * * the permissive provisions of the in-

stallment loan statutes apply to licensees, but every inhibitory provision therein applies to both licensees and nonlicensees and the officers and employees of either or both."

The burden is on the state to establish its cause of action. See, Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645; 20 Am. Jur., Evidence, § 135, p. 138. As stated in 31 C. J. S., Evidence, § 110, p. 718: "The burden of evidence at any particular time rests on the party who would be defeated if no further evidence were introduced; * * *." However, in cases of this character courts will look through the form to the substance of the transactions in order to determine whether there have been bona fide time sales or loans. See, Nelson v. General Credit Corp., *supra;* State ex rel. Spillman v. Central Purchasing Co., 118 Neb. 383, 225 N. W. 46. As stated in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215: "Ordinarily, usurious transactions take forms which on their face appear to be legal. Devices, subterfuges, schemes, and circumvention to conceal usury are innumerable. * * * The applicable principle and rationale (is) that courts in usury cases must look through the form to the substance of transactions by unlawful money lenders * * *." In this respect a practice, if well established, will be presumed to have been followed until the contrary is shown. See, 9 Wigmore on Evidence (3d Ed.), § 2487, p. 281; Lincoln Joint Stock Land Bank v. Bexten, 125 Neb. 310, 250 N. W. 84; State v. Fray, 214 Iowa 53, 241 N. W. 663, 81 A. L. R. 286; Constable v. National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903; Cataneo v. United States, 167 F. 2d 820. As stated in Cataneo v. United States, *supra:* "When the status of a person or a state of affairs is proved to have existed at a particular time, the continuance of this status or relationship is presumed." And as held in Lincoln Joint Stock Land Bank v. Bexten, *supra:* " 'A fact, relation, or state of

things once shown to exist is presumed to continue until the contrary appears.' "

As stated in Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122: "* * * an automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. * * * It is also true that a time sale made in good faith at a price in excess of a cash price, even though the difference exceeds lawful interest for a loan, which price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury." See, also, Nelson v. General Credit Corporation, *supra;* McNish v. General Credit Corp., *supra.* And the same would be true if the dealer called the finance company for that information. See McNish v. Grand Island Finance Co., 164 Neb. 543, 83 N. W. 2d 13. But as stated in Nelson v. General Credit Corp., *supra,* by quoting from McNish v. General Credit Corp., *supra:* "These rules however do not apply where it is proved that the transaction was not made in good faith but that it was a scheme and a device pursued to evade the operation against it of the usury statute."

"In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price. It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such." McNish v. General Credit Corp., *supra.*

It is not a time sale if a car dealer, in selling a car, actually agrees with the buyer that he will finance (take care of) the balance of the cash purchase price agreed upon and does so, either directly or through others, even though he obtains the schedule of payments

and the total amount thereof from a rate chart furnished by a finance company or obtains that information from a finance company by calling its office and then fully informs the buyer of the amount he will be required to pay and the terms thereof. Such a transaction would be a loan to finance the balance of the cash purchase price and if payable in installments must meet the requirements of the statutes relating thereto. And the fact that the buyer knew the terms and provisions of such loan at the time it was made and voluntarily entered into it would not have the effect of waiving the illegality of any provision thereof, if such provision was actually in violation of any of the inhibitory provisions of the installment loan statutes, for the purpose of the Legislature in enacting such laws was, as a matter of public policy under its police powers, to regulate the lenders of money on installment loans as a protection to those of the general public who find it necessary to borrow money on that basis. See McNish v. General Credit Corp., *supra*. As we said therein by quoting from State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215: "Their purpose and design is to license and control the business of making such installment loans, and to restrict the enforcement and collection of illegal installment loans once they have been made by either licensees or nonlicensees, * * * all of such borrowers are regarded not as in pari delicto but as in viniculus (sic) to defendants, to whom they owe no duty in equity." See, also, Seebold v. Eustermann, 216 Minn. 566, 13 N. W. 2d 739, 152 A. L. R. 585.

In construing section 45-105, R. R. S. 1943, which relates to the maximum interest authorized by section 45-101, R. R. S. 1943, we said in Loucks v. Smith, 154 Neb. 597, 48 N. W. 2d 722: "In order to constitute usury, there must be (1) a loan, express or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid or

agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned. * * * The intent which is necessary to constitute usury is not a specific intent to violate the statute but an intent to exact payments which exceed the amount of interest allowed by statute." While all of the contracts, or rewrites thereof, that are hereinafter declared void were, in effect, installment loans, it should be remembered that installment loans are, by the provisions of the statutes hereinafter set forth relating thereto, void and uncollectible for many reasons other than for charging interest thereon in excess of the maximum authorized.

Statutes governing "Installment Loans" are sections 45-114 through 45-158, R. R. S. 1943, together with all amendments that have been made thereto. Section 45-128, R. R. S. 1943, provides, insofar as here material, that: "Any firm or individual members thereof, * * * or corporation or officers thereof, or person, who by any device, subterfuge or pretense whatsoever, shall engage in or continue any of the kinds of business or enterprise permitted to licensees by sections 45-114 to 45-155 without having obtained the license therein required, with intent to evade the provisions of said sections, shall be deemed guilty of a misdemeanor, * * *." Section 45-155, R. R. S. 1943, provides: "Violation of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible." As stated in McNish v. General Credit Corp., *supra:* "In view of this language we think the Legislature intended a lender should have nothing in such a situation." See, also, A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687.

The provisions of the installment loan statutes, insofar as here material, provide as follows: "Every licensee hereunder may make loans, not exceeding one thousand dollars in principal amount, and may contract for and receive thereon charges at a rate not exceeding thirty-

six per cent per annum on that part of the unpaid principal balance on any loan not in excess of one hundred and fifty dollars, thirty per cent per annum on that part of the principal balance on any loan in excess of one hundred and fifty dollars and not in excess of three hundred dollars, and nine per cent per annum on any remainder of such unpaid principal balance." § 45-137, R. R. S. 1943. "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." § 45-138, R. S. Supp., 1955. "No licensee shall enter into any contract of loan under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than twenty-one calendar months from the date of making such contract, if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower * * *." § 45-138, R. S. Supp., 1955. "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 * * *." § 45-138, R. S. Supp., 1955. "Charges on loans made under sections 45-114 to 45-155, shall not be paid, deducted or received in advance. Such charges shall not be compounded; * * * In addition to the charges herein provided for, no further or other amount whatsoever shall be directly or indirectly charged, contracted for, or received." § 45-137, R. R. S. 1943. "The licensee shall not require the purchasing of insurance from the licensee as a condition precedent to the making of the loan, and shall not decline existing insurance where such existing insurance is provided by an insurance company duly licensed by this state." § 45-141, R. R. S. 1943. "No such person, firm, partnership, corporation or association so licensed shall receive any chattel

mortgage * * * signed in blank, but all blank spaces shall be filled in with ink or typewritten or printed with the proper names and amounts, showing the name of the person, firm, partnership, corporation or association by whom the person making the conveyance or assignment is employed." § 45-142, R. R. S. 1943. "No licensee shall take * * * any instrument signed in which blanks are left to be filled after execution." § 45-143, R. R. S. 1943.

The provisions of sections 45-142 and 45-143, R. R. S. 1943, being special statutes relating to a specific subject, installment loans, are here controlling rather than section 62-114, R. R. S. 1943, which relates to negotiable instruments generally. Of course, if the contracts held by Associates are in fact all bona fide time sale contracts, then the provisions of the installment loan statutes would have no application thereto. If, on the other hand, they are in fact installment loans then if they fail to meet the standards thereof, as fixed by the Legislature, they are subject to the penalties and forfeitures therein provided.

The record of the oral testimony taken at the trial of this cause is extensive and, with the thousands of exhibits offered and received in evidence, make a very voluminous record. It would not be practical to outline this evidence in any detailed manner nor would doing so serve any useful purpose. We will state our conclusions as derived from a study thereof and render our opinion based thereon.

The evidence establishes that the Lied Motor Car Company of Omaha, Nebraska, a dealer in Buick automobiles and hereinafter called Lied, handled the financing of most of their car sales through Associates. On July 7, 1955, when this action was brought, Associates held 274 contracts and 79 rewrites originally acquired through Lied. Generally the financing thereof was handled in the following manner: When a prospective buyer came to any of Lied's places of business in Omaha

to purchase a car the salesman with whom he dealt would quote him a cash price for the kind of car he wanted, which would include the price of any accessories the prospective buyer might choose to have placed thereon. Then Lied would have some one on its staff appraise the prospective buyer's car, if he had one to trade in, which he usually did, and inform the buyer of the amount he would be allowed therefor on the purchase price of the new car. At the same time it would be determined the amount of cash, if any, the buyer could pay and occasionally a discount would be allowed. When these amounts had been determined, and the balance of the cash purchase price agreed upon, then, if the prospective buyer informed the salesman that he would need time in which to pay the balance, the salesman would advise the prospective purchaser that they could take care of that, sometimes advising the buyer that Associates would handle it. The salesman handling the sale would then, without stating any time price to the purchaser, have the purchaser fill in and sign a "Purchaser's Statement" or "Purchaser's Statement and Application for Credit," either of which included all information necessary for the purpose of obtaining credit. If either of the foregoing were signed in blank the salesman would get such information from the buyer as the credit application called for. This information would include the buyer's statement as to how much he thought he would be able to pay per month and for how long a period of time. A "Car Invoice" showing the delivered price of the car, including accessories, as the "Total Cash Price" and the allowances, including any trade-in, cash payments, or discount, if any, would be filled in. There was typed on this "Car Invoice" that: "Balance to be paid by Associates Discount—Their Finance," or words to that effect. Lied would then call Associates to see if the buyer's credit was all right, giving Associates all the credit information it had obtained. Lied would, at the same time, advise Associates fully as to

the price of the car being purchased; whether it was new or old; the amount allowed for a trade-in, if any; the amount of cash paid, if any; the amount of discount that had been allowed, if any; the amount of the unpaid balance of the cash purchase price; and what the buyer thought he could pay per month and for how long. If Associates approved the buyer's credit and agreed to accept the paper it would then fix its own terms, which would include finance charges, insurance premiums, an occasional "Pack," and type of payments, which would be either balloon or level type, and inform Lied thereof. In doing so a substantial amount was usually set aside for the dealer as a bonus or as a commission. Occasionally an additional cash payment was required in order to make the paper acceptable to Associates and Lied would be informed of that fact. If the buyer agreed thereto then Associates would be so advised. In either event, when the paper was finally acceptable to Associates, Lied was so informed. The buyer was then informed by Lied that his credit was all right and the deal had gone through. At this time the buyer, before being permitted to take the car he was purchasing, was required to and signed, among other papers, a blank "Motor Vehicle Invoice Form" and a blank note and mortgage, giving the dealer the authority to fill them in. At the same time the buyer was always informed of what his monthly payments would be but usually was not informed of the total of his obligation, the latter including the finance charges made and insurance premiums that had been included by Associates. However, occasionally the buyer was informed of what the total of his payments would be. When these papers had been signed in blank the purchaser was permitted to take the car. Thereafter the "Motor Vehicle Invoice Form" that had been signed by the buyer in blank was filled in by Lied. When so filled in it disclosed the terms of the installment payments owing by the buyer, including the finance charges and insurance premiums. This and the "Car Invoice"

already referred to as showing the "Balance (of the cash purchase price) to be paid by Associates Discount - Their Finance" were then mailed to the buyer. They were usually received by the buyer about a week or 10 days after the sale had been closed and the car delivered. This was usually the first knowledge the buyer had of the amount of the charge made to finance the balance of the purchase price and what amounts had been included for insurance. It was also usually the first time he knew the total amount he owed although, as previously stated, occasionally the buyer would be given the amount thereof at the time he received the delivery of the car. The note and mortgage were then filled in either by Lied or Associates, but more often in the office of Associates. The terms were those that had been fixed by Associates upon accepting the deal and of which the buyer was usually not informed at the time of the sale, and of which he usually did not become aware until he received the "Motor Vehicle Invoice Form" in the mail from Lied. These notes were payable in installments. The notes and mortgages were always filled in so as to be made payable to Lied and then endorsed by Lied to Associates "Without Recourse." When the deal had been fully completed Associates would pay Lied the full amount of the balance of the cash purchase price, although on rare occasions a "D.A." certificate would be issued to the dealer for a part thereof, and would, periodically, pay Lied the dealer's bonus as it accumulated. In fixing the terms of these contracts Associates almost always charged substantially more for financing the balance of the purchase price than the maximum interest rate allowed by statute for installment loans. It otherwise violated the inhibitory provisions of the Installment Loan Act by providing, in many instances, for a balloon payment; in many instances for level monthly payments in excess of 21 months; in many instances by causing the buyer to take out insurance through it when such insurance had not been ordered

or even discussed by the buyer with the dealer; in other instances when the buyer did not want such insurance; and in still other instances insurance was required to be taken out through Associates although the buyer had comparable insurance in another company. After the note and mortgage had been filled in and all information sent to the home office at South Bend, Indiana, that office would send the buyer, through the mail, a coupon or payment book showing the total payments owing, together with such insurance policies as the buyer had ordered, been required to take out, or were taken out without his knowledge. These policies included automobile insurance in Emmco Insurance Company and credit life, health, and accident insurance in Old Republic.

We think the foregoing establishes that there was an agreement between Associates and Lied whereby Associates agreed to and did finance for Lied's car buyers the balance owing by them of the cash sale purchase price whenever the buyer needed time in which to pay such balance and, because thereof, Lied never quoted to such buyers any time sale price as such. In handling these sales Lied did so in the manner as has been hereinbefore set forth. This manner of handling permitted Associates to charge such purchasers (borrowers) finance charges in amounts in excess of those permitted by the installment loan laws and to otherwise violate the inhibitory provisions thereof without the purchaser's knowledge. Lied, either wittingly or unwittingly, participated in this plan as the agent of Associates by handling each sale as if it were ostensibly a time sale and by getting the buyer to sign the necessary papers in blank, thus giving Associates the opportunity to intentionally do what it did. That this plan or scheme resulted in a wholesale violation of the inhibitory provisions of the installment loan statutes is evidenced by the following observations: Of the 274 original contracts held on July 7, 1955, by Associates, which con-

tracts it had acquired through Lied under and pursuant to the above plan, we find at least 244 charged interest in excess of the maximum fixed by statute; 122 provided for balloon payments; and 126 provided for level payments in excess of 21 monthly installments. In addition we observe that 111 had Emmco insurance, 159 had Old Republic insurance, and that practically all of the notes and mortgages were signed in blank to be filled in by the dealer after the execution thereof by the buyer.

We think the effect of this plan or scheme engaged in by Associates to have these contracts handled in such a manner as to convince the buyers that they were actually purchasing cars on a time price basis when, in fact, the balance owing on the cash price of each car was being financed by Associates, and thus permit Associates to ostensibly avoid the inhibitory provisions of the installment loan statutes, extends to all of the contracts acquired by Associates through Lied even though a few of them may have been handled by Lied on a proper time sale basis. Having come to the conclusion that this plan or scheme, which was intentionally put into operation by Associates to avoid the inhibitory provisions of the installment loan statutes while engaged in the making of installment loans without having obtained a license to do so, extends to all contracts Associates acquired through Lied, we hold all such contracts are void and uncollectible. See, §§ 45-128 and 45-155, R. R. S. 1943; Powell v. Edwards, *supra;* McNish v. General Credit Corp., *supra.*

While there are some circumstances indicating that Associates dealt similarly with other car dealers from whom it had acquired contracts which it held on July 7, 1955, we do not think the evidence, as a whole, is sufficient to hold that the same or a similar plan or scheme of operations was put into effect by such other dealers acting as agents for Associates. The evidence establishes that in many instances some of these dealers

were actually making, either through themselves or others, installment loans to finance the balance of the cash purchase price of cars which they were ostensibly selling on a time sale basis. However, in the absence of sufficient proof establishing that such dealers, either wittingly or unwittingly, cooperated with Associates in such plan or scheme and, by their conduct, helped put it into effect, there is a presumption of legality as to each contract held by Associates on July 7, 1955, that it had acquired through such dealers. 20 Am. Jur., Evidence, § 240, p. 236; Horton v. Rohlff, 69 Neb. 95, 95 N. W. 36. As stated in Horton v. Rohlff, *supra:* "The rule is that the contract should be supported if possible, rather than defeated. * * * 'there is no presumption against the validity of contracts.'" Whether such sales were bona fide time sales or actually the financing of the balance of the cash purchase price is, of course, a question of fact, for, as stated in Nelson v. General Credit Corp., *supra:* "Within the scope of the above rules each case must depend on its own facts and circumstances." See, also, Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19; McNish v. General Credit Corp., *supra.*

In view of our holding that all contracts acquired by Associates through Lied are void we must also hold that all rewrites thereof are void. See, State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; Nelson v. General Credit Corp., *supra.* As stated in Nelson v. General Credit Corp., *supra:* "The usurious character of a transaction is determined as of the time of its inception, and if a contract is usurious in its inception, no subsequent transaction will cure it. Hence, when a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract, making it subject to the defense of usury to the same extent as was the original obligation." Consequently the 79 rewrites of Lied contracts are void and uncollectible.

In the absence of any statute or provision in a contract providing for the method of applying payments made this court has said in Dickson v. Stewart, 71 Neb. 424, 98 N. W. 1085, 115 Am. S. R. 596: "The rule is well established that 'Interest on a judgment or debt due is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, such surplus is applied to sink the principal, * * *.' Mills v. Saunders, 4 Neb. 190, and Davis v. Neligh, 7 Neb. 78." The contracts and rewrites herein involved have no provision therein as to how the payments, when made, are to be applied as to either interest or principal.

In considering the evidence adduced as to individual contracts other than Lied we find the following to be loans made to the purchasers of cars for the purpose of financing the balance of the cash purchase price thereof and not bona fide time sale contracts: Clifford P. Yunker, George A. Scott, John W. Frost, Murray G. Smith, Howard Mattox, Robert A. Bendon, John E. Walker, Sebastino Gaffglione, Floyd Howard Knott, Jr., Dean D. Nissen, Leo M. Barby, Bonnie Louis Beedle, Werner F. Messenbrink, Frederick J. Anderson, Nunzio J. Vaccaro, Glenn P. Bjork, Edmond Tschetter, Richard L. Oakes, Harry S. Swanson, Al H. Snyder, Clinton Gibson, Earl E. Rice, Sylvester Branch, George P. McClure, Robert Freerking, Allan R. Kunce, James Backora, Foster J. Scott, Jr., Donald G. Hurlbutt, Robert M. Hosman, Rev. L. V. Mick, Willie L. Brown, Ray J. Lenz, Don S. Peterson, D. R. Cotter, Stanley Zdan, Leslie M. Hatcher, Arthur Herschlag (2), Robert P. Johnson, and C. Neil Cline.

These loans were all made payable on the installment basis and in one or more respects violated the inhibitory provisions of the installment loan statutes and are therefore void and uncollectible. Thirty-eight of these loans charged interest in excess of the maximum authorized by statute on such loans, 18 provided for a balloon pay-

ment, and 21 provided for more than 21 monthly installments. Five of the foregoing have been rescheduled but such rescheduled extensions are also void and uncollectible for the reasons hereinbefore stated.

It is interesting to note that of the foregoing 41 contracts held to be installment loans that although 10 thereof were made by Associates directly to the purchaser in all but one of those 10 the notes and mortgages were actually made directly to the dealer selling the car and then endorsed by the dealer to Associates "without recourse." This clearly evidences that Associates and Kemnitz were intentionally engaging in a plan or scheme on the part of Associates to cover up their operations of engaging in the installment loan business without a license to do so.

We have found at least three individual contracts, not included in the foregoing list of names, that were, in fact, installment loans to finance the balance of the cash purchase price of automobiles that were entered into in states other than Nebraska as the result of the sales of motor vehicles in such states. These three contracts have provisions therein that violate the inhibitory provisions of the installment loan statutes of Nebraska.

Neither appellants nor appellees pleaded or presented the law of the state wherein these three contracts were entered into. Generally, "* * * with regard to the laws of a sister state, the broad rule prevails that in the absence of a showing to the contrary, such laws will be presumed to be the same as the laws of the forum. To state the rule another way, unless the court's attention is directed to a statute or decision of another state bearing on a question before it, the law of such state will be presumed to be the same as that of the forum." 20 Am. Jur., Evidence, § 178, p. 182. See, also, Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431; First State Bank of Herrick v. Conant, 117 Neb. 562, 221 N. W. 691; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37. As stated in First State Bank of Herrick v. Conant,

supra: "In the absence of pleading and proof to the contrary, the statutes of a sister state are presumed to be the same as those of this state." We held in Scott v. Scott, *supra,* in discussing the Uniform Judicial Notice of Foreign Law Act passed by the 1947 Legislature, that: "The foregoing statutes were not intended to remove the necessity of pleading and presenting the common law or statutes of another jurisdiction of the United States when recovery based thereon is sought in an action brought in this state to enforce a cause of action arising thereunder. It only removes the requirement of proving it. A court may require that it be pleaded and presented." We then went on to say therein that: "In the absence of the common law or statutes of any other jurisdiction in the United States being pleaded and presented we will presume the common law or statutes of such other jurisdiction to be the same as ours." However, as stated in 20 Am. Jur., Evidence, § 182, p. 188: "A number of courts, however, have adopted the rule that in the absence of proof of the statute law of a sister state, the presumption is that it is the same as the statute law of the state within which an action is brought. Such presumptions do not extend to such statutory enactments as are penal in their nature." We followed this in People's Building, Loan & Savings Assn. v. Backus, 2 Neb. (Unoff.) 463, 89 N. W. 315, wherein we said: "The laws of that state are not pleaded, and even if we concede that the transaction in controversy is to be governed thereby, the result would be the same, since, in the absence of some showing as to the New York law in the record, we will presume it to be the same as our own. Welton v. Atkinson, 55 Neb., 674. This presumption obtains also in cases where usury is alleged. In such cases, in the absence of pleading and proof of the foreign law, the question will be determined according to the law of the forum. Craven v. Bates, 96 Ga. 78, 23 S. E. Rep., 202; Webb, Usury, section 280. It is true there is no such presumption where the local stat-

ute prescribes penalties and forfeitures. Balfour v. Davis, 14 Ore., 47, 12 Pac. Rep., 89. But our statute is not of that character. It does not avoid the whole contract in case of usury, but only limits recovery to the sum actually loaned. Hence there is no reason for refusing to presume it to represent the law in force elsewhere."

Here the statutes involved are penal in character and void the entire contract in case of a violation of any of the inhibitory provisions thereof. See, McNish v. General Credit Corp., *supra;* §§ 45-128 and 45-155, R. R. S. 1943. We think our holding in People's Building, Loan & Savings Assn. v. Backus, *supra,* is here controlling of the contracts entered into in states other than Nebraska.

We find the evidence adduced establishes the contracts of the following individuals to have been bona fide time sales: Harry R. Davis, Roy Benfield, William R. Batth, Joseph O. Edwards, Francis J. Mohatt, Jr., Clifford Drey, Julian C. Eberhart, and Jaushua Foster.

We come then to the rewrite or extensions numbering some 177. They are set out in exhibit "D" of the record. We have already held 84 of these to be void because they are extensions of original contracts that we have held to be void.

First, the method used by Associates in extending these contracts should be set forth. When the debtor of either a balloon or level payment type contract wished to extend the time for payment of any part thereof Associates would take a new note and mortgage from such debtor. The total amount of such new note and mortgage would be determined by adding to the balance of the debt remaining unpaid the finance charge made for extending the time for payment of such balance and any insurance premiums incurred by the debtor for insurance obtained through Associates. However, the original note and mortgage would not be surrendered to the debtor by Associates but were kept by it and not marked

either paid or cancelled. Likewise the certificate of title and the lien endorsed thereon for the original debt were kept by Associates. The lien for the original debt was not cancelled nor was any lien placed on the certificate of title for the indebtedness evidenced by the new note and mortgage. However, when the new note and mortgage had been executed by the debtor extending the loan, then Associates would pay itself the amount of the old unpaid balance and credit that amount to the account of the debtor. We find that by this procedure Associates kept the old note, mortgage, and certificate of title, with the original lien endorsed thereon, as collateral security for the substituted new debt.

In a comparable situation in Chicago Lumber Co. v. Bancroft, 64 Neb. 176, 89 N. W. 780, 57 L. R. A. 910, we said: "The note and mortgage were satisfied for the purpose for which they were executed and retained by the creditor as further security to the notes evidencing the new contract." That is, "The note and mortgage sued on were held as a pledge to the payment of the valid demands owing by the makers to the payee, and nothing more." See, also, State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215. As stated in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215: "We conclude that such claimed rescheduling or forbearance was simply a renewal or substitute for the original contract which was the purported consideration therefor, * * *." Thus the question of Associates' rights must depend upon the validity of the renewal or extension note.

However, appellees contend: "An original valid time sales contract which is not affected by usury can never be invalidated by any subsequent usurious transaction * * *." That this contention has many authorities to support it is beyond question. See, Nichols v. Fearson, 32 U. S. 103, 8 L. Ed. 623; Annotation, 3 A. L. R. 877; Annotation, 102 A. L. R. 574. As stated in Annotation, 102 A. L. R. 574: "It is a general rule that the usurious

nature of a contract or obligation is to be determined as of the time it is entered into, and that, if it is not usurious in its inception, it is not invalidated or tainted with usury by any subsequent usurious transaction with respect thereto." In the early history of this court we followed this doctrine. See, Richards v. Kountze, 4 Neb. 200; Dell v. Oppenheimer, 9 Neb. 454, 4 N. W. 51. However, in Chicago Lumber Co. v. Bancroft, *supra,* we did not choose to do so, which is clearly evidenced by a dissent thereto. Therein we held, by quoting from McDonald v. Beer, 42 Neb. 437, 60 N. W. 868, that: "Where a loan is made at a legal rate of interest and a note executed as evidence of the indebtedness thereby created, and at the maturity of the note a contract is made by which the time of payment is extended and a new note is given in which is included interest on the amount of the loan at a usurious rate for the time of the extension, the renewal note is tainted with usury." The provisions of the usury statute were therein enforced and applied. It should be remembered in reading Chicago Lumber Co. v. Bancroft, *supra,* that what is now section 45-105, R. R. S. 1943, which forfeits only the interest, was involved whereas the statutes herein involved make the entire obligation void and uncollectible.

Applying the reasoning of Chicago Lumber Co. v. Bancroft, *supra,* and our holding therein, to the situation herein presented we think that if any of the provisions of these renewal or extension notes are in violation of the inhibitory provisions of the installment loan statutes that they are void and uncollectible and that no recovery can be had by Associates on the original contracts for which such extensions or renewals were substituted. To hold otherwise would permit the holders of valid obligations to provide for any provisions in a renewal or extension thereof on an installment basis which they could force the debtor to sign and, if collected, they would be that much ahead, but, if the debtor subsequently objected and such provisions were held to be in violation

of some inhibitory provision of the installment loan statutes, the holder would be out nothing for he could then fall back on his original contract. We are certain the Legislature did not so intend by its enactments covering installment loans and we can see no good reason why courts should permit such a loophole to be created, that is, to let the holder of valid obligations violate the provisions thereof with impunity in making extensions or renewals thereof.

Admittedly 165 of these rewrites include finance charges in excess of the maximum permitted by law. We have examined all of the renewal or extension notes held by Associates on July 7, 1955, as contained in exhibit "D", other than the 84 already held void and uncollectible, and find that all but one, that of Harold Damewood, Jr., violate in some manner the inhibitory provisions of the installment loan statutes hereinbefore set forth. Usually such violations consisted of charging interest beyond the maximum limits provided for by statute in such cases, providing for balloon payments or for monthly payments in excess of 21 months. Appellees call our attention to the fact that beginning with June 24, 1955, after examiners from the Department of Banking had examined part of the assets of Associates, and extending through July 7, 1955, when this action was instituted, Associates, in rewriting eight of its contracts, charged a rate that produced less than nine percent simple interest. That is true. However, three of these renewals were of contracts originally acquired through Lied and six provided for monthly payments beyond 21 months and were, because of those provisions, void. We have not been able to find the record of one of these rewrites referred to as Dale Hayden. For the reasons hereinbefore stated we find all of the renewal or extension agreements listed in exhibit "D" of the record to be void and uncollectible except that of Harold Damewood, Jr.

Associates sought to avoid the effect of having over-

charged its debtors when making these extensions or renewals by rescheduling them after July 7, 1955, and giving the debtor credit for all finance charges made in connection with any previous rewrite thereof. It was able to obtain 107 reschedules on this basis and voluntarily credited 58 other accounts for the full amount thereof, of which 6 were paid in full when such credit was applied thereto. But, as we said in State ex rel. Beck v. Associates Discount Corp., 161 Neb. 410, 73 N. W. 2d 673: "* * * violations mentioned cannot be purged by a credit or waiver of interest. If such exactions of interest are usurious, the whole obligation is void and uncollectible under applicable statutes."

Having come to the conclusion that all Lied original contracts and rewrites thereof, the contracts of the individuals herein named and the renewals of any thereof, together with the other rewrites contained in exhibit "D", except the one mentioned, are void and uncollectible, we think the following, as stated in McNish v. General Credit Corp., *supra,* is applicable: "The statutes, which have been hereinbefore quoted, not only provide that a loan made in violation of the installment loan statutes shall be void and uncollectible but further provide that the lender is not entitled to 'receive any principal, interest, or charges on such loan.' See § 45-138, R. S. Supp., 1953. In view of this language we think the Legislature intended a lender should have nothing in such a situation. We therefore come to the conclusion that the appellee must return the payments which it has received on this void loan." As stated in McNish v. General Credit Corp., *supra,* by quoting from Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111: "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."

In order to perform the obligation imposed upon this

court by the foregoing principle Associates will be required to account to the receiver for all money, or anything else of value, that it has received, either directly or indirectly, since July 7, 1955, in connection with the contracts and rewrites herein held void and uncollectible. These can be ascertained from exhibits Nos. R-12 A and R-12 B. The receiver shall not turn over to Associates any of the assets now held by him, and which will ultimately be returned to Associates, until that is done. Nor shall the bond of Associates given herein, which provides:

"2. That the defendant will obey and carry out all orders of the Court entered herein.

"3. That the defendant Associates Discount Corporation will duly account to the Court for any monies coming into its hands upon the contracts which are the subject matter of this action during the pendency of this action when ordered by the Court to do so," be exonerated until such accounting has been made. Such accounting shall be made of all money or anything else of value received in connection therewith by Associates from and after July 7, 1955, when a "Temporary Restraining Order" was issued by the district court "restraining the defendants and each of them from removing any of their records, files, papers, documents, notes, mortgages, documents and other assets of every kind and description pertaining to the business of Defendants in the State of Nebraska, and further restraining the Defendants and each of them from continuing the making of loans at unlawful and usurious rates in the manner described in Plaintiff's Petition or in any other manner contrary to law or from collecting or attempting to collect any of the unlawful and void loans heretofore made," up to December 12, 1955, when the receiver, being then qualified, took over the assets of Associates and thereafter received all payments of any kind made thereon by the debtors.

When such an accounting has been made by Associates

to the receiver then the receiver is directed to pay to each debtor, whose obligation has been held void and uncollectible, the full amount he has received in connection therewith and, if any amount of such obligation remains unpaid, the receiver is to cancel such unpaid balance and return the cancelled obligation to the debtor together with his certificate of title with the lien thereon cancelled. In other words, each debtor, whose obligation has been declared void, is to be fully freed thereof and placed in status quo. The latter would include the return of any car which, for any reason, might still be in the possession of either Associates or the receiver. In order to fully carry out our findings that these obligations are void and uncollectible we permanently enjoin the appellees, or either of them, from in any manner attempting to collect, either directly or indirectly, any part or all of such void obligations. For, as stated in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215: "In such cases as that at bar, plaintiff represents the public, including the borrowers from defendants, for whose benefit the action is prosecuted. * * * To declare such contracts void and uncollectible without cancellation thereof, or, more appropriately, without enjoining their collection, would permit defendants to subsequently use them * * * for purposes of unlawful harrassment and extortion, which this action sought to enjoin. Equity is not so helpless. Equity will always strive to do complete justice. To declare such contracts void and uncollectible and enjoin their collection if they are void and uncollectible, is but a necessary incident to the primary purpose of this action which by injunction and receivership sought to put an end to continuous violations of the civil and criminal provisions of the installment loan statutes, enforce forfeitures as provided therein, and avoid a multiplicity of actions."

The record establishes that appellees were intentionally operating, both directly and indirectly through a

scheme or device, an installment loan business in this state without having obtained a license to do so and were operating such business in an improper and unlawful manner. Such is, of course, contrary to the public policy of this state as declared by the Legislature and should be enjoined. As stated in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215, by quoting from State v. Chicago & N. W. Ry. Co., 147 Neb. 970, 25 N. W. 2d 824: "Injunction is a proper remedy to be used by the state in the protection of public rights, property, or welfare, whether or not the acts complained of violate a penalty statute and whether or not they constitute a nuisance." Then going on to say: "The state itself, represented by the Attorney General, has therefore of necessity, in order to protect its people and prevent public wrongs, emerged as the proper party whose duty it is to represent all the public in defense of the state's own sovereignty and bring such actions as that at bar. In doing so, courts have generally recognized the state's right to the equitable remedies of injunction and receivership as a proper and effective method of controlling unlawful lenders under statutes comparable with our own."

But here the appellees contend that because Associates quit acquiring contracts some time shortly after July 7, 1955, left the state in June 1956, and Kemnitz did so in July 1956, no injunction is proper, citing our holding in Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274, to the effect that: "The remedy by injunction is wholly preventative, prohibitory, or protective, and it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights, if any, already lost, and wrongs, if such, already perpetrated, cannot be restrained or remedied by injunction." Also, as stated in Neff v. Boomer, 149 Neb. 361, 31 N. W. 2d 222: "As a general rule injunction will not issue upon mere apprehension of the possibility of an invasion of rights." But as stated in Conrad v. Kaup, 137 Neb. 900, 291 N.

W. 687: "The relief ordinarily granted in equity is such as the nature of the case, the law, and facts demand, not at the beginning of the litigation, but at the time the decree is entered."

Here some of the contracts will ultimately be returned to Associates, which is still a going corporation engaged in the finance business and of which Kemnitz is still an employee. In connection with the collection of the contracts to be returned to Associates there will come the possibility of renewals or extensions being made which could lead to making installment loans. In view of this fact we think appellees should both be enjoined from engaging in the business of making installment loans in Nebraska until such time as they have been lawfully authorized to do so by the proper authorities of this state. And this is proper in view of the way the appellees have conducted themselves in the past when Associates was authorized to do business in this state, particularly after this suit was instituted.

When the receiver has fully carried out all duties which he is hereinbefore and hereinafter directed to perform, he shall then make a final report to the district court, setting out in full an account of all his acts and doings since November 12, 1957. Whereupon, if the report is found to be a true and correct account, it shall be approved by the district court. Thereupon, that court shall order the balance of the assets then in the receiver's possession to be returned to Associates. When that has been done the receiver shall be discharged and his bond released.

In regard to contracts, if any, returned to Associates by the receiver it should be fully understood that we do not herein adjudicate the rights of any of the parties thereto. The same is true of all contracts that have been fully paid but as to which the rights of the parties thereto have not been herein adjudicated. Also, if the receiver's final report shows that Associates has made a full accounting to him, as is herein directed, then the

bond Associates gave on July 19, 1955, may be exonerated.

There were replevin actions commenced by Associates to which the receiver became a party that are still pending. In such cases, when we have declared the contract or rewrite involved therein to be void and uncollectible, a judgment should be rendered therein accordingly. The same would be true if it involves a contract we have held to be valid. In those cases involving a contract on which we have not directly passed, the parties should be left to litigate their own rights and the receiver should withdraw therefrom.

There were also some actions brought by debtors, which are still pending, to have their obligations declared void in which the receiver was either originally made a party or voluntarily became such. If such cases involve any contracts or rewrites which we have declared void and uncollectible, a judgment should be rendered therein accordingly. The same would be true of any contract that we have herein declared valid. On the other hand if we have not directly passed on any contract involved in any of such suits then the receiver should withdraw therefrom and leave the parties free to litigate their own rights.

In other words, we do not herein adjudicate the rights of either party to any contract which is not directly passed on herein and leave the parties thereto free to take whatever action they may desire to determine what their rights thereunder are.

The receiver, Theodore L. Richling, has also appealed from the decree of the district court. He complains primarily of three things. First, that the trial court erred in failing to approve his reports. Second, that the trial court awarded inadequate fees for him and his counsel. And third, that the trial court erred in failing to make provision for the payment of expenses and fees subsequent to November 12, 1957, and until the receivership is fully completed and terminated. In that respect it should be stated that when hearing was had on the re-

ceiver's reports they covered his acts and doings up to November 12, 1957.

We appointed Theodore L. Richling receiver on December 3, 1955, and he qualified to act as such on December 12, 1955; and the assets of Associates were turned over to him on that date. These assets consisted of 1,175 accounts of which 815 were active and had a face value of $1,054,996.33.

Our order of December 3, 1955, contains the following language: "* * * ordered that the defendants, Associates Discount Corporation, a foreign corporation, and Jack F. Kemnitz, and each of them, be, and they hereby are temporarily restrained and enjoined from collecting or attempting to collect, by legal process or otherwise, or from receiving any of the proceeds of any of the loans described in plaintiff's amended and supplemental petition, and it further appearing to the court that in order to fully protect the rights of all parties pending appeal, a receiver should be appointed and that Theodore L. Richling, attorney of Omaha, Nebraska, is a fit and proper person to act as such receiver. It is therefore further ordered that Theodore L. Richling be and he hereby is appointed as receiver to take possession of all books, records, files, papers, notes, mortgages and other documents pertaining to the business of the defendants now located at 216 WOW Building, Omaha, Douglas county, Nebraska, and he is hereby given all authority generally imposed upon a receiver or as contained in any order of this Court, and specifically is authorized to receive payments from any of said borrowers and to release any mortgage and deliver to said borrower the certificate of title to the automobile upon payment in full to him of the balance due on such loan according to the records of the defendants. * * * It is further ordered that this order remain in effect until further order of this court."

"The receiver is an officer of the court which appoints him." Taylor v. Sternberg, 293 U. S. 470, 55 S. Ct. 260,

79 L. Ed. 599. See, also, State v. Bank of Rushville, 57 Neb. 608, 78 N. W. 281; State v. Nebraska Savings & Exchange Bank, 61 Neb. 496, 85 N. W. 391.

The reports of the receiver show that up to November 12, 1957, he had received payments on these 815 active accounts of $810,676.41. "A receiver, as an officer of the court appointing him, is required to account to the court for the receipts and disbursements of all money and property received by him as receiver." 45 Am. Jur., Receivers, § 336, p. 271.

The receiver made a full and complete report of his receipts and disbursements for the period from December 12, 1955, to June 12, 1956, to this court and we approved the same on June 30, 1956. The receiver subsequently, after this cause had been returned to the district court for Douglas county, made reports to that court for the periods from June 12, 1956, to December 31, 1956; from January 1, 1957, to June 30, 1957; and from July 1, 1957, to November 12, 1957. As stated in 45 Am. Jur., Receivers, § 339, p. 272: "As it is the duty of the receiver to account to the court whose officer he is, so there is the correlative duty to examine and rule upon the account." We have examined all the reports of the receiver covering the period from December 12, 1955, to November 12, 1957, together with the oral and documentary proof offered in support thereof, and find the same to be a full, complete, and accurate report by the receiver of all money received and disbursed by him and the same are approved and allowed.

The receiver provided the necessary facilities and help to conduct the receivership. In connection therewith his disbursements show that he expended, up to November 12, 1957, the sum of $24,165.33 for this purpose. These expenditures covered such items as rent, lights, telephone, and stenographic, clerical, and miscellaneous help. In State v. Nebraska Savings & Exchange Bank, *supra,* we said: "The one question is whether the receipts and expenditures by the receiver are in ac-

cordance with the directions of the court and in conformity with the law in the accomplishment of the purposes for which the receiver was appointed." We think these expenses were necessary to carry out the purpose for which the receivership was created and being reasonable in amount the same are approved.

The trial court allowed the receiver total fees of $28,000 to cover his services for the period from December 12, 1955, to November 12, 1957, or 23 months. This included the sum of $7,000 allowed the receiver as an interim fee by this court. As of February 23, 1956, the receiver retained counsel and for his services from that date to November 12, 1957, the trial court allowed the receiver the sum of $15,620. The receiver contends these fees are inadequate for the services rendered.

Compensation of a receiver should be fixed at an amount that will be fair and reasonable for the services rendered and the question as to what is fair and reasonable is always one of fact in each case. As stated in 45 Am. Jur., Receivers, § 288, p. 223: "While the amount of the allowance for costs, expenses, compensation, and fees, involved in a receivership, lies in the sound discretion of the court in which receivership proceedings occur, such allowance should be reasonable according to the circumstances of the case." Ordinarily the compensation should not be greater than what would be reasonable compensation for doing the same amount and character of work if employed in the usual course of private business. As we said in State v. Nebraska Savings & Exchange Bank, *supra:* "As to the compensation to be allowed the receiver for his services, this is a matter largely in the discretion of the court having charge of the receivership; and unless it be made to appear affirmatively that the amount allowed is erroneous and there has been an abuse of discretion in the action taken in approving the report, it will not for that reason be reversed." See, also, Jacobs v. Ringling Brothers-Barnum & Bailey C. Shows, 141 Conn. 86, 103 A. 2d 805. As

therein stated: "They must be fixed at an amount that will be reasonable and fair compensation for the services rendered."

In fixing such compensation, as stated in Jacobs v. Ringling Brothers-Barnum & Bailey C. Shows, *supra:* "Certain recognized factors enter into the determination. Consideration should be given to the nature, extent and value of the property administered. * * * The complications and difficulties encountered should be noted. * * * The responsibilities involved, and assumed by the receiver, and the diligence and thoroughness which he displays are weighty elements. * * * The knowledge, experience, labor and skill required of the receiver and devoted by him to the receivership must be taken into account. * * * Then, too, the time properly required to be spent is an important consideration. * * * The amount paid as compensation for similar services should also be regarded." See, also, Mursener v. Forte, 186 Or. 253, 205 P. 2d 568; Hudson v. Hubbell, 171 Okl. 201, 41 P. 2d 844. As stated in 45 Am. Jur., Receivers, § 288, p. 224: "The considerations which should control in fixing the compensation are the value of the property in controversy; the particular benefit derived from the receiver's efforts and attention; time, labor, and skill required, and experience in the proper performance of the duties imposed; their fair value measured by common business standards; and the degree of integrity and dispatch with which the work of the receivership is conducted."

The burden is upon the receiver to prove the worth of his services. Jacobs v. Ringling Brothers-Barnum & Bailey C. Shows, *supra;* Woods v. City Nat. Bank & Trust Co., 312 U. S. 262, 61 S. Ct. 493, 85 L. E. 820. However, "In making such allowance the court is not confined to evidence formally introduced, in respect to the matter, but may act on his own knowledge and judgment as to the reasonableness of the charge in connection with what has been done by the receiver in dis-

charge of the duties of his receivership, and the nature, extent and value of the services rendered." State v. Nebraska Savings & Exchange Bank, *supra*. See, also, Mortimer v. Pacific States Savings & Loan Co., 62 Nev. 147, 145 P. 2d 733.

The receiver was appointed under and pursuant to section 45-157, R. R. S. 1943, which provides, insofar as here material, as follows: "Such receiver, when so appointed and qualified, shall have such powers and duties as to custody, collection, administration, winding up and liquidation of such property and business as shall, from time to time, be conferred upon the said receiver by the court." We have already set forth the order of this court which sets out the powers conferred upon the receiver.

As to the form of compensation to be paid a receiver section 25-1092, R. R. S. 1943, provides: "Receivers shall receive for their services such compensation as the court may award, subject to the following restrictions: (1) Receivers appointed for the purpose of preserving and protecting property pending litigation, or for the purpose of continuing the business of the debtor or corporation pending litigation, or when financially embarrassed, may be awarded a salary or lump sum; (2) Receivers appointed for the purpose of winding up the affairs of a debtor or corporation, reducing the assets to cash and distributing them, shall be awarded as compensation for such services a percentage upon the cash received and properly accounted for by them, which percentage may be increased where extraordinary services have been performed, and correspondingly reduced where the services have not been meritoriously performed."

It is the appellees' contention that the receiver was appointed for the purpose of preserving and protecting property pendente lite and therefore he should be awarded fees in the form of a salary or lump sum whereas the receiver, although admitting the receiver-

ship had its inception for that purpose, contends it actually turned into a liquidating receivership and, because of that fact, he should be allowed a fee based upon a percentage of the cash he has received and accounted for.

The receiver was primarily appointed for the purpose of preserving and protecting the property seized pending the outcome of this litigation and therefore within subsection (1) of section 25-1092, R. R. S. 1943. However, because of the duration of the litigation, the receivership has developed some of the characteristics of the situation intended to be covered by subsection (2) thereof. Under this dual situation we shall allow such fees for the receiver as we think are fair and reasonable.

The receiver offered both oral and documentary proof which detailed at great length the duties he performed, the nature and extent thereof, and the responsibility he had, and will have, in connection therewith. This evidence establishes that at the beginning the receiver had a difficult and burdensome problem in seeking to establish a satisfactory method for handling the accounts so as to be able to efficiently operate the collection thereof, and that this burden continued for many months. However, the evidence shows that this work materially decreased during the latter part of the 23 months herein involved, for on November 12, 1957, there were only slightly over 100 of these active accounts unpaid and some of them were tied up in litigation. While the work was burdensome and time consuming it was primarily of a ministerial character and clerical in form. No affirmative legal action was ever taken to collect any of the accounts. Payments were all voluntarily made although it is apparent the receiver spent a great deal of time urging the payment of all accounts and, as a result, a good job of collecting was done. As to any legal matters involved the receiver obtained legal counsel to advise him in regard thereto and to handle all such matters for him.

The receiver also offered the evidence of himself and three other qualified witnesses as to what his services were reasonably worth.

While such evidence is of value in aiding the court to arrive at what is a fair and reasonable fee, and we shall consider it for that purpose, however, in making such allowance, we are not confined solely to the evidence formally introduced but may properly act on our own knowledge and judgment as to the reasonableness of any fee to be allowed in connection with the work that has been performed by the receiver in the discharge of his duties, together with the nature, extent, and value thereof. See State v. Nebraska Savings & Exchange Bank, *supra.*

Viewed in the light of the foregoing principles, the evidence introduced and our knowledge of the kind and extent of the work performed and responsibility assumed we think the fee of $28,000 allowed the receiver for the work he performed from December 12, 1955, up to November 12, 1957, is a fair and reasonable compensation therefor.

Reasonable fees for necessary legal services performed by attorneys for a receiver may be properly allowed as an expense of a receivership. State ex rel. Sorensen v. Ralston State Bank, 125 Neb. 245, 249 N. W. 615; State ex rel. Sorensen v. First State Bank of Bethany, 123 Neb. 620, 243 N. W. 877. "A reasonable attorney fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited, and the character and standing of the attorneys concerned." Strasser v. Strasser, 153 Neb. 288, 44 N. W. 2d 508. See, also, Hardy v. Hardy, 161 Neb. 175, 72 N. W. 2d 902; Scully v. Scully, 162 Neb. 368, 76 N. W. 2d 239. As stated in State ex rel. Sorensen v. Ralston State Bank, *supra:* "Reasonable fees for necessary services

performed by attorneys for the receiver * * * may be allowed as an expense of the receivership." As stated in Mortimer v. Pacific States Savings & Loan Co., *supra:* "In finding the reasonable value of a receiver's or his attorney's fees, the elements to be considered as controlling are fairly well stated in United States v. Admiral Refining Co., Tex. Civ. App., 146 S. W. 2d 830, 831, cited by plaintiff: 'The considerations that should be controlling with the court in fixing compensation are the value of the property in controversy; the practical benefits derived from the receiver's efforts and attention; time, labor and skill needed or expended in proper performance of the duties imposed, and their value measured by the common business standards; and the degree of activity, integrity, and dispatch with which the work of the receivership is conducted.' * * * The measures to be weighed in fixing attorney's fees in receivership proceedings are, to a large extent, the same which are considered in fixing the receiver's fees. In fixing the allowances to either, the governing principle is that the compensation so allowed should be measured by the reasonable value of their services rendered."

The attorney for the receiver testified in detail as to the extent, nature, and character of the services rendered to the receiver since he was employed by him on February 23, 1956, up to November 12, 1957. He detailed the number of office hours used for that purpose, the work he performed directly in the receivership, the number and type of cases in which he appeared for and filed pleadings in behalf of the receiver, and the number of days he spent in court in connection therewith. He then testified as to what he considered to be the fair and reasonable value thereof. He also offered the testimony of two qualified witnesses as to what they considered his services to be worth. As stated in 5 Am. Jur., Attorneys at Law, § 192, p. 377: "The opinion evidence of expert witnesses, as to the

value of an attorney's services, is not conclusive or binding * * * on the court * * *. Such evidence is to be taken into consideration, with all the other evidence in the case, in arriving at a conclusion as to the just value of the services performed." And, as stated in 45 Am. Jur., Receivers, § 288, p. 223: "Evidence thereof is admissible if necessary for the information of the court, but where the court has personal knowledge of all that has been done by the attorneys, it is not always necessary to hear evidence respecting the amount to be allowed them. The court is presumed to know the value of attorneys' services, and it is for its own enlightenment that such evidence is heard." See, also, 5 Am. Jur., Attorneys at Law, § 190, p. 376.

We have considered the evidence adduced and, in light of the foregoing principles, have come to the conclusion that the amount allowed the receiver for attorney fees in the sum of $15,620 is a fair and reasonable value of the services performed by the receiver's attorney from February 23, 1956, to November 12, 1957.

The receiver has raised a question as to the payment of expenses and the allowance of fees for work and services performed in connection with the receivership subsequent to November 12, 1957, and that which will be performed up until the receivership is terminated. Of course all reasonable expenses necessarily incurred by the receiver in connection with the administration of the receivership on and after November 12, 1957, are hereby authorized and, if such, should be allowed and approved by the trial court when the receiver files his final report in that court. It is apparent the work of the receiver, since November 12, 1957, could not have been very heavy or difficult because of the limited number of unpaid active accounts remaining in his possession as of that date. However, he will have considerable work to perform in connection with the closing thereof. For this purpose we allow an additional fee of $12,000 so that the total fee to be received by the receiver shall

be $40,000. The receiver will have need of legal counsel during this period of time and for that purpose we allow him an additional $4,380 or a total fee for legal services of $20,000. It should be understood that these additional fees are to cover all ordinary services of the receiver and his counsel in connection with the receivership from November 12, 1957, up to and including the closing thereof. If extraordinary and unusual services are required in connection therewith the receiver may apply to the district court for additional compensation to cover such services.

As already stated herein it is our purpose to place the debtors whose contracts have been declared void in status quo. Consequently it would not be proper to charge them with any part of the costs of this receivership. On the other hand the necessity for our having to appoint a receiver was brought about by Associates. We therefore charge all the costs of this litigation to Associates which costs include the fee of $40,000 allowed the receiver, the fee of $20,000 allowed the receiver for his attorney, the $24,165.33 allowed as costs of administration, and such additional administrative costs and fees as the trial court may approve and allow upon final report of the receiver. The receiver is directed to pay all costs out of any funds of Associates in his possession, and if that be insufficient, to hold any of the contracts which we have herein directed to be returned to Associates until such costs are paid.

It appears that the amount charged by the reporter for preparing the bill of exceptions is far in excess of that authorized by statute. See, § 24-342, R. S. Supp., 1957; Pueppka v. Iowa Mutual Ins. Co., on rehearing, 166 Neb. 203, 88 N. W. 2d 657. We direct the district court, whose duty it is to tax the cost of preparing the bill of exceptions against the unsuccessful party in the final determination of the litigation, to not allow in excess of the amount authorized by statute when doing so. Pettis v. Green River Asphalt Co., on rehearing, 71 Neb.

519, 101 N. W. 333. When the amount that may be properly charged and taxed for preparing the bill of exceptions has been correctly determined the reporter should be directed to refund to the state, whom the record shows has paid the reporter, all amounts it has paid him in excess thereof.

In view of what we have herein held we reverse the judgment of the district court and remand this cause to it with directions to render such judgment as will fully and completely carry out the holding of this court as set out in our opinion and authorize it to terminate the receivership after the purpose for which it was established has been fully carried out and completed.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF HARRIET T. SCHEER, DECEASED. ERNEST PAULEY ET AL., APPELLEES, V. DOROTHY SCHEER, APPELLANT.

95 N. W. 2d 672

Filed April 3, 1959. No. 34504.

1. **Appeal and Error.** The only question that can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment.
2. ———. In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of evidence produced at the trial.
3. ———. If there is no bill of exceptions, it is presumed in this court that an issue of fact raised by the pleadings was sustained by evidence and that it was correctly decided by the district court.

APPEAL from the district court for Clay County: EDMUND NUSS, JUDGE. *Affirmed.*

Massie, Bottorf & Massie, for appellant.

S. W. Moger and *Waring & Gewacke,* for appellees.

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

YEAGER, J.

Harriet T. Scheer died testate a resident of Clay County, Nebraska. A large number of bequests were designated in her will for which legatees were specifically named. In addition the will made provision for the disposition of the residuary estate. This case involves nothing related to specific bequests, and nothing in fact except the disposition of a single portion of the residuary estate.

The residuary provision of the will, to the extent necessary to set it out here is as follows: "Any residue and remainder of my estate in excess of the special bequests and legacies hereinbefore made, I give, bequeath and devise share and share alike to my nieces and nephews named herwith (sic); * * * Dorothy Scheer * * *." Twenty-nine persons other than Dorothy Scheer were named in the provision.

By the decree of the county court it was found that each of the 30 residuary legatees was entitled to a share of the residuary estate. By this decree it was also found that Dorothy Scheer Hall was the same person as one named in the residuary provision of the will as Dorothy Scheer and accordingly a share of the residuary estate in the amount of $1,421.72 was awarded to her.

Dorothy Scheer, appellant herein, appealed to the district court from this adjudication and on appeal she contended that she was the person named in the will rather than Dorothy Scheer Hall. Ernest Pauley and Bernard Johnson, executors, were appellees.

In a petition on appeal to the district court filed by the executors of the estate of Harriet T. Scheer, deceased, it was alleged substantially that Dorothy Scheer Hall was a niece of decedent; that before her marriage her name was Dorothy Scheer; and that she was the person named as Dorothy Scheer in the residuary clause

of the will, and accordingly was entitled to take thereunder.

By appropriate pleading Dorothy Scheer denied these allegations and claimed that she was the person named and entitled to take under the will. The allegations in this respect were denied by the executors.

In order to avoid confusion it should be pointed out that Dorothy Scheer Hall was related to the deceased by blood and that before marriage her name was Dorothy Scheer. The appellant was not related to the deceased by blood. She became Dorothy Scheer by marriage to a blood relative of the deceased.

The case was tried in the district court and there it was adjudicated that Dorothy Scheer Hall was the person named in the will and distribution of $1,421.72 was ordered to be made to her. From this adjudication Dorothy Scheer appealed to this court. As in the district court the executors are appellees in this court.

The sole question by this appeal is the propriety of this order. That question comes here for determination on the pleadings and judgment alone. There is no bill of exceptions. No procedural step has been attacked and no contention is made that any legal impairment is present in the pleadings or judgment. The only question therefore is one of fact.

The case must therefore be determined on the question of whether or not the pleadings are sufficient to support the judgment.

In Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760, it was said: "The only question that can be presented to the Supreme Court on appeal, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment."

In Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312, it was said: "In the absence of a bill of exceptions, no question will be considered, a determination of which requires an examination of evidence produced at the trial."

In Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396, it was said: "If there is no bill of exceptions, it is presumed in this court that an issue of fact raised by pleading was sustained by evidence and that it was correctly decided by the district court."

An application of these rules to this case as presented leads to the conclusion that the judgment of the district court should be and it is affirmed since, as pointed out, the judgment is supported by the pleadings.

AFFIRMED.

MESSMORE, J., participating on briefs.

KENNETH O. WEESNER, APPELLANT AND CROSS-APPELLEE, V. RUTH WEESNER ET AL., APPELLEES AND CROSS-APPELLANTS.
95 N. W. 2d 682

Filed April 3, 1959. No. 34528.

1. **States: Courts.** A court of one state cannot directly affect or determine the title to land in another state.
2. **Courts: Divorce.** However, a court of competent jurisdiction in one state, with all necessary parties properly before it in an action for divorce, generally has the power and authority to render a decree ordering the execution and delivery of a deed to property in another state in lieu of alimony for the wife.
3. **Divorce: Judgments.** Such an order is personam in character, and when final it is generally res judicata, bringing into operation the doctrine of collateral estoppel.
4. ———: ———. Thus, where all necessary parties are before a competent court in the land situs state, such an order will be given force and effect under the full faith and credit clause of the Constitution of the United States, and same may in a proper case be pleaded as a defense, or as a cause of action to enforce the obligation of the order, if the related public policy of the situs state is in substantial accord with that of the other state.
5. **Divorce.** In that connection, the courts of this state will presume that the public policy of the other state with regard to division of real property in a divorce action is the same as our own, in the absence of a showing to the contrary.
6. **Quieting Title.** In an action to quiet title, when the plaintiff's title is put in issue by the answer, he is required to establish

upon the trial that he is the owner of the legal or equitable title to the property, or has some interest therein, superior to the rights of the defendant, in order to entitle him to the relief demanded.

7. **Equity.** If a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary. In other words, the maxim that "he who seeks equity must do equity," should be applied in suits to quiet title.
8. **Quieting Title.** In an action to quiet title in this state the question of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate or any part of it to the party entitled thereto.

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

Baskins & Baskins, for appellant.

Maupin, Dent, Kay & Satterfield, Wm. E. Morrow, Jr., and *George B. Dent,* for appellees.

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

CHAPPELL, J.

Plaintiff, Kenneth O. Weesner, brought this action in the district court for Lincoln County against defendants, Ruth Weesner, plaintiff's former wife, and three-named minor children of the parties, seeking to have declared void a divorce decree rendered by the district court for Goshen County, Wyoming, on September 22, 1954, insofar as same purported to directly affect and determine the title to described real property located in North Platte, Lincoln County, Nebraska, which property was allegedly owned by plaintiff and Ruth Weesner as joint tenants with right of survivorship. Plaintiff prayed for an order cancelling such portion of said decree of record in Lincoln County, quieting the title to his interest in the property, and enjoining defendants from asserting any right, title, or interest therein as against plaintiff by virtue of said Wyoming decree.

Plaintiff's amended petition alleged in substance that plaintiff and Ruth Weesner, hereinafter called defendant, were married at Stapleton, Nebraska, on April 24, 1936; that the three minor defendants were born of said marriage; that on February 23, 1943, during their marriage, the title to the property involved was conveyed to plaintiff and defendant as joint tenants with right of survivorship by warranty deed recorded March 2, 1943, in Lincoln County; and that on September 22, 1954, the Wyoming court rendered a divorce decree in an action wherein plaintiff herein was plaintiff and defendant herein was defendant and cross-petitioner. A copy of said decree, which was incorrect in some particulars, was attached to and made a part of plaintiff's amended petition filed herein.

However, an admittedly true copy of said Wyoming decree, as far as important here, disclosed the following: That on September 22, 1954, plaintiff appeared in the Wyoming court in person with his attorney, and defendant as cross-petitioner also appeared in person with her attorney, after having been regularly served with process. Evidence was adduced by plaintiff and defendant and the cause was regularly submitted. Thereupon the court found and adjudged the issues generally in favor of defendant on her cross-petition and against plaintiff; that the parties were lawfully married in Nebraska on April 24, 1936, but had become legal residents of Goshen County, Wyoming; and that defendant was entitled to and was granted an absolute divorce from plaintiff, together with the custody and control of their three-named minor children with right of reasonable visitation by plaintiff. The decree then ordered plaintiff to pay to the clerk of the district court of Goshen County, Wyoming, designated monthly amounts payable semimonthly for support and care of the children, and ordered plaintiff to pay the costs, including $200 as fees for defendant's attorney. Defendant was then *"awarded the dwelling house of the parties located in*

North Platte, Nebraska" particularly describing same, which is admittedly the property here involved, *"provided that the Defendant * * * cannot, for a period of five years from date hereof sell or mortgage said property without Court order and provided, further, that in the event of the"* defendant's *"death during said five year period, said real estate shall then become the property of the children hereinabove named in equal portions. * * * that the Plaintiff * * * shall make, execute, and deliver to the Defendant * * * a Quitclaim Deed of his interest in and to the above described real estate * * * and in the event of his failure to do so this Decree shall act as a conveyance of his interest in and to said real estate to the Defendant * * *."* (Italics supplied.)

We are primarily interested here in the legal effect of only the italicized portion of said decree. In that connection, plaintiff's amended petition filed herein also alleged that on November 16, 1954, defendant recorded said decree in Lincoln County, Nebraska, but that same was of no force and effect insofar as it purported to award and convey plaintiff's interest in the aforesaid real property to defendants or any of them because the Wyoming court was without jurisdiction to directly affect or determine the title to the real estate, and that any claim thereto made by defendants casts a cloud upon plaintiff's interest in the title thereto.

Defendant's answer and cross-petition as amended, after plaintiff's demurrer to defendant's cross-petition had been sustained and she had been denied any suit money, alleged substantially the following: She admitted the marriage as alleged; admitted that on February 23, 1943, plaintiff and defendant had acquired the property as alleged; and admitted that on September 22, 1954, the decree of divorce heretofore set forth was rendered by the Wyoming court, and that same was recorded by defendants as alleged. An admittedly correct copy of the said Wyoming decree was attached to and made a part of defendant's answer and cross-petition

as also was a copy of plaintiff's amended petition for divorce and defendant's answer and cross-petition thereto filed in the Wyoming court.

Defendant's amended answer and cross-petition filed herein denied generally. It then alleged that on June 8, 1954, plaintiff filed his petition, and on July 10, 1954, filed his amended petition for divorce in the Wyoming court which had jurisdiction of the subject matter; that in both said petitions plaintiff alleged that during their marriage plaintiff and defendant had acquired described personal property and a home in North Platte, Nebraska, which home is the property here involved; and plaintiff prayed for an equitable division of said property. In that connection, defendant's answer and cross-petition filed in the Wyoming court also alleged that during their marriage plaintiff and defendant had acquired said described property, set forth encumbrances thereon, and prayed for an equitable division of said property.

Also, defendant's amended answer and cross-petition filed herein alleged that plaintiff took no appeal from said Wyoming decree, which, based on said pleadings and evidence, had granted defendant an absolute divorce, division of property, and other equitable relief; that said decree had become final and res judicata; that plaintiff was now estopped to deny that said decree was void and of no force and effect as now claimed by him: and that by reason of said proceedings and plaintiff's conduct and actions in connection therewith, he was without equity in the case at bar. Defendant then alleged that the district court for Lincoln County had jurisdiction of the whole matter, and if the district court for Lincoln County found otherwise than as heretofore alleged by defendant, said court should redetermine the question of division of the property and alimony for defendant in connection therewith. Defendant further alleged that she was destitute and in poor health; and that plaintiff had failed to make the child support payments as ordered by the Wyoming decree, and had fallen

in arrears about $800, which necessitated that defendant employ attorneys for the purpose of attempting to collect same. Defendant's prayer was for dismissal of plaintiff's amended petition; the rendition of a decree finding that plaintiff was without equity and was estopped to deny that the Wyoming court was without jurisdiction to award the property involved to defendant; a determination that said court's finding of ownership thereof and rights therein by defendant was res judicata, conclusive, and binding on plaintiff; and the quieting of title in defendant to any interest in the property claimed by plaintiff. In the alternative, defendant prayed for a redetermination of the question of division of the property and alimony for defendant, and an award to her of absolute title to the property, together with allowance of a reasonable sum for attorney's fees and costs. Defendant further prayed for general equitable relief.

Plaintiff's reply thereto admitted that the Wyoming court's decree attached to defendant's answer and cross-petition was a correct copy thereof, but otherwise denied generally. A guardian ad litem was duly appointed for the three minor children named as defendants by plaintiff, and such guardian ad litem filed an answer, denying generally and requesting that plaintiff be placed upon strict proof. Plaintiff's reply thereto was a general denial.

After a hearing on the merits, the trial court's decree found and adjudged that plaintiff was without equity; that he was not entitled to quiet title to his interest in the property as against the Wyoming decree; and dismissed his petition. On the other hand, it found and adjudged that defendant's cross-petition should be and was dismissed for the reason that the Wyoming court was without jurisdiction to directly affect title to the property and that the award of the property to defendant as made was not res judicata and binding on the Nebraska court. The decree also found and adjudged that

such part of defendant's cross-petition as prayed for alternative relief in the nature of a redetermination of division of the property and allowance of alimony to defendant was not germane to plaintiff's alleged cause of action, and should be and was dismissed. Costs, including an allowance of $100 as a guardian ad litem fee, were taxed to plaintiff.

Thereafter separate motions for new trial filed by plaintiff and defendant were each overruled, whereupon plaintiff appealed, and defendants cross-appealed. In his appeal, plaintiff assigned in substance that the judgment of the trial court was not sustained by the evidence but was contrary thereto and contrary to law. We do not sustain plaintiff's assignment except as hereinafter set forth. On the other hand, defendants in their cross-appeal assigned in substance that the trial court erred: (1) In dismissing defendant Ruth Weesner's cross-petition and refusing to grant either of the alternative forms of relief prayed for; and (2) in not granting her a reasonable allowance for attorney's fees. We sustain defendants' first assignment on cross-appeal to the extent hereinafter set forth. However, we do not sustain defendants' second assignment. We so conclude because a division of the property and a redetermination of alimony as sought alternatively by defendant in her cross-petition was not germane to plaintiff's original action to quiet title. It was beyond the requirements of a complete adjudication upon the subject matter of said original action, and was not necessary for the court to consider in deciding the questions raised therein in order to do complete justice between the parties with respect to said cause of action on which plaintiff demanded relief. See, O'Shea v. O'Shea, 143 Neb. 843, 11 N. W. 2d 540; Higgins v. Vandeveer, 85 Neb. 89, 122 N. W. 843.

Also, the Wyoming court had jurisdiction of the parties, the divorce controversy, and all that pertained to it, including an award in lieu of alimony to defend-

ant. If once decided in a final valid personam decree, the same claim or demand for division of the property and alimony cannot generally be relitigated in another action between the parties in this state because of the application of the principle that determines the estoppel of judgments which are res judicata. In other words, as claimed by plaintiff, the Wyoming court had no jurisdiction and authority to directly affect and determine the title to the property in North Platte, Nebraska. However, it did have jurisdiction and authority under the circumstances presented here, to render any personam order it might make in lieu of alimony, such as an order that plaintiff make, execute, and deliver a quitclaim deed to defendant of his interest in the property, which when made and final would be res judicata and binding upon plaintiff and defendant. See, Bates v. Bodie, 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444.

Further, contrary to defendant's contention, her cross-petition seeking suit money and an allowance of attorney's fees was not a proceeding filed "in the original divorce action" wherein the court had "power and authority * * * to award the wife such expenses and reasonable attorneys' fees as were necessary to defend and prosecute such litigation," as was the situation in Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232, and other authorities relied upon by defendant.

The factual situation becomes important here in determining what other remedy should or should not have been awarded in this case. The facts were established without dispute by admissions in the pleadings, stipulations, exhibits offered and received, and the testimony of only one witness called by defendant. The parties were married as heretofore set forth, and the three-named minor children were issue of their marriage. On February 23, 1943, during their marriage, plaintiff and defendant had acquired the described property in North Platte, known as their dwelling house or home, by warranty deed as joint tenants with right

of survivorship, and said deed was recorded in Lincoln County on March 2, 1943. After the parties had moved to Wyoming, and while admittedly residents of Goshen County, Wyoming, plaintiff filed a petition and amended petition for divorce from defendant in the district court for Goshen County, Wyoming, and defendant filed an answer and cross-petition in said proceeding. As heretofore pointed out, plaintiff in his petition and amended petition for divorce, and defendant in her answer and cross-petition thereto, both alleged that the parties owned said described home here involved in North Platte, Nebraska, and other personal property, and prayed that the Wyoming court would make an equitable division thereof. On September 22, 1954, after a hearing on the merits by the Wyoming court, whereat both parties were present with counsel and adduced evidence, that court rendered the decree of divorce heretofore set forth.

In that connection, plaintiff did not make, execute, and deliver a quitclaim deed to defendant of his interest in the property as ordered by the decree of the Wyoming court, despite the fact that in his petitions in said action plaintiff had described the real property here involved and as an inducement for granting of the decree had prayed that said property should be equitably divided between plaintiff and defendant. Thereafter, plaintiff admittedly permitted said decree to become final, then left the jurisdiction of the Wyoming court and returned to the situs of the property and the jurisdiction of the district court for Lincoln County, Nebraska. Also, for almost 3 years after rendition of the decree, plaintiff recognized its validity for all purposes, accepted the benefits and obligations thereof, and performed all other requirements made therein except the execution and delivery of said quitclaim deed to defendant. Only recently, after defendant's answer and cross-petition had been filed, plaintiff made total payments of $835 in order to bring his delinquent child support payments up to date. Defendant had filed the

Wyoming decree and same had been recorded in Lincoln County, Nebraska, on November 16, 1954.

On February 3, 1953, the parties had employed a real estate agent to handle the property involved while they lived in Wyoming, and such property was rented by said agent to another party on February 5, 1953. From that date until right after the Wyoming decree had been rendered on September 22, 1954, the balance of the monthly rentals received by said agent after making monthly loan payments on the property, were remitted to plaintiff. However, ever since such decree has been rendered and up to the time of this trial, May 20, 1958, the balance of each such monthly rentals received has been remitted to defendant by said agent, and plaintiff has never made any claim thereto.

Concededly, a court of one state cannot directly affect or determine the title to real property located in another state. Thus, that part of the Wyoming decree which awarded and attempted to convey the described dwelling house real property in North Platte, Nebraska, to defendant with limitations on the ownership thereof, was void and of no force and effect as claimed by plaintiff. However, plaintiff concedes here that the parties were residents of Goshen County, Wyoming, and were present with counsel in court there which had jurisdiction of the parties and subject matter of the divorce proceeding. Also, plaintiff concedes that the Wyoming decree became final and that the Wyoming court had jurisdiction, power, and authority to determine such part thereof as granted defendant an absolute divorce together with custody of their minor children, allowances for their support, and other equitable relief. Further, plaintiff concedes that so much of said decree as ordered plaintiff to "make, execute, and deliver to the Defendant * * * a Quitclaim Deed of his interest in" the described dwelling house real property in North Platte, Nebraska, was an order in personam and not in rem,

which order the Wyoming court had jurisdiction, power, and authority to make.

However, plaintiff argued, citing and relying upon Fall v. Fall, 75 Neb. 120, 113 N. W. 175, 121 Am. S. R. 767, and Fall v. Eastin, 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65, 23 L. R. A. N. S. 924, that only the Wyoming court could compel performance of such personam order to convey, although plaintiff had admittedly failed and refused to make the conveyance and had returned to Nebraska and the situs of the real property involved, and was before the district court for Lincoln County, Nebraska, in this action. We do not agree.

A careful study of Fall v. Fall, *supra,* and Fall v. Eastin, *supra,* discloses that they are the same case and clearly distinguishable from the case at bar upon at least two basic grounds. First, Fall v. Fall, *supra,* decided on rehearing by this court on July 12, 1907, and affirmed in Fall v. Eastin, *supra,* stressed the point that the courts of this state did not at that time have any statutory power and authority to award the real estate of a husband as alimony in a divorce case, and that the courts of this state would not be compelled under the full faith and credit clause of the Constitution of the United States to recognize an award or order such as that at bar contained in the decree of another state which the equity courts of this state could not themselves lawfully render. However, in 1907, that rule of law relied upon by the court was changed by the enactment of what is now section 42-321, R. R. S. 1943. See Bigelow v. Bigelow, 131 Neb. 201, 267 N. W. 409.

Another distinguishable ground is that E. W. Fall, a defendant in Fall v. Fall, *supra,* who had been ordered by a court in the State of Washington in a divorce decree to convey the Nebraska land involved to his wife, Sarah F. Fall, which he had neglected and refused to do, was not served personally and made no appearance in the suit to quiet title to the land brought by his wife in the district court for Hamilton County, Nebraska,

but had even left the State of Washington and was a resident of California. In the case at bar, plaintiff, who was ordered by the Wyoming court to convey his interest in the North Platte home real estate to defendant, had also left the State of Wyoming and had neglected and refused to obey the personam order of the Wyoming court to convey to his wife, but plaintiff herein had not only returned to the situs of the real estate in Nebraska but also was and is before the Nebraska court, having brought this action himself to quiet the title to his interest in the real estate.

In that connection, it is universally held that a court of one state cannot directly affect or determine the title to land in another state. However, it is also now well established that a court of competent jurisdiction in one state with all necessary parties properly before it in an action for divorce, generally has the power and authority to render a decree ordering the execution and delivery of a deed to property in another state in lieu of alimony for the wife. Such an order is personam in character, and when final it is generally res judicata, bringing into operation the doctrine of collateral estoppel. Thus, where all necessary parties are before a competent court in the land situs state, such an order will be given force and effect under the full faith and credit clause of the Constitution of the United States, and same may in a proper case be pleaded as a defense, or as a cause of action to enforce the obligation of the order, if the related public policy of the situs state is in substantial accord with that of the other state. In that connection, the courts of this state will presume that the public policy of the other state with regard to division of the real property in a divorce action is the same as our own, in the absence of a showing to the contrary.

The foregoing conclusions are not only supported by the opinions in Fall v. Fall, *supra*, and Fall v. Eastin, *supra*, but also are supported by many other author-

ities, of which a few are: Matson v. Matson, 186 Iowa 607, 173 N. W. 127; Mallette v. Scheerer, 164 Wis. 415, 160 N. W. 182; Bailey v. Tully, 242 Wis. 226, 7 N. W. 2d 837, 145 A. L. R. 578; Beebe v. Brownlee, 63 Ohio L. A. 377, 110 N. E. 2d 64; Rozan v. Rozan, 49 Cal. 2d 322, 317 P. 2d 11; Lyle Cashion Co. v. McKendrick, 227 Miss. 894, 87 So. 2d 289; Tolley v. Tolley, 210 Ark. 144, 194 S. W. 2d 687; Greer v. Greer (Tex. Civ. App.), 189 S. W. 2d 104; State ex rel. Long v. Westover, 107 Neb. 593, 186 N. W. 998; Modisett v. Campbell, 144 Neb. 222, 13 N. W. 2d 126. See, also, many authorities collected, cited, and quoted from in 17 Mich. L. Rev. 527; 34 Yale L. J. 591; and 21 U. Chi. L. Rev. 620.

We turn then to the nature of a suit to quiet title. In McCauley v. Ohenstein, 44 Neb. 89, 62 N. W. 232, this court held: "In an action to quiet title, when the plaintiff's title is put in issue by the answer, he is required to establish upon the trial that he is the owner of the legal or equitable title to the property, or has some interest therein, superior to the rights of the defendant, in order to entitle him to the relief demanded."

As reaffirmed in Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486: "Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary."

Also, in Bank of Alma v. Hamilton, 85 Neb. 441, 123 N. W. 458, 133 Am. S. R. 676, which was a suit to quiet title, this court concluded that if a litigant asks affirmative equitable relief, he will be required to do justice himself with regard to any equity arising out of the subject matter of the action in favor of his adversary. In other words, the maxim that "he who seeks equity must do equity," should be applied to suits to quiet title.

In that connection, this court said in Kerr v. McCreary, 84 Neb. 315, 120 N. W. 1117: "The meaning of the maxim invoked is said to be that, 'whatever be the nature of the controversy between two definite parties,

and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy.' 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 385. 'This principle is not confined to any particular kind of equitable rights and remedies, but pervades the entire equity jurisprudence, so far as it is concerned with the administration of equitable remedies.' 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 388."

Further, in Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658, quoting from Hanson v. Hanson, 78 Neb. 584, 111 N. W. 368, and other authorities, this court said: " 'The original petition filed by plaintiff in the "title suit" was for the purpose of quieting all conflicting claims of title in the lands between plaintiff and defendant. It was instituted under the code, which, for the purpose of preventing a multiplicity of suits, has enlarged and expanded the general equity jurisdiction of the district courts, so as to permit an action of this nature at the suit of a plaintiff, whether in possession of the disputed lands or not. The plain intent of the statute is to determine in one cause of action all conflicting claims of all parties to the suit to all the lands in dispute between them. And, when the district court takes jurisdiction of such a cause of action, it takes it with power to do whatever is necessary to a full exercise of its jurisdiction, * * *.' See, also, Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1031; Foree v. Stubbs, 41 Neb. 271, 59 N. W. 798; Dolen v. Black, 48 Neb. 688, 67 N. W. 760. In such last-cited case this court held: 'In an action quia timet in this state the question of title between the parties may be fully litigated and determined and a decree rendered assigning the title to the real estate or any part of it to the party entitled thereto.' "

In the light of such rules and the undisputed facts heretofore set forth, it is clear that defendant had a right to file her answer and cross-petition in plaintiff's quiet title action, and that the trial court erred in dismissing defendant's cross-petition and denying the first alternative equitable relief sought by defendant. The denial of any relief to plaintiff was proper in every respect except as heretofore pointed out, because he was without equity and collaterally estopped from denying validity of the Wyoming court's personam order which required him to make, execute, and deliver to defendant a quitclaim deed to his interest in the property involved.

We conclude that the judgment of the trial court denying plaintiff any relief except as aforesaid, should be and hereby is affirmed. On the other hand, the judgment of the trial court dismissing defendant's cross-petition and thereby refusing to recognize and enforce the personam obligations imposed upon plaintiff by the Wyoming decree which required him to execute and deliver a quitclaim deed of his interest in the described dwelling house real property in North Platte, Nebraska, to defendant, should be and hereby is reversed and the cause is remanded with directions to render a judgment either enforcing such order of the Wyoming court or in the alternative by quieting the title in defendant to plaintiff's interest in the property. All costs are taxed to plaintiff, including an allowance of $250 for services of the guardian ad litem in this court, as authorized by section 7-113, R. R. S. 1943. However, such costs shall not include any allowances of attorney's fees for the services of defendant's attorney in the district court or this court.

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

ERNIE T. JENSEN, APPELLEE, V. MARGARET A. MANTHE ET AL., APPELLANTS.

95 N. W. 2d 699

Filed April 3, 1959. No. 34552.

1. **Contracts.** In determining the nature of an oral agreement which has been partially performed, the acts and conduct of the parties thereto before a dispute arose as to the intention of the parties at the time the agreement was made are entitled to great weight and are ordinarily conclusive of the intention of the parties in entering into the agreement.
2. **Mechanics' Liens.** Where a building is constructed on a "time and materials" basis, the materials and labor for which a party furnishing them is entitled to a mechanic's lien are such only as were used in or delivered at the building described in the claim of lien, and at a cost not in excess of the actual cost thereof.
3. ———. In such a case the owner is entitled to the benefit of any discount or other reduction of cost accruing to the contractor operating under a cost or cost plus agreement.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed as modified.*

Richard A. Dier, for appellants.

Dryden & Jensen, for appellee.

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

CARTER, J.

Plaintiff brought this action to foreclose a mechanic's lien in the amount of $821.89. The defendants alleged that plaintiff entered into an oral contract to construct a house on the property here involved; asserted that the amount had been fully paid; and asserted that plaintiff therefore had no basis for a lien. The defendants, by cross-petition, alleged that plaintiff failed to complete the house in accordance with his contract and that they were compelled to expend $1,137.20 to complete it; and prayed for a judgment in that amount. The trial court found for the plaintiff and against the defendants and directed

a foreclosure of the mechanic's lien in the amount of $528.08 with interest at 6 percent from August 14, 1957. The defendants have appealed.

In September 1955, the defendants desired to build a new house on the real estate described in the petition. They found a rough drawing of a house in a book of house plans which appeared to meet their desires. They took the drawing to plaintiff to determine the cost of constructing such a house. Plaintiff estimated that it would cost $15,000. Plaintiff informed defendants that an accurate estimate could not be made until detailed plans had been prepared. The parties agreed to have plans prepared, which was done. Thereafter plaintiff submitted the plans to subcontractors and obtained bids from them. He then approached the defendants and offered to contract for the building of the house for $15,000. The defendants declined to enter into such a contract because they could not afford to put that much money into the house. Negotiations were then commenced to reduce the cost of the house.

Plaintiff submitted a written estimate based on the following: Excavation, $100; cement work, $1,200; material, $4,800; plumbing and heating, $2,200; painting labor, $585; paint, $300; floor covering, $1,280; electrical work and fixtures, $378; and labor, $3,600; a total of $14,443. The plaintiff indicated that an additional charge of $225 for labor on the fireplace should be added. Plaintiff stated that after calling the lumber dealer and obtaining a 5 percent discount on the lumber, and the defendants agreeing to do the inside painting, the defendants said to go ahead with the construction. Plaintiff testified that he told defendants the figures were an estimate only and that it would not vary more than 10 percent either way.

The defendants testified that the negotiations between the parties occurred generally as testified to by the plaintiff. Their evidence, however, is to the effect that after securing the 5 percent discount on the lumber,

and the defendants agreeing to do the inside painting, the plaintiff agreed to build the house for $14,200.

Whether or not there was a meeting of the minds of the parties on a firm contract to construct the house for $14,200 constitutes the primary issue in the case. The evidence of the parties on that point is in direct conflict.

There is evidence in the record, however, which indicates what the parties intended. The manner in which the parties interpreted the agreement before the dispute arose is ordinarily a safe guide in determining the true nature of the contract.

Plans were prepared as a guide to the construction of the house. Specifications as to materials to be used or the type of appliances to be installed were never provided. We think it would be unusual for a builder to enter into the construction of a house under a firm contract at such an amount without complete plans and specifications. The evidence shows that the defendants paid subcontractors direct. The plaintiff testified that this was because the defendants desired to select the subcontractors and secure those who would give them discounts on the cost. Defendants testified that they paid subcontractors to relieve plaintiff of the necessity of borrowing money at the bank, a matter which was of no concern to them if the house was being built under a firm contract. Ordinarily, direct payment of subcontractors by the owner is evidence that no firm contract was agreed upon. See Timmons v. Nelsen, 159 Neb. 193, 66 N. W. 2d 406. There is evidence that plaintiff went to the defendants and told them they could save on materials and labor by using cement stone instead of tile in the foundation. They approved, stating that they desired to save money wherever they could. The plaintiff suggested using cement stones instead of brick in the fireplace for the same reasons and defendants approved the savings. These instances are clearly incon-

sistent with defendants' contentions that a firm contract was made.

The defendants contend, on the other hand, that they paid subcontractors only on the approval of the plaintiff. It seems to us, however, that plaintiff as the builder, was obliged to approve such payments as a protection to the owner, whether or not he was working under a firm contract or on a time and material cost basis. The record shows also that all of the inside painting was not done by the defendants and that there was no discussion as to the effect of this on the amount of the alleged firm contract. There was no discussion as to the effect upon the alleged firm contract of savings made with subcontractors other than those the plaintiff had procured during the preliminary negotiations.

The trial court saw and heard the witnesses as they testified. It had a better opportunity to appraise the credibility of the witnesses than does this court. The trial court resolved the conflicting evidence in favor of the plaintiff. While this court tries appeals in equity de novo, we must necessarily consider the findings of the trial judge on matters that are in irreconcilable conflict. Wilkie v. Banse, 166 Neb. 138, 88 N. W. 2d 181; Marston v. Drobny, 166 Neb. 747, 90 N. W. 2d 408. For the reasons stated, the record supports a finding that there was no firm contract to construct the house for $14,200 which resulted from a definite offer and unconditional acceptance by the parties. The agreement was for the construction of the house on a "time and materials" cost basis as plaintiff contended.

The evidence shows that plaintiff received a discount of 5 percent on the materials purchased from the lumber dealer which amounted to $293.01. The defendants are entitled to credit for the amount of this discount. Grothe v. Erickson, 157 Neb. 248, 59 N. W. 2d 368. It is the general rule that the profits made and advantages gained by a builder in the execution of work on a cost basis belong to the owner, in the absence of an agreement

to the contrary. 2 Am. Jur., Agency, § 268, p. 215.

The defendants contend that they are entitled to credit for overcharges made by plaintiff for the labor employed to construct the house. This contention is based on the wages paid to employees Gard, Bickford, Bruening, Laue, and Forsburg. The evidence shows that Gard worked 125 hours and was paid $1.75 per hour. The defendants were charged $2 per hour for the work performed by Gard. Similar increased charges were made on the wages paid the other employees named, the total amount of the added charges being $491.15. The plaintiff testified that it was customary to increase the wage rate actually paid in billing the owner to cover the cost of compensation and liability insurance, the use of tools, the use of machinery and tools in his shop, and for the use of his pickup truck in hauling tools and materials to and from the job.

The defendants paid the bills submitted by the plaintiff as the work progressed, including the amounts claimed to have been expended for labor. The defendants had no knowledge that they were paying wage rates in excess of those actually paid to the employees. They have not waived their rights in the matter by making payments on labor costs, such payments having been made without knowledge of the added charges.

Under contracts designated as "cost plus" agreements, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors. Such items are generally understood to include the cost of supervision, the cost of compensation and liability insurance or other insurance which he is required to carry, and the cost of hauling, storage, and usual operating expenses. Generally speaking, overhead, charges for equipment, depreciation of equipment used, and general taxes are not proper charges as they are treated as within the percentage of profit agreed

upon. In a "time and materials" agreement in which the builder is to receive no percentage profit, and is paid going wages only for his time, the builder should be allowed all costs and charges incurred which are reasonably necessary to the completion of the project. In other words, the builder is entitled to be paid the reasonable value of all the services rendered by him. It is fundamental that under a "cost plus" or "time and materials" contract a builder may not charge for labor an amount that is not reasonable and proper, nor an amount in excess of that which he actually paid. Lytle, Campbell & Co. v. Somers, Fitler, & Todd Co., 276 Pa. 409, 120 A. 409, 27 A. L. R. 41.

We necessarily conclude that the excess charges for labor in the amount of $491.15 are not proper and cannot be allowed as a cost of labor. The evidence of the plaintiff that such charges were made in lieu of other charges which were proper to be made under the contract is not a compliance with the duty he owes to the owner. The builder must list his costs, and where in so doing absolute accuracy is not possible an estimate based on known facts may be used. But a builder is not permitted to misinform the owner on one item of expense to escape the necessities of proof on another when he is working on a cost basis. The excess charges do not appear to have been fraudulently made. They may therefore be disallowed without destroying the balance of the lien. Platner Lumber Co. v. Theodore, 120 Neb. 804, 235 N. W. 467; Rivett Lumber & Coal Co. v. Linder, 113 Neb. 567, 204 N. W. 77.

In the instant case there is no proof in the record as to the cost of insurance, use of tools, depreciation, or the value of the use of the pickup truck. Any recovery for these items must fail for want of proof.

We point out also a further reason for a true and correct itemization of the costs of construction on a contract such as we have before us. Not all items of expense in constructing a building are subject to a lien

under the mechanic's lien law. § 52-101, R. R. S. 1943. Consequently the amount of the personal judgment obtained in a mechanic's lien foreclosure action may exceed the amount for which the lienor may be entitled as a lien. It would be highly improper to permit a lienor to include items of cost or expense which were not in fact subject to a lien under the mechanic's lien law.

We conclude that defendants are entitled to credit for the discount on material received by the plaintiff in the amount of $293.01. We find also that defendants were improperly charged for excess labor in the amount of $491.15. There being no evidence in the record to sustain the cost of the items alleged to have formed the basis of the overcharges for labor, they must be disallowed for want of proof. The plaintiff is entitled to a decree foreclosing his mechanic's lien in the amount of $37.73. He is also entitled to a personal judgment for the same amount. The decree of the district court is modified in the respects noted and the decree as modified is affirmed.

AFFIRMED AS MODIFIED.

YEAGER and WENKE, JJ., participating on briefs.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, PLAINTIFF, V. PHILIP B. LUSH ET AL., DEFENDANTS.
95 N. W. 2d 695

Filed April 10, 1959. No. 34257.

1. **Contempt.** Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged contempt. An attachment or order to show cause will then be issued, and the party accused brought before the court.
2. ———. A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence.

3. ———. Such a proceeding is not a "criminal case" within the meaning of Article I, section 12, of the Constitution of the State of Nebraska nor "criminal prosecutions" within the meaning of Article I, section 11, thereof.
4. ———. Contempt, being without any particular form of action, is not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions.
5. **Contempt: Evidence.** The rules of evidence in civil cases are applicable in criminal contempt cases.

Original action. On motion to review order of referee. *Rulings of referee sustained.*

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *John S. Samson,* for plaintiff.

Crosby, Pansing & Guenzel and *Chauncey E. Barney,* for defendants.

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

WENKE, J.

This is an original action brought by the Attorney General in behalf of the State of Nebraska after this court had granted its application for leave to do so. The original information charged the defendants therein named with conduct allegedly constituting contempt of this court. Thereafter, with our permission, an amended information was filed against certain of the same defendants alleging the following:

"That the defendants, and each of them, at all times hereinbefore mentioned, and in doing and committing each and everyone of the acts set forth in each and every one of the above and foregoing counts, were operating pursuant to the conspiracy, scheme and device set forth in paragraphs I to VI herein, and did wilfully, knowingly, contumaciously, unlawfully and intentionally commit the following offenses:

(1) Engage in the practice of law in the State of Nebraska without a license to do so;
(2) Engage in the practice of 'Ambulance Chasing,'

and in stirring up strife and litigation for the purpose of instituting suits thereon within as well as outside the State of Nebraska; and

(3) Committed the offense of champerty and maintenance.

"That all of said offenses were committed without respect for and in direct contempt of the power, dignity and authority of this honorable Court to regulate the practice of law in the State of Nebraska and the due administration of justice therein, and in direct contempt of the power, dignity and authority of all other lawfully created Courts of the State of Nebraska, and said defendants, and each of them, are therefore subject to punishment by this Court for criminal contempt."

Issues having been joined, this court appointed Paul H. Bek as referee to take testimony and make a report to this court based thereon. Bek took the oath required of him as referee and qualified as such. Thereafter the State, under authority of section 25-1267.37, R. R. S. 1943, propounded interrogatories to certain of the defendants. These were objected to by all of the defendants. Some of the defendants moved for an order to suppress them. The State also filed motions directed to certain of the defendants for the discovery and production of documents for inspection, copying, or photographing. This was presumably done under the authority of section 25-1267.39, R. R. S. 1943. The defendants objected to these motions and asked that they be denied. The referee overruled all objections to both the interrogatories propounded and to the motions for discovery and production of documents for inspection, copying, or photographing. Because of the importance of the question involved we have, at the request of the defendants, decided to review the correctness of the referee's rulings.

The parties agree the question involved is: "May the State in a prosecution for criminal contempt obtain information from the accused through the use of written

interrogatories and discovery by production of documents, as permitted by sections 25-1267.37 through 25-1267.39?"

"Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged contempt. An attachment or order to show cause will then be issued, and the party accused brought before the court. * * *" Gandy v. State, 13 Neb. 445, 14 N. W. 143.

A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence. See, State ex rel. Wright v. Barlow, 132 Neb. 166, 271 N. W. 282; Butterfield v. State, 144 Neb. 388, 13 N. W. 2d 572, 151 A. L. R. 745. In State ex rel. Wright v. Barlow, *supra,* we held that such a proceeding was not a "criminal case" within the meaning of Article I, section 12, of the Constitution of the State of Nebraska nor "criminal prosecutions" within the meaning of Article I, section 11, thereof. Consequently the defendant, in a criminal contempt case, can not invoke the provisions of the foregoing constitutional provisions but may be called as a witness therein and required to testify.

The old common law concept of interrogatories, as used in criminal contempt cases, has no application in this jurisdiction. Thereby the party charged could exculpate himself by denying the charges made against him in answering such interrogatories and the only relief available to the State, if it thought the answers given were false, was to charge the defendant with perjury. This court has held that if the acts complained of are denied then the court should hear the evidence and determine whether or not the party charged is guilty. See, Gandy v. State, *supra;* Nebraska Children's Home Society v. State, 57 Neb. 765, 78 N. W. 267.

Contempt, being without any particular form of action, is not subject to the limitations of procedure prescribed for the conduct of either civil or criminal actions. See State ex rel. Wright v. Barlow, *supra.* However, we have often said that a prosecution for criminal contempt is governed by, and to be conducted in accordance with, the strict rules applicable in criminal prosecutions. See, State ex rel. Wright v. Barlow, *supra;* McCauley v. State, 124 Neb. 102, 245 N. W. 269; Yearsley v. State, 132 Neb. 286, 271 N. W. 802. The information in the case at bar charges criminal contempt. See, State ex rel. Wright v. Barlow, *supra;* Butterfield v. State, *supra.*

Sections 25-1267.37 through 25-1267.39, R. R. S. 1943, had as their source Rules 33 and 34 of the Federal Rules of Civil Procedure. They were enacted by the 1951 Legislature and are found in the Session Laws of 1951 as sections 1 and 2 of chapter 66 and as section 37 of chapter 68. Both, by their respective titles, relate the subject matter thereof to procedure in civil actions. In order to understand what the Legislature meant by using this language it should be remembered that the procedure for contempt proceedings, as provided by the Legislature, is found in Chapter 25, R. R. S. 1943, relating to "Civil Procedure." See §§ 25-2121 through 25-2123, R. R. S. 1943. However, this statutory proceeding for contempt does not limit the power of this court to punish for contempt. See, State v. Bee Publishing Co., 60 Neb. 282, 83 N. W. 204, 83 Am. S. R. 531, 50 L. R. A. 195; Nebraska Children's Home Society v. State, *supra;* State ex rel. Wright v. Barlow, *supra.* As stated in Nebraska Children's Home Society v. State, *supra:* "The power to punish for contempt is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid, * * *."

While we have, in some instances, followed the strict rules applicable in criminal prosecutions in cases of criminal contempt, such as here, there are, however,

many instances when we have not seen fit to do so. We have said the charge must be by information, Gonzalez v. State, 119 Neb. 13, 226 N. W. 801; that the charge must be made with the same particularity as in a criminal complaint, Cornett v. State, 155 Neb. 766, 53 N. W. 2d 747; that the guilt of the person charged must be established beyond a reasonable doubt, Whipple v. Nelson, 138 Neb. 514, 293 N. W. 382; Butterfield v. State, *supra;* and that on appeal to this court it should be by petition in error, Whipple v. Nelson, *supra.* On the other hand we have said that a preliminary hearing was not necessary, Kopp v. State, 124 Neb. 363, 246 N. W. 718; that it was not necessary to have a formal arraignment, Nebraska Children's Home Society v. State, *supra;* that a failure to deny was a confession of the charges and left no issue to be tried, Hanika v. State, 87 Neb. 845, 128 N. W. 526; Nebraska Children's Home Society v. State, *supra;* State ex rel. Wright v. Hinckle, 137 Neb. 735, 291 N. W. 68; and that the party so charged was not entitled to a trial by jury, Gandy v. State, *supra;* Hanika v. State, *supra.*

We have directly passed on the question herein involved in State ex rel. Wright v. Barlow, *supra.* Therein we approved the State calling the party charged as a witness and the use of a deposition. In support of the latter we cited State ex rel. Spillman v. Priest, 118 Neb. 47, 223 N. W. 635, a disbarment case, which proceeding is in the nature of a civil action. See, also, State ex rel. Nebraska State Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138; State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136. It is significant to note in the case of State v. Lovell, 117 Neb. 710, 222 N. W. 625, an original action brought in this court for criminal contempt, that after the State called the defendant therein charged as a witness none of the then members of this court objected to the State doing so. In fact, after counsel for the State had examined the witness, each member of the court did so. We have come to the conclusion that this court has adopted the

rules of evidence in civil cases as applicable to criminal contempt cases and we can see no good reason for our now departing therefrom.

Each of the defendants herein charged, as well as any other witness in a case of this character, is fully protected by section 25-1210, R. R. S. 1943, from being required to answer if the matter sought to be elicited from him would, in any manner, tend to render him criminally liable or expose him to public ignominy. This statute provides, insofar as here material, that: "When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, * * *." However, to avoid waiver thereof, objections based on this statute must be made when the witness is confronted with a question or interrogatory seeking such information. See State ex rel. Wright v. Barlow, *supra*.

We have come to the conclusion that the referee's rulings were proper and the same are therefore sustained.

RULINGS OF REFEREE SUSTAINED.

DWAYNE D. ANDERSON, APPELLEE, V. LLOYD L. EVANS, APPELLANT.

96 N. W. 2d 44

Filed April 10, 1959. No. 34491.

1. **Trial: Appeal and Error.** In determining the question of whether or not a motion of a defendant for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom.
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. **Master and Servant: Negligence.** Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury.
4. **Trial.** Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable.
5. **Trial: Appeal and Error.** The fact that the court copied the pleadings in presenting the case to the jury is not alone sufficient to cause a reversal unless it can be said that the complaining party was prejudiced thereby.
6. ———: ———. It is not prejudicial error for a trial court to inform a jury orally or in writing that an inquiry made by it is covered by an instruction and that reference should be made to such instruction.
7. **Evidence.** The trial court should be allowed a reasonable discretion in receiving or rejecting evidence of prior declarations of a witness consistent with his testimony where he has been impeached by proof of other inconsistent statements.
8. ———. Considerable latitude must necessarily be allowed in the admission of corroborative evidence; and whether such testimony should be received rests largely in the discretion of the trial court.
9. **Limitations of Actions.** The defense of the statute of limitations is a personal privilege of the debtor, and can be raised only by such debtor and those in privity with him.
10. **Appeal and Error: Costs.** The cost of preparation of a bill of exceptions is fixed by section 24-342, R. S. Supp., 1957, and an official court reporter may not charge in excess of that amount.

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

Max Kier, Charles Ledwith, and *William W. Griffin,* for appellant.

Louis A. Seminara and *Julius D. Cronin,* for appellee.

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 Holt County by Dwayne D. Anderson, plaintiff, against Lloyd L. Evans, defendant, to recover damages

for injuries sustained by the plaintiff when he was a minor 18 years of age arising out of an accident which occurred when he was employed by the defendant as a farm hand and was severely burned. The second cause of action includes amounts incurred for hospital and medical expenses by plaintiff's father, assigned to the plaintiff. The plaintiff had attained his majority prior to the time of this trial. The case was tried to a jury resulting in a verdict in favor of the plaintiff, fixing the amount of his recovery in the sum of $8,000.

This is the second appearance of this case in this court. See Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59.

At the conclusion of the plaintiff's evidence and at the conclusion of all of the evidence, the defendant moved for directed verdict, both of which motions were overruled. The defendant filed a motion for judgment notwithstanding the verdict or for a new trial, which was overruled. From such rulings the defendant perfected appeal to this court.

The second amended petition of the plaintiff, insofar as necessary to consider here, alleged that an accident occurred in the process of removing a broken wooden stake from the body of a pick-up truck by means of pouring fuel onto the stake and igniting it, when the plaintiff, not knowing the explosive properties of liquid fuel and acting on the command of the defendant, picked up a can of tractor fuel to pour on the burning stake. The can exploded and seriously burned the plaintiff.

It is further alleged that the negligence, carelessness, and omissions of the defendant were the direct and proximate cause of the plaintiff's injuries. The specific acts of negligence charged to the defendant are as follows: (1) In failing to provide a safe place for the plaintiff to work; (2) in failing to inform the plaintiff of the perils and dangers incident to his employment and to instruct the plaintiff how to avoid them; (3) in failing to advise and inform the plaintiff of the contents of the can which

the defendant negligently and carelessly instructed the plaintiff to pour onto the stake ignited by the defendant; (4) in commanding and directing the plaintiff to pour fuel on said burning stake, which act was a dangerous undertaking, and the hazard and danger were well known to the defendant who was a mature and experienced rancher, but which hazard and danger were not known to the plaintiff due to his youth and inexperience; (5) in failing to provide the plaintiff the proper and necessary safeguards prior to directing and commanding the plaintiff to pour said tractor fuel on the stake to be removed; and (6) in directing, commanding, and instructing the plaintiff to use the highly explosive and inflammable fuel as a means to burn the stake, when the defendant knew, or should have known, that such a method of removing said stake was the most dangerous method to the plaintiff.

The second amended petition then alleged the injuries accruing to the plaintiff by virtue of the defendant's negligence, and the nature and effect of such injuries.

The second cause of action relates to the medical expenses incurred, all of which are set out in the petition, and the assignment of the same by the plaintiff's father to the plaintiff due to the fact that the plaintiff became of age prior to the time of this trial.

The defendant's answer to the second amended petition alleged that the specific acts of negligence charged to the plaintiff were as follows: Needlessly exposing himself to the danger of fire and the danger of explosion; voluntarily assuming an unnecessary risk of fire and explosion; failing to protect himself from the possibility of fire or explosion; failing to observe that the stake, which had in his presence been partially burned, was still on fire; failing to observe that there remained in said partially burned stake a live spark; holding said can of tractor fuel in such a position as to permit a combustible gaseous mixture of its vaporized contents and air to be exposed in the presence of a spark

or flame; and failing to obey the orders of his master to desist from lifting the can of tractor fuel into a position where fire or explosion would be likely to occur. The defendant assigns as error the following: The court erred in not sustaining the defendant's motions for a directed verdict and motion for judgment notwithstanding the verdict. The court erred in excluding tendered testimony as to what knowledge of explosive properties of tractor fuel is commonly possessed by other persons of similar age and experience as the plaintiff. The court erred in admitting in evidence a newspaper article telling of the plaintiff's accident. The court erred in receiving in evidence the testimony of a witness given at a former trial without a proper foundation being laid. The court erred in giving instructions Nos. 2 and 13. The court erred in failing to permit defendant to amend his answer to plaintiff's second amended petition to conform to the proof, namely, that the medical expenses on which plaintiff sought recovery were outlawed. The court erred in giving the jury an oral explanation of an instruction.

"In determining the question of whether or not a motion of a defendant for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom." Anderson v. Evans, *supra.*

"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." Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804.

We will refer to Dwayne D. Anderson as Dwayne, or

plaintiff; to Lloyd L. Evans as Evans or defendant; and to Ralph Fuqua as Fuqua.

The record discloses that the plaintiff, at the time of this trial, was 23 years of age; that he went to Atkinson with Fuqua in Fuqua's car on August 5, 1953; and that upon arriving at Atkinson the plaintiff visited some relatives and was informed that the defendant was looking for help. The plaintiff and Fuqua proceeded to the defendant's farm where they met Mrs. Evans. She went with them to the hayfield where the defendant was working, and introduced them to the defendant. These young men talked to the defendant about employment. He said he needed help, and inquired about their experience. The plaintiff told the defendant he had had some experience when he worked with his uncles in hayfields for three or four summers. The defendant then discussed the type of equipment he used and showed them how he had it set up and how it operated, which was different than the plaintiff had been accustomed to. The defendant said he would pay $5 a day and give them room and board. The plaintiff was to go to the field with the defendant the next day and Fuqua was to remain in the farmyard and sharpen sickles.

On August 6, 1953, the plaintiff was returning to the defendant's pick-up truck with a canteen of water and at that time saw the defendant with a 5-gallon can in each hand. The plaintiff put the canteen in the front part of the pick-up truck, and the defendant put the cans in the back of the same. The plaintiff and defendant got into the truck and proceeded to the field to start haying operations. While the plaintiff was in the process of greasing the trail mower and rake and repairing some equipment, the defendant was servicing and fueling the tractor, using one of the cans which he had placed in the truck. After finishing such work they started the haying operation. During the process of such operation the sickle on the trail mower broke, requiring them to

quit the haying operation. The defendant then told the plaintiff about a broken stake on the box at the rear of the truck which he wanted to replace with a new one. In an attempt to remove the broken part of the stake that was stuck in the socket, the defendant used a hammer and chisel, also a brace and bit to drill into it, and tried to pull it out with pliers. The plaintiff handed the defendant the tools to be used in such operation. After that they returned to the farmyard and parked the truck. The defendant directed the plaintiff to remove the bolts off the top half of the stake, which the plaintiff started to do. The defendant picked up a can from the back of the truck and soaked the bottom half of the stake with the contents of the can. The defendant then left and returned with two sickles, placing them in the back of the truck. The plaintiff was removing the bolts as directed, but was unable to remove them all and the defendant assisted the plaintiff in removing the remainder of the bolts. The defendant lit the stake he had soaked, and there was a flame. They stepped back and watched it burn for a couple of minutes. The flame died down and the defendant looked at the plaintiff and said: "Dwayne, pour some more fuel on the fire." The can was to the left of the plaintiff and the defendant was to his right. The plaintiff reached down and picked up the can with his left hand and there was an explosion before he had an opportunity to pour any of the contents out of the can. The plaintiff had the can just about waist high when the explosion occurred in front of him. The explosion knocked him off his feet, moving him back away from the truck. He saw fire in front of him, and his clothing was set on fire. After the explosion the plaintiff took three or four steps then laid down on the ground and started to roll. Fuqua removed the plaintiff's clothes, as he was the first one to reach him. The plaintiff was wearing bibless overalls, a T shirt, and engineer's boots. After that the plaintiff got up and walked to Fuqua's car and put on another pair of

overalls. Fuqua wrapped a blanket about him. The plaintiff asked the defendant to get him to a doctor and the defendant said he would.

The defendant said nothing about the tractor fuel being dangerous or that it would possibly explode, nor that the contents of the can might explode. Neither did he put his hand on the plaintiff in any way. The plaintiff testified that he did not know what was in the can.

After the explosion the defendant took the plaintiff to the hospital in Atkinson in the defendant's car. Fuqua went along. The defendant drove and Fuqua and the plaintiff rode in the rear seat. The plaintiff testified that he had no conversation with the defendant on the way to the hospital, but that the defendant looked at him and said: "Dwayne, I should have never told you to do it." The defendant offered the plaintiff a cigarette, which he did not accept. The defendant shook his head and repeated: "Dwayne, I should never have told you to do it."

In Atkinson, they first stopped at a doctor's office and then proceeded to the hospital. The plaintiff walked into the hospital with the defendant and Fuqua beside him. The plaintiff was taken to the operating room and put on a table where his clothes were removed and preparations were made to bandage him. Fuqua was there, trying to hold the plaintiff on the table. Present in the operating room were the defendant, Fuqua, two sisters who were registered nurses, the doctor, and the plaintiff. The next thing the plaintiff remembered he was in a hospital bed in another room.

He further testified that he did not discuss the accident with anyone while he was in the hospital; that the same evening his parents and brother arrived from Omaha; that he had no conversation with them; and that he was taken to Omaha that night in an ambulance and hospitalized at the Nebraska Methodist Hospital for 2 months, 3 weeks, and 4 days.

The plaintiff further testified to the employment he

had obtained when he was able to return to work, about a year after the accident, and the difficulty he experienced in certain types of employment. He testified that at the time of trial he was working as a can placer for the Continental Can Company, earning $2.07 an hour; and that he was married and had one child.

On cross-examination the plaintiff testified that he was graduated from South High School in 1953; that he was taught different types of engines and the construction of same, and also what made an internal combustion engine operate; and he explained this process. He further testified that he had a course in mechanics for two semesters; that he did not learn that gas was explosive; that he had owned two cars and also two cars were owned by him and his brother; that he had done mechanical work on these cars such as adjusting the brakes, working on doors and windows, tightening fan belts, and working on the electric system; that he worked for his step-uncle in the hayfields three summers before this accident occurred; that he helped stack and put up hay, operated and refueled tractors, using tractor fuel, and knew it had to be handled with care because it would ignite and burn; that it was never explained to him that tractor fuel had to be handled in a certain way; and that before the accident he knew that fuel oil was flammable and used to operate tractors.

He further testified that when the defendant lit the stake, setting the fire, the defendant told him to pour more fuel on the fire and the plaintiff figured it was tractor fuel; that when he picked up the can he was going to follow the defendant's instructions to pour some more fuel on the fire; that no fuel oil was poured from the can; and that he did not know what was in the can. Prior to the accident he knew that fuel oil would burn, but did not know that it would explode. The can that exploded was the same can the defendant used when he poured fuel on the stake while in the farmyard.

The plaintiff's mother testified that she went to At-

kinson with her husband and her oldest son John, arriving at about 9 p. m., the day of the accident. She further testified that the defendant told her at a cafe in Atkinson that he "shouldn't have told him (Dwayne) to do it."

The plaintiff's brother testified that at the breakfast table at the defendant's ranch the morning after the accident the defendant said he was sorry he told Dwayne to do it and that he did not understand why he told Dwayne to pour the fuel on that stake.

The plaintiff offered the testimony of Fuqua given at the first trial. For the purpose of this trial, this testimony may be summarized as follows: After returning from the hayfield and parking the truck, the defendant came to this witness and said he and the plaintiff were trying to get a stake butt out of the back of the truck with tractor fuel. After talking to this witness, the defendant went back to the truck. The Evans children were in the yard and the defendant told them to get back to the house before they got hurt. The next thing this witness saw was a big flash. At that time the plaintiff was about 5 feet from the rear of the truck. The plaintiff flew back about 10 feet, and his clothing was on fire. When this witness saw the flame he called to the plaintiff to lie down and roll, and started chasing him. This witness caught up with the plaintiff and ripped off his clothing. This witness further testified that he got the plaintiff up to his car and tossed a blanket around him; and that the defendant got his car and drove this witness and the plaintiff to the hospital in Atkinson. The defendant said to this witness: "I shouldn't have told him to do it; its all my fault." This conversation occurred on the way to the hospital, and was repeated three or four times. Arriving at the hospital, they went to the operating room. This witness testified that he helped the doctor and the sisters bandage the plaintiff; that he stood to the right of the plaintiff; and that he was there all of the time. Afterwards the defendant

and this witness went to town and then back to the defendant's farm. The defendant talked to this witness about the accident, and this witness remembered him saying: "I shouldn't have told him to do it; its all my fault." He repeated this several times.

Sister Mary Antonita testified in behalf of the defendant that she was superintendent of the Atkinson hospital and saw the plaintiff first when he was brought to the hospital and taken to the operating room. She further testified that the plaintiff said: "He told me not to do it; why I did it I don't know." This statement was made before the hypodermic injection was administered. This witness also testified that Fuqua was not in the operating room, except for an instant.

Sister Mary Felicia testified that she was a registered nurse; that when the plaintiff was returned to his room and during the time she was there with him alone, between 5 and 6:30 p.m., she asked the plaintiff to tell her just what happened, and testified: "He says, I was going to burn some kind of stalk or spoke or something, and he says, I would have to put gas or something on it, and Mr. Evans told him, don't do it; and then he says, Sister, why I did it I don't know."

The owner of the ambulance used to transport the plaintiff to Omaha testified that he asked the plaintiff what happened and the plaintiff told him a can of tractor fuel exploded as he was putting it on the stake that they were burning out of a pick-up truck; and that the plaintiff said he should have known better.

The defendant testified that he had been engaged in farming and ranching for the past 20 years; that he was married and had two children, Ruth 14 and Gary 10; and that he was 51 years of age. He further testified to the employment of the plaintiff and Fuqua. The defendant further testified that he was using a half-ton 1949 model Chevrolet pick-up truck with a steel cab and steel box behind the cab upon which were a grain box and stock rack. He described the manner in

which the stakes were placed on the stock rack. One of the stakes was broken off and required replacement. He testified as to how he and the plaintiff endeavored to remove the pieces of wood contained in the socket where the stake had broken off with a hammer and chisel, and with a brace and bit. He further testified that the plaintiff suggested to him that they could soak the socket containing the broken stake with tractor fuel and burn it out, to which the defendant said that would be all right, but it could not be done in the hayfield. The plaintiff poured some tractor fuel on the stake, but it was not ignited in the hayfield. The plaintiff placed the caps on the can. The defendant further testified that he and the plaintiff returned to the farmyard and parked the pick-up truck. He then asked plaintiff to remove the bolts that held the angle iron to the grain box at the right rear corner of the grain box, which he did. The plaintiff then ignited the soaked stake in the socket. The defendant was preparing to make a new stake to replace the one which they were endeavoring to remove. At that time he was standing at the back of the truck putting a bit into a brace. As he was doing that, he observed the flame in the socket had died down. The plaintiff said: "That fire is not burning very good, I believe I will put some more fuel on it." The plaintiff, as he said that, stepped onto the rear bumper of the pick-up truck and grabbed the can containing the tractor fuel. As he stepped back to the ground, the defendant held his left hand against the plaintiff's body and said: "No, Dwayne, don't do that, that would be dangerous to put that fuel on that fire." The plaintiff merely stood there at that time holding the can, and the defendant told him to put the can down and wait until he returned. The defendant further testified that he told the plaintiff he would go down by the windmill and get a small open can. The plaintiff then set the can down. The defendant laid the brace and bit in the back end of the truck and started to walk away in an

easterly direction, believing that the plaintiff would follow his instructions. After he had walked approximately 18 feet he heard the plaintiff say: "I am going to be awful careful here." The defendant turned around and saw the plaintiff standing in a position to pour fuel on the burning stake, holding the can up in his hands in a position to do so. There was a flash and an explosion which momentarily stunned the defendant. The defendant then heard the plaintiff yell: "Get me out of here." The defendant ran toward the plaintiff who turned and ran in a northerly direction, then lay down on the ground and rolled 35 feet before the defendant overtook him. With the help of Fuqua, the defendant proceeded to remove the burning clothing from the plaintiff's body. The defendant directed Fuqua to take care of the plaintiff. The defendant put out the fire on the pick-up truck with a pail of water which was brought to him by his wife.

On cross-examination the defendant testified that there was some question in his mind at the time he first talked to the plaintiff about the plaintiff's competency to operate the farm machinery which the defendant used, but he believed with a little help the plaintiff could learn to do the work assigned to him well enough, and with a little orientation the plaintiff would be able to operate the tractor. The defendant further testified that he had no objection to the plaintiff pouring tractor fuel on the stake out in the field, but that they did not burn it there. The defendant admitted that at the previous trial of this cause he testified that he did not believe it was dangerous to light the stake that was soaked with tractor fuel. He also testified that he did not tell the plaintiff not to light the stake after they arrived back in the farm yard. The defendant further testified that an explosion is no more easily brought about with tractor fuel than it is with gas; that tractor fuel is more liable to explode in a condition in which the can is partly filled than when it is full; and that this

particular can used to burn out the stake was partly full, and the defendant knew it. The defendant denied conversations as testified to by the plaintiff's witnesses to the effect that he directed the plaintiff to pour more tractor fuel on the stake. Likewise, his wife denied any conversation that took place at the breakfast table the morning after the accident, as testified to by the plaintiff's witness.

This court, in Anderson v. Evans, *supra,* cited Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951, and particularly Collins v. Weise, 110 Neb. 552, 194 N. W. 450, wherein this court said: " 'There is no presumption that a boy 16 years of age, who has had little experience as a farm laborer, has as much prudence and understanding as an adult, and where such youth is injured while engaged in dangerous work, which he was ordered to do by his employer's foreman in charge of the work, it is for the jury to say, considering his age and experience, whether he assumed the risks of such employment.' "

Where there is a disputed question of fact as to whether or not an employee was informed or had knowledge of latent dangers of his employment, a question is presented for determination by a jury. Anderson v. Evans, *supra.*

We conclude that the trial court did not err in refusing to sustain the motion for directed verdict made by the defendant, and did not err in overruling the motion for judgment notwithstanding the verdict made by the defendant.

The defendant contends that the trial court erred in receiving the testimony of Fuqua, a witness at the former trial but who was not present at the trial of the instant case. Objection was made to the receiving of this testimony for the reason that at the former trial the defendant was deprived of his right of cross-examination. The evidence shows that after the former trial Fuqua left the city of Omaha and went to St. Joseph, Missouri,

and was in the process of moving to a job in the State of Wisconsin. The evidence also discloses that the plaintiff made a reasonable and diligent effort to find and locate this witness in the State of Wisconsin to testify at the instant trial, but was unable to do so. At the former trial the plaintiff on re-direct examination offered in evidence a statement, exhibit D, to which the defendant objected. The court took the matter of the admissibility of this statement under advisement. The trial court was understood to have excused the witness due to inclement weather. On the following day the court allowed the admission of the statement. Defense counsel requested that Fuqua be recalled for the purpose of cross-examination concerning this statement. Due to Fuqua's departure counsel was unable to cross-examine him. The plaintiff at this trial did not offer the re-direct examination of Fuqua given at the first trial, and did not re-offer the statement, exhibit D, as an exhibit in the instant case.

In Wolski v. National Life & Accident Ins. Co., 135 Neb. 643, 283 N. W. 381, this court held: "'Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable.'"

We conclude that under the circumstances presented by the record the trial court did not commit prejudicial error in admitting the testimony of Fuqua.

The defendant contends that the trial court committed prejudicial error in giving instruction No. 2 to the effect that as a result of the accident the plaintiff "will be unable to work for the remainder of his lifetime"; that this allegation contained in the plaintiff's second amended petition and read to the jury by the court was not supported by the evidence; that the evidence shows that the plaintiff had been employed for 3 years; and that during the last year preceding the second trial he had not missed a day of work, worked a 40-hour week, and earned $16 a day.

The evidence discloses no attempt on the part of the plaintiff to conceal the fact of his employment. He frankly testified to the nature of his employment before and after the accident and what he earned.

In Franks v. Jirdon, 146 Neb. 585, 20 N. W. 2d 597, this court said: "This court has frequently criticized the practice of copying the pleadings as a method of stating the issues to a jury and where they contain allegations not supported by evidence it may be reversible error to include such allegations in defining the issues if the reviewing court is satisfied that the jury may have been misled thereby."

We conclude that the jury was in no way misled by the instruction complained of.

The defendant contends that the trial court erred in giving an oral explanation of an instruction to the jury. The defendant asserts that in the instant case the jury apparently inquired of the court what would "slight negligence" be considered, percentage wise. The record shows the following reply: "The Court: I have answered your question in writing. That is covered in Instruction Number 11. You can just refer to that; it is defined in there. You will just take that and go back to your jury room; that will comply with the law." Instruction No. 11 shows that the court defined "slight negligence." The defendant contends that the reference made by the court to instruction No. 11 did not answer the question of the jury; and that in order to cure the error the court took the paper on which the jury had written the question and wrote: "Please refer to Instruction No. 11." The defendant also contends that these proceedings took place in the absence of counsel for the defense.

In support of this contention the defendant cites Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 74 A. L. R. 5, wherein the court held: "The giving of an oral instruction to the jury in regard to the principles of law applicable to the case and to the evidence, without a waiver

of the statutory requirement that it be in writing, is reversible error."

We are in accord with the statement made in Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627, that communications between the trial judge and the jury after retirement of the jury should be controlled by a high degree of circumspection. However, the oral communication alleged by the defendant to have been given to the jury in the instant case was merely a repetition or affirmation of an instruction already given to the jury.

In Commonwealth v. Kelly, 292 Pa. 418, 141 A. 246, it is said: "'* * * If there were any contradiction or uncertainty as to the instruction, there should, of course, be a new trial, but (to hold it to be reversible error) for the judge to repeat to the jury, either by recalling them or in a note in answer to their inquiry, a part of the instruction already given them, even though the defendants and their counsel were not present, seems to us to be super-technical, and not in harmony with the tendency of our courts to have cases retried only where there has been material error made in the trial of the case.'"

In the case of Oklahoma City v. Collins-Dietz-Morris Co., 183 Okl. 264, 79 P. 2d 791, the jury was returned into open court and asked the court the following question after reading instruction No. 8, which concerned the measure of damages: "We want to know if we would be permitted to fix the amount of the damage, if any, at any figure we see fit, or are we restricted to the figures set up in the petition." The court replied, in substance, that the law as to the measure of damages was set forth in instruction No. 8, that the petition was not evidence, and that the jury was to fix the amount of damages, if any, in accordance with the evidence and instructions of the court, and further advised the jury that in making these remarks the court did not intend to intimate either what the verdict should be nor the

amount of damages. The court said: "While this was technically an error on the part of the trial court and one to be carefully guarded against, yet, after a careful examination of the entire record, it does not appear that it resulted in a miscarriage of justice or constituted a substantial violation of the defendant's constitutional or statutory rights. The court did not give any new instructions, but in substance merely directed the attention of the jury to instructions previously given."

We conclude that the communication of the court to the jury should not be considered as an oral instruction contemplated by the statutes of this state sufficient to constitute reversible error. We observe nothing in this situation which could have prejudiced either party.

The defendant contends that the trial court erred in receiving and refusing to receive certain evidence. The defendant in this connection asserts that at the former trial the plaintiff had testified that he had never made any claim to the effect that the defendant had told him to pour oil on the burning stake to anyone until after he had talked to his attorney. On re-direct examination the plaintiff was permitted to identify a newspaper article appearing in an Omaha newspaper under date of September 9, 1953, to which there was an objection. The objection was overruled. The court received the newspaper article in evidence. The defendant contends that this ruling was damaging because of the statement previously made by the plaintiff which is sought to be refuted by the newspaper article; that this newspaper article was hearsay; and that there was no proper foundation laid for the admissibility of the same in evidence and no opportunity for cross-examination.

The record discloses that the first time the plaintiff discussed the case with his attorney was October 8, 1953. On the first trial of this cause, the plaintiff testified that to the best of his recollection the first time he had told anyone concerning how the accident happened was at the time he discussed the matter with his attorney. On

the trial of the instant case, on cross-examination the plaintiff recalled that the first time he had discussed how the accident happened was when he was interviewed by a newspaper reporter from an Omaha newspaper on September 9, 1953. At this point defense counsel endeavored to impeach the declaration of the plaintiff by showing him his testimony given at the prior trial wherein the plaintiff stated that as far as he remembered he had not made any statement concerning how the accident happened to anyone until he gave a statement to his attorney. Thereupon, upon re-direct examination, the plaintiff introduced into evidence a newspaper article dated September 9, 1953, which appeared in an Omaha newspaper and supported and corroborated the plaintiff's declaration at this trial that he told the story of how the accident happened approximately a month prior to the time he employed counsel.

The plaintiff contends that the trial court, in the exercise of its sound discretion, properly allowed the introduction of the newspaper article, not for the purpose of proving or disproving any of the issues or facts contained therein, but for the purpose of showing that the witness had given prior statements consistent with his testimony, particularly where he has been impeached by proof of other inconsistent statements.

In 58 Am. Jur., Witnesses, § 818, p. 457, it is stated: "The trial judge should be allowed a reasonable discretion in receiving or rejecting evidence of prior declarations of a witness consistent with his testimony where he has been impeached by proof of other inconsistent statements, and the appellate court should be loath to disregard an exercise of such discretion except in a clear case of abuse."

Considerable latitude must necessarily be allowed in the admission of corroborative evidence; and whether such testimony should be received rests largely in the discretion of the trial court. See, 98 C. J. S., Witnesses,

§ 648, p. 669; Heusser v. McAtee, 151 Neb. 828, 39 N. W. 2d 802.

We conclude that the defendant's assignment of error is without merit.

The defendant contends that the trial court committed prejudicial error in refusing the request of the defendant to amend his answer or in failing to strike the second cause of action on motion of the defendant for the reason that the second cause of action was barred by the statute of limitations.

In the second cause of action the plaintiff sought recovery, as assignee of his father, on account of hospital, doctor, and nurse bills incurred by the father in the sum of $3,513.35.

In Gurske v. Strate, 165 Neb. 882, 87 N. W. 2d 703, it was held: "The defense of the statute of limitations is a personal privilege of the debtor, and can be raised only by such debtor and those in privity with him." See, also, Neill v. Burke, 81 Neb. 125, 115 N. W. 321.

In the instant case it was stipulated that the substitution of Dwayne D. Anderson as sole party plaintiff was without prejudice to the rights of any parties to this action.

We conclude that the rule in Gurske v. Strate, *supra*, applies, and that the defendant's contention is without merit.

Instruction No. 13 relating to the measure of damages has been examined and is held not to be prejudicially erroneous as it relates to this assignment of error.

The defendant offered the testimony of certain witnesses aged 27, 18, and 16, to prove their knowledge of the use of tractor fuel and the danger connected with its use. These witnesses had each had considerable experience in working on farms and in the use of farm machinery and tractor fuel. Objections were made to this testimony for the reason that there was no proper foundation laid, which objections were sustained. An examination of the testimony of these witnesses shows

that the experience of these witnesses and that of the plaintiff, with reference to the matters to which they did testify relating to tractor fuel and its use, are in no respect similar, but quite dissimilar.

The plaintiff at all times denied that he knew the contents of the can that exploded and did not have knowledge of this fact until some time later, and the questions asked by defense counsel of the witnesses heretofore mentioned assumed that the plaintiff knew that the can contained tractor fuel.

It was the function of the jury to determine what the plaintiff knew or did not know with reference to the properties of tractor fuel at the time of the accident. See Anderson v. Evans, *supra.*

We conclude that the defendant's assignment of error is without merit.

In addition to the foregoing, it appears that in the instant case the charge by the official court reporter for the preparation of the bill of exceptions which comprises three volumes containing 534 pages and 98,986 words by actual count, was $310.

Section 24-342, R. S. Supp., 1957, provides in part: "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 statutes, the proper charge for the bill of exceptions in the instant case is $148.50. The overcharge for the preparation of the bill of exceptions was $161.50. The cost of the preparation of the bill of exceptions in the instant case is hereby fixed at $148.50, and the district court is directed to retax the costs of the bill of exceptions in that amount. See Pueppka v. Iowa Mutual Ins. Co., on rehearing, 166 Neb. 203, 88 N. W. 2d 657.

For the reasons herein given, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERIC NELSON, DOING BUSINESS AS ERIC NELSON NEWS COMPANY, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. SIDNEY COREN, DOING BUSINESS AS MEYERS NEWS STAND, APPELLANT.

95 N. W. 2d 678

Filed April 10, 1959. Nos. 34513, 34514.

1. **Constitutional Law: Statutes.** The constitutionality of a legislative act having been passed upon by this court, and no additional grounds being presented, the same will be adhered to in all future cases in which that question is directly involved and in which it becomes a vital and integral factor in the determination of the issues made.
2. **Criminal Law.** A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder.
3. **Constitutional Law: Statutes.** A legislative act which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
4. ———: ———. The dividing line between what is lawful and unlawful cannot be left to conjecture.
5. **Statutes: Municipal Corporations.** The standards of certainty in legislative acts punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

J. M. Emmert, Neal H. Hilmes, Irvin C. Levin, and *Jerry M. Gitnick,* for appellants.

Herbert M. Fitle, Charles A. Fryzek, Edward M. Stein,

James P. Costello, Walter J. Matejka, and *Robert H. Blanchard,* for appellee.

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

SIMMONS, C. J.

These cases began in the municipal court of Omaha by the filing of separate complaints for the violation of an ordinance of the city of Omaha. They were tried at the same time, resulting in a finding of guilt. The defendant in each case was fined. Each defendant appealed separately to the district court, where the causes were again tried at the same time and with the same result. Each defendant brings the cause relating to him here by appeal. The causes were docketed, briefed, and argued separately here.

Each defendant presents assignments of error not common to the other. An assignment of error, common to each cause, is argued here. We deem it controlling and hence consolidate the causes for decision.

We reverse the judgment in each case and remand each cause with directions to dismiss the complaints.

For convenience herein we refer to the State of Nebraska as the city.

The city filed a complaint against each defendant, the charging parts being identical. It is that the defendant "then and there being did unlawfully offer for sale, attempt to sell, exhibit, keep in his possession with intent to sell or give away to any person, magazines and other publications *which, read as a whole are of an obscene nature* in violation of Omaha Municipal Code 14924 as amended by Ordinance 18508 Chapter 12 Art. 40.7 contrary to the City Ordinance of the City of Omaha in such cases made and provided, * * *." (Emphasis supplied.)

The ordinance provided: "It shall be unlawful for any person to sell, offer for sale, attempt to sell, exhibit, give away, keep in his possession with intent to

sell or give away, or in any way furnish or attempt to furnish to any person any comic book, magazine, or other publication which, read as a whole, is of an obscene nature." Ordinance 18508, c. 12, Art. 40.7, City Ordinance, City of Omaha.

An assignment of error common to both defendants is that the ordinance is vague and indefinite and hence unconstitutional and void.

The defendants here rely on our decision in State v. Pocras, 166 Neb. 642, 90 N. W. 2d 263. The city asks that we reconsider the Pocras case. It asks that we apply the rule of construction of ejusdem generis to the Omaha ordinance in accord with the contentions of the dissent in the Pocras case in which the writer of this opinion joined.

The applicable rule is: The constitutionality of an act of the Legislature having been passed upon by this court, and no additional grounds being presented, the same will be adhered to in all future cases in which that question is directly involved and in which it becomes a vital and integral factor in the determination of the issues made. Malin v. Housel, 105 Neb. 784, 181 N. W. 934.

We do not deem it consistent with sound adjudicative procedure to refuse to apply the ejusdem generis rule to one legislative act and then apply it to another similar act. We point out, however, that if we were to do so here it would not remove the invalidity of the ordinance here involved.

In the Pocras case the defendant was charged in that he "did unlawfully cause to be offered for sale and *dispose of* obscene, lewd and indecent publications * * *." The court held that part of the ordinance which made it unlawful to "dispose of in any manner, any obscene, lewd, or indecent book" etc., was void for uncertainty as a violation of due process as guaranteed by both state and federal Constitutions.

We there stated this rule: A crime must be defined

with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. It is sustained by the authorities cited and quoted in the opinion.

In the Pocras case the defendant was charged with an offense based in part on the provision of the ordinance held to be void and accordingly we affirmed a dismissal of the complaint.

The defendants here argue that the provision of the ordinance here involved "or in any way furnish or attempt to furnish" is subject to a like finding of uncertainty rendering the ordinance void. We need not determine that question.

In the instant cases the language to which the above objection is made was not included in the complaints stating the alleged offenses.

However, in the instant cases the language used in the ordinance "which, read as a whole, is of an obscene nature" was included in the complaints as an essential element of the offenses charged.

Based on the authorities cited and the rules of law stated in the Pocras case we would find no difficulty in concluding that the above language was void for uncertainty.

The city, however, relies on Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. The holding there upon which the city relies is epitomized as follows: The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.

The rule of the Roth case was stated as a guide to the finders of fact in considering the evidence.

The city would have us read into the ordinance the above "standard for judging" as a definition of the language relating to books, magazines, or other publications

"which, read as a whole, is of an obscene nature."

We anticipate no difficulty in finding the "average person" as comparable to the reasonable man that is often referred to in tort litigation. We have doubts if the "average person" whether he be judge or juror, would be able to apply the phrase "appeals to prurient interest" without conjecture or resort to a dictionary. We point out that the phrase "of an obscene nature" is far more indefinite than the phrase "prurient interest." However, if we were to accept as a definition the language quoted and read into the ordinance the clause "contemporary community standards," we would be creating an area of vagueness and indefiniteness that would itself require a holding that the ordinance was vague and indefinite and hence void.

In Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322, that court affirmed an interlocutory injunction restraining the enforcement of a statute that made it a misdemeanor for an employer to pay less than the "current rate" of wages "in the locality" where the work was performed. The court held that what was meant by "current rate of wages" was incapable of any definite answer. It held also that "additional obscurity" is imparted by the use of the qualifying word "locality." The court asked and answered the question: "Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality." The court concluded with this statement: "* * * this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the

application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities."

The court held that the term "locality" was "fatally vague and uncertain." So here we are compelled to the conclusion that the term "community standards" would be, if adopted as a part of a legislative act, "fatally vague and uncertain." In addition to the vague and indefinite word "community" we would have also the added indefiniteness and vagueness of what constituted "contemporary * * * standards."

During the course of the opinion the court held: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. * * * the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, * * * or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, * * * 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' "

By quotation from United States v. Capital Traction Co., 34 App. D. C. 592, 19 Ann. Cas. 68, the court held:

"'* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.'"

In Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840, the court held: "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. * * * There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment."

It is not amiss to point out that we followed Connally v. General Construction Co., *supra,* and Winters v. New York, *supra,* in the Pocras case. We accept as sound the rules of law quoted from the Connally and Winters cases. We adhere to our decision in State v. Pocras, *supra.*

For the reasons herein given we find that portion of the ordinance providing "which, read as a whole, is of an obscene nature," is void and of no effect, and consequently the charges made against the defendants based thereon are without force and effect.

We accordingly reverse the judgment of the trial court in each cause and remand each cause to the trial court with directions to dismiss each complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

ELLSWORTH F. STOHLMANN, APPELLANT, V. NORMA GRACE STOHLMANN, APPELLEE, AUGUST STOHLMANN, SR., ET AL., INTERVENERS-APPELLANTS.

96 N. W. 2d 40

Filed April 10, 1959. No. 34526.

1. **Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Divorce.** In a case where by decree of divorce the custody of minor children has been established the court thereafter, under the provisions of section 42-312, R. R. S. 1943, is empowered to change the custody on its own motion or on petition, if the circumstances of the parties change, or if a change will be in the best interests of the children.
3. ———. In a case where the fixing of the custody of a minor child is concerned, the wishes of the child are not controlling, but if the child has reached sufficient age and has the ability to express an intelligent preference, such an expression is entitled to consideration.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Reversed and remanded with directions.*

W. L. Dwyer, for appellants.

John L. Lawler, for appellee.

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

YEAGER, J.

This is a proceeding for modification of the portion of a decree in an action for divorce relating to the custody and control of minor children of the plaintiff and the defendant. The background of the present proceeding is as follows: In the divorce proceeding Ellsworth F. Stohlmann was plaintiff. He is an appellant here. Norma Grace Stohlmann was defendant and is appellee herein. In the divorce action August Stohlmann, Sr.,

and Louisa Stohlmann, parents of the plaintiff, were interveners. They are appellants herein. In the action a decree of divorce was granted to the defendant on March 3, 1948. At the time the decree was rendered the plaintiff and defendant had two children whose names and ages were Danny, 5, and Carolyn Sue, 4.

By the decree the custody of the children was given to the interveners except for the period from June 15 to August 15 of each year, during which period custody was awarded to the defendant. During the periods for which the defendant was awarded custody she was not permitted to remove the children from the jurisdiction of the court. The right of visitation at reasonable times was allowed the defendant when the interveners had custody and a corresponding right of visitation was awarded plaintiff when the defendant had custody.

On June 13, 1958, the interveners filed an application to modify that portion of the decree relating to custody of the children by denying the right of the defendant to custody. There was no request that her right of visitation should be denied. The basis of the application was that the defendant indulged in the use of intoxicants contrary to the provisions of the decree, and that it was for the best interests of the children and in accord with their desires that they be removed from any custody of the defendant.

To the application for modification the defendant filed an answer denying the pertinent allegations of the application. A cross-petition was also filed wherein the defendant sought relief against the terms of the decree in one respect, and that was that during the periods when she had custody that she should be allowed to remove the children from the jurisdiction of the court. In addition to this she sought an award of $150 a month from the plaintiff for support for the periods during which she had custody of the children. She was awarded nothing for support by the original decree.

A trial was had and on July 31, 1958, the decree was

modified in the following particulars: The defendant was awarded custody annually from June 15 to August 1, beginning in 1959. She was granted the right to take the children during such periods from the jurisdiction of the court, and particularly she was granted leave to take them to any place in the United States at her own expense. The plaintiff was required to pay the defendant each year the sum of $120 for support, payable $60 on June 15, and $60 on July 15. The interveners were granted the right during the times when they had custody to take the children from the jurisdiction of the court on vacations.

From the order modifying the decree the plaintiff and interveners appealed. There is no cross-appeal.

In the light of what has been pointed out it must be said that the interveners are proper parties to have the custody of these children. Their qualities and qualifications in that respect have not been brought into question. The defendant does not herein seek to have this in anywise changed. The inquiry here is limited to the question of whether or not the defendant because of her conduct should no longer have the custody of these children for two months or, as the modification provides, one and one-half months out of each year, and that of whether or not in the light of the best interests of the children she should be permitted to have custody for these designated periods.

As to the first of these questions there was some evidence that the defendant on occasion partook of intoxicants, contrary to the exactions of the decree, but there is no very convincing evidence of excesses. The trial court heard the evidence and of course evaluated it and at least by inference found it insufficient upon which to deprive the defendant of the custody granted by the decree. The inclination in the area of fitness on account of personal conduct to have custody of the children is to accept the obvious finding of the trial court that she was not unfit. The following from Dier

v. Dier, 141 Neb. 685, 4 N. W. 2d 731, which has been repeated either with exactness or in substance in numerous cases, appears to be applicable to the present situation: "When the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of 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."

This leaves for consideration only the question of what is for the best interests of these children. As to change of custody, section 42-312, R. R. S. 1943, provides: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

The record discloses these children have not been cared for by or in the custody of the defendant since Caroyln Sue was 3 months old, except 2 months each year since the decree of divorce was rendered. The only thing appearing in the present record as a reason for this is the bare statement by the defendant that she departed and went to work because the plaintiff was not supporting his family. At all times mentioned they have been in the care of the interveners who until recently have lived on a farm near Louisville, Nebraska. They now live in Louisville and the plaintiff lives on and operates the farm. The defendant lives in Chicago, Illinois, and her parents live in Boise, Idaho. The defendant was remarried in 1955 and the plaintiff was remarried in 1955. During the annual periods when the defendant has had custody of the children she has come to Omaha and rented quarters in which to live and care for the children. There is nothing to indicate that the quarters were not proper or environmentally

satisfactory. Likewise it may not be said, although some complaint appears, that the children did not receive satisfactory care and treatment at the hands of the defendant.

According to the testimony these children have been members of the Louisville community all of their lives and their friends and interests are centered there. They go to school there. It is there that they have extracurricular interests which are not part of but are related to school affairs and activities. Carolyn Sue has a calf the care of which she enjoys and from which she does not care to be separated. She is very much interested in music, and her practice and progress are interrupted much to her disadvantage. Danny has more than one calf to look after, and he is interested in farming and in helping his father on the farm. He is interested in sports, particularly baseball, but because of lack of practice on account of being away, he is handicapped and as a result he does not have the opportunity to engage in them. In short, by being required to leave the environment in which they have grown up from earliest recollection they are unhappy and not contented during the time when they are in the custody of their mother.

It appears from the testimony that each year during the period when they have been in the custody of their mother they have been in Omaha but at different locations and under the circumstances have not had the opportunity to form friendships and associations which have been satisfactory. The activities provided were shows, swimming, and similar events, and nothing of a character similar to that to which they were accustomed the other 10 months of the year.

The arrangement was displeasing to both of the children and they were desirous that the requirement that they spend the fixed periods with their mother be discontinued.

This résumé of the evidence is not complete in detail

but it does present, fairly and sufficiently, the situation upon which this court must say whether or not the decree as to the custody of these children shall be modified.

In Anderson v. Wilcox, 163 Neb. 883, 81 N. W. 2d 314, this court said with regard to section 42-312, R. R. S. 1943: "In the absence of changed conditions the modification must be denied." If by this statement it was meant that before a decree could be modified a changed environmental condition must be shown or some change must have come about in or with reference to personal qualities of a party having custody, then the application of interveners must be denied, since in these respects it cannot well be said that there has been any change.

It is not believed however that the statement was predicated on any such meaning. It is not believed that it was intended to preclude a modification based upon a change which would contribute to the best interests of children in the light of advance in years and their evolutionary social changes.

Happiness, welfare, and opportunity to do and perform without interruption the things which children enjoy and which contribute to fitness of children to occupy a proper and fruitful place in the social and economic order must be regarded as matters which contribute to the best interests of children. The deprivation or interruption of these incidents of course would operate to the contrary.

It is not probable that the Legislature intended by the quoted provision to preclude a change of custody of children of divorced parents when by advance in years the best interests of the children were not being served.

It appears that one more thing ought to be considered in determining what should be done in this case. It is the will and wish of these children that the interveners shall have full custody of them. This desire is quite normal and natural since from what has been

said it is clear that the interveners have actually stood in loco parentis to them in a satisfatcory environment since they were babies.

This court said in State ex rel. Bize v. Young, 121 Neb. 619, 237 N. W. 677: "While the wishes of a child under the age of fourteen years are not controlling where in conflict with what the courts regard as the minor's best interest, still 'Even though an infant is under the age of fourteen, if he has reached an age sufficient to enable him to form an intelligent preference, it is proper that his wishes should be consulted in connection with the selection of a guardian.' 28 C. J. 1077." In the present case Carolyn Sue and Danny were respectively 14 and 15 years of age at the time of trial. It is true that the foregoing statement was made in a guardianship matter but the question involved was fitness to be custodian of children.

The conclusion reached here is that the interveners should have the full custody of the two children involved in this controversy. Accordingly the order of modification of decree is reversed and the cause remanded with directions to enter an order modifying the decree to conform with the prayer of the application therefor by the interveners. The costs are taxed to plaintiff-appellant herein.

REVERSED AND REMANDED WITH DIRECTIONS.

MESSMORE, J., participating on briefs.

IN RE GUARDIANSHIP OF FRANCINE L. WORKMAN, A MINOR. DOLORES LUCILLE WORKMAN, APPELLEE, V. FRANK M. WORKMAN, APPELLANT, IMPLEADED WITH JOSEPH GINSBURG, SUCCESSOR-GUARDIAN, APPELLEE.

IN RE GUARDIANSHIP OF ROBERT LEE WORKMAN, A MINOR. DOLORES LUCILLE WORKMAN, APPELLEE, V. FRANK M. WORKMAN, APPELLANT, IMPLEADED WITH JOSEPH GINSBURG, SUCCESSOR-GUARDIAN, APPELLEE.

IN RE GUARDIANSHIP OF JOSEPH M. WORKMAN, A MINOR. DOLORES LUCILLE WORKMAN, APPELLEE, V. FRANK M. WORKMAN, APPELLANT, IMPLEADED WITH JOSEPH GINSBURG, SUCCESSOR-GUARDIAN, APPELLEE.

95 N. W. 2d 704

Filed April 10, 1959. Nos. 34539, 34540, 34541.

1. **Courts: Appeal and Error.** On appeal in a probate proceeding from the county court to the district court the party who stands in the relationship of plaintiff to the proceeding shall file his petition within 50 days after the date of rendition of the judgment in the county court.
2. ———: ———. The answer or responsive pleading to a petition on appeal to the district court in a probate proceeding from the county court shall be filed on or before the third Monday after 50 days from the rendition of the judgment of the county court.
3. **Guardian and Ward: Appeal and Error.** In an appeal from an order of the county court removing a guardian of a minor the county court has power to designate a representative for the guardianship for the purposes of the appeal.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Max Kier, for appellant.

Crosby, Pansing & Guenzel and *Perry, Perry & Nuernberger,* for appellees.

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

YEAGER, J.

On this appeal three cases were consolidated and

presented as one. The only difference is in the names of certain parties whose interests are involved. Duplicate pleadings were filed in the cases and the evidence taken applied to all three. For the purposes of this opinion, they will be treated as one case.

The outline of the factual situation and the issues presented for consideration are the following: Frank M. Workman and Dolores Lucille Workman were husband and wife and the parents of Francine L. Workman, Robert Lee Workman, and Joseph M. Workman, minors. On March 15, 1950, Frank M. Workman, who will hereinafter be referred to as Workman, with the consent of Dolores Lucille Workman, was appointed by the county court of Lancaster County, Nebraska, guardian of the estates of the three minors. On May 7, 1955, on petition of Dolores Lucille Workman, Workman was removed as guardian by the court. At the same time Joseph Ginsburg was appointed as successor-guardian. He qualified as successor-guardian on May 10, 1955. Workman appealed from the order removing him as guardian on May 11, 1955. The transcript on appeal was filed in the office of the clerk of the district court on May 21, 1955. On June 22, 1955, Joseph Ginsburg filed a petition on appeal in the district court. In the petition it was stated by Ginsburg: "That he is the duly appointed, qualified and acting successor guardian for the estate of the above-named minor; that he has been authorized and directed by the County Judge of Lancaster County, Nebraska to file this Petition on Appeal; this successor guardian shows to the court that he has a direct interest in this matter and in the maintenance of the Order entered herein by the County Judge of Lancaster County, Nebraska; * * *."

The petition contained allegations of unfitness of Workman to continue as guardian of these minors, which allegations it is deemed unnecessary to repeat here. By the prayer Ginsburg prayed for dismissal of the appeal

and that his appointment as successor-guardian be sustained, affirmed, and approved.

To the petition no answer and no other responsive pleading was ever filed. In fact nothing else was ever filed in the case relating to issues except a motion to set a hearing on the appeal from the removal of Workman as guardian. This was filed on May 13, 1958, by Dolores Lucille Workman who was in the motion designated as guardian, mother, and next friend. The motion was sustained and hearing was set for May 17, 1958. Hearing however started on July 24, 1958.

On the trial the issue presented by the Ginsburg petition as to whether or not the facts stated as ground for removal of Workman were sustained by evidence was not tried. The only questions presented were those of whether the appeal of Workman should be dismissed on the ground that he had abandoned it, and whether or not the petition of Ginsburg was valid for the purpose of review and adjudication on an appeal from the county court.

At the commencement of the trial the attorney for Workman made an oral motion (1) to strike the petition on appeal by Ginsburg on the ground that he was not a party to the proceeding and that he had no authority to file a petition on appeal in view of the fact that the order of his appointment has been superseded; (2) to vacate the order removing Workman as guardian; and (3) to nonsuit Dolores Lucille Workman who filed the petition for removal of Workman as guardian for the reason that she failed to file a petition on appeal in the district court, in consequence of which she was in default. By motion he also objected to a hearing for the reason that issues had not been made up.

The attorneys for the appellees orally objected to the several motions and asserted in substance that there was no default as to the filing of a petition on appeal for the reason that the petition of Ginsburg was properly filed by him, but that Workman was in default for

failure to file responsive pleadings. The appellees at that time asked leave to make a record on the facts bearing on the question of whether or not Workman had abandoned his appeal.

A hearing was had on this question and the record of this evidence discloses that on May 13, 1955, after qualifying as successor-guardian, Ginsburg demanded the assets of the guardianships which assets were delivered to him by the attorney for Workman on May 16, 1955. Neither Workman nor his attorney contested the right of Ginsburg to act as guardian as long as he was the purported guardian, which was until December 1957, when his resignation, according to the testimony, was acted upon.

At the conclusion of this hearing the court found that Workman voluntarily turned over to Ginsburg as successor-guardian all of the assets of the guardianships; that he recognized the authority of Ginsburg and acquiesced in his appointment; and that he failed to maintain and prosecute his appeals for approximately two and one-half years, in consequence of which the appeals should be dismissed. By order of the court the appeals were dismissed. It is from this order that Workman has appealed.

The first question for consideration is that of whether or not a petition was filed in the district court which satisfied the statutory requirements on appeal to the district court from the county court.

Section 27-1306, R. R. S. 1943, which is applicable here as to parties and time for pleading on appeal to the district court in probate proceedings in the county court, is as follows: "In all cases of appeal from the county court or a justice of the peace, the plaintiff in the court below shall, within fifty days from and after the date of the rendition of the judgment in the court below, file his petition as required in civil cases in the district court, and the answer shall be filed and issue joined as in cases commenced in such appellate court." See,

also, In re Estate of Lindekugel, 148 Neb. 271, 27 N. W. 2d 169; Rice v. McGrath, 162 Neb. 511, 76 N. W. 2d 428.

Section 25-821, R. R. S. 1943, as to time when a responsive pleading to a petition on appeal from the county court shall be filed, is as follows: "The answer or demurrer of the defendant shall be filed on or before the third Monday, * * * after the return day of the summons or service by publication." In the case here Workman, who had the status of defendant, never did file any kind or character of responsive pleading. The statute does not provide for summons or notice of the filing of a petition by the appellee in an action on appeal from the county court. Since however the appellant is the moving party it appears that reasonably it should be presumed that he has notice of the legal duty of the appellee as to the time for filing his petition, and in the light of this notice he should be required to respond within the time provided by statute after summons or notice in other cases. This would require him to respond on or before the third Monday after the expiration of 50 days from the rendition of the judgment of the county court, and if he fails to do so he is in default. He has never asked for an extension of time or for leave to file such a pleading.

If therefore Ginsburg was the proper party to file the petition on appeal, then of course Workman was in default and had and has no standing in the proceeding.

As pointed out, Ginsburg pleaded in his petition that he was acting successor-guardian and that he had been authorized and directed by the county judge to file the petition on appeal. This alone, if proved, we think, would be sufficient as right and authority of Ginsburg to file the petition on appeal.

The case of Crooker v. Smith, 47 Neb. 102, 66 N. W. 19, was one in which a guardian was removed and an appeal taken to the district court. The name or capacity of the person who conducted the proceeding does not appear. The thing pointed out therein by in-

ference as of controlling importance is that the duty to protect a minor in a guardianship proceeding devolves upon the court on notice to the guardian and not necessarily upon some other person having a relationship to the proceeding or the estate.

The case of Robertson v. Epperson, 78 Neb. 279, 110 N. W. 540, was one wherein a guardian was removed after notice from the court on its motion and pursuant to a petition of a guardian ad litem appointed by the court. An appeal was taken. The inference to be drawn from this case is that power resides in the county court to designate the person to conduct on behalf of the estate the proceedings for removal of a guardian.

This court, in In re Guardianship of Timperley, 141 Neb. 604, 4 N. W. 2d 603, recognized the right of a daughter of an insane incompetent person under guardianship to institute and maintain action in the county court in the name of the estate for removal of a guardian, in which court a removal order was rendered, and to defend against an appeal to the district court therefrom.

While it is true that none of these cases is directly in point on the question here they do indicate that the real party in interest is the guardianship estate; that the county court has power to designate a representative for the estate in proceedings for the removal of a guardian; and that as such representative he is the proper party to file a petition on appeal to the district court from an order removing a guardian.

There is no purpose to say here that only a person designated to act by the county court may represent the estate in such a situation as this. The question of whether or not a person may so act without general or special designation of the county court is not presented in this case.

The record discloses the appointment of Ginsburg as successor-guardian. His testimony discloses that he continued as such until December 1957. The record of all of the evidence shows that Workman by his acts and

conduct from the date of Ginsburg's appointment has recognized the authority of Ginsburg to act as guardian. He has not, since the transcript on appeal was filed in the district court, challenged that authority in any legally recognizable manner. This last is true in view of his default and failure to put himself in a position to be heard.

The judgments of the district court in these three cases are affirmed.

AFFIRMED.

MESSMORE, J., participating on briefs.

VIOLET STUMP, APPELLANT, V. LEONARD J. STRANSKY ET AL., APPELLEES.
95 N. W. 2d 691

Filed April 10, 1959. No. 34559.

1. **Municipal Corporations.** The law of this state imposes upon the various municipal corporations thereof the duty to keep their streets and sidewalks in a reasonably safe condition for travel by the public.
2. ———. Under the common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition.
3. ———. Where the provisions of an ordinance impose upon property owners the performance of a part of the duty of the municipality to the public and are for the benefit of the municipality as an organized government, and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government, and no right of action accrues to an individual citizen especially injured thereby.
4. ———. The requirement of notice contained in Article VIII, section 19, of the Charter of the city of Lincoln, and in section 15-734, R. R. S. 1943, is a condition precedent to the operative effect of the duty of an owner of property contained in the two provisions.
5. **Evidence.** Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Albert S. Johnston, for appellant.

Marti, O'Gara, Dalton & Sheldon and *Bernard L. Packett,* for appellees.

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

SIMMONS, C. J.

This is an action for damages brought by plaintiff for injuries caused by falling on a sidewalk in front of property owned by the defendants. At the close of plaintiff's case the court, on motion of the defendants, dismissed plaintiff's cause. Plaintiff appeals.

We affirm the judgment of the trial court.

The tenant in the house on the premises was also made a party defendant. He defaulted and is not involved in this appeal.

Plaintiff assigns that the trial court erred in sustaining the motion to dismiss; in holding that there was insufficient evidence to require the submission of the cause to the jury; in striking an allegation as to the contents of an ordinance of the city of Lincoln from the petition and in refusing its admission in evidence; and in holding that the cause was governed by the common law rule and not by statute, city charter, and ordinance provisions.

Plaintiff alleged the ownership of the property by the defendants and the tenancy, which defendants admitted by answer.

Plaintiff alleged that on December 10, 1955, at 1:30 p. m., plaintiff fell on the walk in front of the premises and was seriously injured; that the walk was coated with ice, over which was a light coating of snow that had fallen that day which concealed the ice; and that she slipped on the ice without notice or warning of its condition. She further alleged that neither the ice nor

snow had been strewn with ashes or sand or otherwise treated so as to allow pedestrians to use the walk with safety; that the coating of ice was negligently caused by defendants in allowing rain or melting snow to flow upon the walk and congeal thereon; that defendants negligently allowed the snow to remain on the ice and conceal it; and that defendants had knowledge of the ice and posted no warnings, did not remove the ice, and did not cause it to be strewn with ashes or sand or otherwise cause the walk to be in a condition for safe use.

She pleaded the charter provision; also the city ordinance, to which reference is later made in this opinion.

Defendants denied generally.

Plaintiff offered evidence that there was ice on the walk; that it was covered with a half inch of recently fallen snow; that the ice was not strewn with ashes or sand; and that she fell to her serious injury.

Plaintiff contends that the evidence was sufficient to take the case to the jury on the issue of negligence. We do not reach or decide that question. The trial court struck the allegation as to the ordinance from the petition and denied its admission in evidence. Plaintiff contends that there was error in that regard.

The city ordinance provided: "Snow and Ice Removal. Every owner or occupant of any house or other building, or the owner or proprietor, lessee, or person entitled to the possession of any vacant lot, and any person having charge of any church, jail or public hall, or public building in the City, shall, during the winter season, and during the time snow shall continue on the ground, before nine o'clock every morning clear the sidewalks in front of such lots, from snow and ice, and keep such sidewalks free from snow and ice during the day, or in case the snow and ice are so congealed that they cannot be removed without injury to the sidewalk, shall cause the said snow and ice to be strewn with ashes or sand, and shall also at all times, keep such sidewalks clear and free from all dirt or filth, or

other obstructions or encroachments, so as to allow pedestrians to use the said sidewalks with safety. Failure on the part of any person upon whom a duty is placed by the provisions of this section to perform such duty shall be deemed a misdemeanor and punishable as in this Code provided." § 39-113, 1951 Supp., Lincoln Municipal Code.

We see no substantial difference between the ordinance here involved and that involved in Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382, wherein we held: "The law of this state imposes upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public. * * * Under the common law no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition. * * * Where the provisions of an ordinance impose upon property owners the performance of a part of the duty of the municipality to the public and are for the benefit of the municipality as an organized government, and not for the benefit of the individuals comprising the public, a breach of such ordinance is remediable only at the instance of the municipal government, and no right of action accrues to an individual citizen especially injured thereby."

Plaintiff does not here contend that there is a difference. It follows then that the ruling of the trial court as to the ordinance was not erroneous.

Plaintiff contends that section 15-734, R. R. S. 1943, and the city charter provision have modified the common law rule above stated. Plaintiff further contends that the statute or charter provision was not involved in the above case.

Plaintiff advises us that the charter provision and the statute are in substantially the same language. The statute is available to our bar. Hence we quote only the charter provision.

Plaintiff contends that the charter provision and the

statute create a right of action in an individual injured against the property owner.

Assuming but not deciding that such a contention is correct, it is patent that plaintiff has not complied with the condition precedent to liability.

The language is that: "The owner * * * is * * * charged with the duty of keeping and maintaining the sidewalks * * * in a safe and sound condition, and free from snow, ice and other obstruction, and in default thereof, *upon notice* to such abutting property owner as hereinafter provided, such abutting property owner shall be liable for injuries or damages sustained by reason thereof. * * * In case such abutting property owner refuses or neglects, *after five days notice* * * * to so construct or maintain such sidewalk, the city * * * may" etc. (Emphasis supplied.) Art. VIII, § 19, Charter, City of Lincoln, Neb.

Plaintiff argues that the giving of notice is not required in this instance because the second reference to notice relates only "to so construct or maintain such sidewalk" and does not repeat "free from snow, ice and other obstruction." Neither is the "safe and sound condition" clause repeated. The contention is not persuasive. The important provision is that "keeping and maintaining the sidewalks * * * free from snow, ice and other obstruction" is made subject to the notice provision.

It is patent that the first sentence here considered is designed to define the scope of the liability created contingent "upon notice" being given. The second sentence here considered defines the nature of the notice required and the time that must elapse before the requirement of notice is satisfied so as to make the liability provision operative.

Accordingly we hold that the requirement of notice contained in Article VIII, section 19, of the Charter of the city of Lincoln, and in section 15-734, R. R. S. 1943, is a condition precedent to the operative effect of the duty of an owner of property contained in the two pro-

visions. Plaintiff does not contend that any notice was given within the requirements of the act or the charter.

The evidence here is that the sidewalk where plaintiff fell was sloping and that there was a ridge of snow along and parallel to the upper side. Plaintiff contends that this constitutes an obstruction within the definition found in Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710. Plaintiff's theory is that there could have been more snow in the ridge; that it could have melted; that it could have caused water to run across the sidewalk; that it could have frozen on the walk; and that it could have caused the ice which caused plaintiff to slip and fall.

The rule is: Presumptions and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. Lebs v. Mutual Benefit Health & Accident Assn., 124 Neb. 491, 247 N. W. 19; Peabody v. Continental Life Ins. Co., 128 Neb. 23, 257 N. W. 482; Wolcott v. Drake, 162 Neb. 56, 75 N. W. 2d 107.

Other arguments advanced by plaintiff do not have sufficient relationship to the issues here presented to require discussion.

The judgment of the trial court is affirmed.

AFFIRMED.

YEAGER and WENKE, JJ., participating on briefs.

TONY SAVORELLI ET AL., APPELLEES, V. LEON STONE ET AL., APPELLANTS.

96 N. W. 2d 222

Filed April 17, 1959. No. 34524.

1. **Fraud.** A recovery by a plaintiff in a civil action based upon fraud pursuant to the provisions of section 81-335, R. R. S. 1943, may not be sustained where there is a judicial admission by the plaintiff that no fraud existed.
2. **Pleading: Evidence.** A judicial admission is a formal act done

in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.

3. **Corporations.** Prior to the enactment in 1955 of sections 81-347 and 81-348, R. R. S. 1943, there was no specific remedy for recovery of money paid out for the purchase of securities sold in violation of the Blue-Sky Law.
4. **Principal and Agent.** Where a person acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf, in the absence of fraud, create no individual or personal liability against him.

APPEAL from the district court for Lincoln County: RICHARD VAN STEENBERG, JUDGE. *Reversed and remanded with directions.*

Baskins & Baskins, for appellants.

Maupin, Dent, Kay & Satterfield and *William E. Morrow, Jr.,* for appellees.

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

YEAGER, J.

This is an action by Tony Savorelli and Faye Savorelli, plaintiffs and appellees, who are husband and wife, against Leon Stone and Bess B. Stone, defendants and appellants, who are also husband and wife, to recover $9,000 from the defendants.

In their petition the plaintiffs alleged as the basis of their action that on October 8, 1952, the defendants jointly and severally sold, purported to sell, and contracted to sell and deliver to plaintiffs certain securities, i.e., preferred stock of Stoneward, Inc., a purported corporation, whose stock had not been authorized for sale, without the defendants, or either of them, having first complied with the Blue-Sky Law of the State of Nebraska, for the amount of $9,000. They further alleged that the money obtained had not been returned and they had received nothing of value for it. The

prayer was for judgment for this amount with interest at the rate of 6 percent from October 8, 1952.

The defendant Bess B. Stone filed a separate answer in which first she denied all allegations of the petition except those admitted to be true. Further answering, she admitted that prior to October 8, 1952, Tony Savorelli gave to her $650 which, at the request of Savorelli, was deposited to the account of Stoneward, Inc.; that thereafter, but before October 8, 1952, $4,350 was in like manner delivered and deposited to the account of Stoneward, Inc.; and that on or about October 8, 1952, Faye Savorelli delivered to Bess B. Stone $4,000 with directions that it be deposited to the account of Stoneward, Inc., but not all at one time. Further answering, she alleged that she never offered to sell any stock in Stoneward, Inc., that she had nothing to do with any attempt of plaintiffs to purchase any stock, and that as to the money, she received it as secretary and treasurer of the corporation and faithfully deposited it to its account.

The defendant Leon Stone also filed a separate answer. It contains no conflict with the answer of Bess B. Stone. It becomes necessary therefore only to summarize the following from its contents: He alleged that the money was received by him as an officer of Stoneward, Inc., and not in any individual capacity; that Tony Savorelli of his own accord attempted to procure stock in Stoneward, Inc.; that he was never solicited or invited to purchase stock; that he was informed that no stock could be sold and none could be issued in the absence of and before reorganization and revamping of the corporation; that he was advised that on such reorganization he would become one of the incorporators if he decided to get in in that manner; and that the money was received by and for the corporation and not by this defendant. A reply was filed wherein the allegations of the answers were generally denied.

Prior to the trial there was a pre-trial conference. The pre-trial order discloses that Stoneward, Inc., was

a corporation; that Leon Stone was president of the corporation and that Bess B. Stone was secretary; that the Department of Banking of the State of Nebraska had not granted a permit to sell stock either to Stoneward, Inc., or Leon or Bess B. Stone; that Stoneward, Inc., had not issued any corporate stock, either common or preferred, to the plaintiffs; and that the issue of law in the case was whether or not the defendants had an absolute liability to refund the sums advanced by the plaintiffs which the defendants have handled either as individuals or as officers of Stoneward, Inc. At the conference the parties waived a trial by jury.

The case was tried to the court without a jury and a judgment was rendered in favor of plaintiffs and against the defendants for $9,000 with interest at 6 percent per annum from October 8, 1952, amounting to $3,075, and interest on the judgment of $9,000 at 6 percent per annum from the date of judgment. Following the filing of a motion for new trial which was overruled, the defendants have appealed.

There is very little, if any, real dispute as to the controlling substance of the evidence. The substance of the evidence, about which there is no dispute, is the following: Stoneward, Inc., was incorporated with authorized capital stock of $25,000. There were 250 shares of common stock of a par value of $100 each. The issuance of preferred stock was not authorized. Leon Stone, Bess B. Stone, and Joseph H. Stone held 110 shares. Theodore W. Hayward and Evelyn Hayward held 110 shares. The remaining shares were not issued. The officers were Leon Stone, president, Theodore W. Hayward, vice-president, and Bess B. Stone, secretary-treasurer. The business being conducted at all times of concern here was the manufacture and sale of a rain boot.

The substance of the evidence of the plaintiffs is the following: In September 1952, Tony Savorelli, who will be hereinafter referred to as Savorelli, requested

of Leon Stone, who will be hereinafter referred to as Stone, that he be allowed to come into the corporation. Neither of the defendants ever solicited or suggested that he come into or invest in stock of the corporation. Savorelli testified that other conversations were had and finally in one of them, the exact date of which is not known, but it was probably before September 22, 1952, he told Stone he would like to invest $10,000 and was told that he could invest that amount in stock. Thereafter, on or about September 22, 1952, $650 was delivered to Bess B. Stone and about one week later $4,350 was delivered. Later Faye Savorelli delivered an additional $4,000 to Bess B. Stone. The $650 was turned over at the insistence of Savorelli and the $4,350 was turned over without the knowledge of Stone at the time, both to be paid on Stoneward, Inc., debts. It is pointed out here that on the trial Mr. Dent, one of the attorneys for the plaintiffs, informed the court that no fraud was claimed by plaintiffs. No fraud was pleaded. The plaintiffs did not contend that they or either of them talked to Bess B. Stone about the transaction. Savorelli testified that Bess B. Stone was present on occasion, but he did not remember that any conversation was had with her. The $4,000 was delivered by Faye Savorelli to Bess B. Stone probably in October 1952.

The substance of the evidence of defendants is as follows: Stone testified that Savorelli told him that he wanted to get into business in Stoneward, Inc., but Stone told him he had no way of letting him in because he had nothing to offer but that he would talk to the corporation's attorney. Savorelli said he had $10,000 and would like to get in but was told there was no stock for sale. Stone said that in Council Bluffs, Iowa, Savorelli told him to write a check on the corporation for $650 in payment of a debt owed by the corporation and he would advance the money to meet the check since he was going to get into the corporation with his $10,000. Savorelli did advance the money to pay the

check which was deposited to the account of the corporation. Stone talked to the corporation's attorney and thereafter told Savorelli that "later on we could issue preferred stock, providing he signed over his voting rights for five years." The response was: " 'Anything you say, Leon, is all right.' " He told Savorelli "that I didn't know how we was going to come out, and I didn't want him to lose his money, that I thought he was taking a big gamble." He never solicited Savorelli to come into the business. Savorelli paid in an additional $4,350 and still an additional $4,000, all of which was deposited to the account of Stoneward, Inc. Stone said that no stock certificates were ever requested. He said that by an instrument (exhibit B) he was acknowledging that he had sold the plaintiffs $9,000 worth of preferred stock and that it would be delivered at a later date. He said also that exhibit C was in recognition of the fact that he had sold $9,000 worth of preferred stock in Stoneward, Inc., and that it would be delivered when the articles of incorporation had been amended.

The attorney for the corporation testified and his testimony, to the extent that it is important, is in summary as follows: On October 25, 1954, he talked to Savorelli who asked when the preferred stock (of Stoneward, Inc.) would be issued to him, and whether or not he could take the $9,000 which had been advanced to Stoneward, Inc., as an income tax loss. As to the preferred stock inquiry the attorney responded that under the articles of incorporation 75 percent of the stockholders must vote affirmatively to amend the articles which could not be accomplished since Hayward could not be found and until they could get together 75 percent no amendment could be had.

Bess B. Stone testified on behalf of the defendants. A summary of her testimony in its entirety is not required. She said that the money received from plaintiffs was deposited to the credit of Stoneward, Inc. The effect of her testimony as to the incidents leading to

the payment and receipt of the money was that she took no active part therein at any time except to receive the money and place it to the credit of Stoneward, Inc. She was at all times secretary-treasurer.

The record of the testimony together with three exhibits attached as a part of the bill of exceptions leads to certain definite conclusions. Some of these are that Stoneward, Inc., was a corporation with authority to issue common stock but with no authority to issue preferred stock. This became known to the plaintiffs before they parted with any money. On and before October 8, 1952, the plaintiff, Tony Savorelli, induced the defendant, Leon Stone, to permit the plaintiffs to advance to the corporation $9,000 and in consideration thereof Stone on behalf of the corporation agreed on reorganization for that purpose and, when reorganization could be effected, to issue for the $9,000 5 percent preferred stock of the corporation. The agreement was confirmed first by a receipt, exhibit A, dated October 8, 1952, executed in the name of the corporation and signed by Leon Stone, president, and Bess B. Stone, secretary-treasurer. It was further confirmed by a letter, exhibit C, dated November 17, 1952, signed Stoneward, Inc., by Leon Stone. On November 17, 1952, an agreement, exhibit B was entered into between Stone and the plaintiffs, the effect of which was to give to Stone the power to vote the stock of the plaintiffs for a period of 5 years in case of reorganization and issuance of stock in the corporation to the plaintiffs. This agreement was signed by Stone and the plaintiffs as individuals. A copy was receipted for on behalf of the corporation by Leon Stone, president. Bess B. Stone participated in none of the negotiations antecedent to the agreements and the transfer of funds, although she was informed as to them. The failure of Stoneward, Inc., to meet, reorganize, and provide for the issue of preferred stock was not occasioned by any preventative act or purpose on the part of the defendants or

either of them. It was occasioned by failure to obtain a quorum of stockholders on account of inability to locate Theodore W. Hayward. This was known to plaintiffs. The plaintiffs do not contend that they were ever mislead or misinformed as to any detail of any of the transactions involved. It is specifically stated in the record that no fraud was involved.

In an approach to a determination of the question of whether or not there is a liability of the defendants or either of them to the plaintiffs it should be said that the transaction involved here is defined by section 81-314, R. R. S. 1943, as a violation of what is commonly referred to as the Blue-Sky Law.

It should be further pointed out that at the time this transaction took place no specific remedy for recovery of the money paid out by the purchaser from the person or persons perpetrating the violation was to be found in the Blue-Sky Law. There are such provisions now but they were not enacted until 1955, hence they are not applicable in this case. See §§ 81-347 and 81-348, R. R. S. 1943.

It should be further pointed out that no benefit can flow to the plaintiffs from section 81-335, R. R. S. 1943, which is as follows: "Any issuance, assignment, sale, exchange or transfer of any securities in violation of any of the terms, provisions or purposes of sections 81-302 to 81-346, shall, in any civil action involving said act of issuance, assignment, sale, exchange or transfer, be deemed prima facie evidence of fraud upon the part of the issuer, assignor, transferor or seller." It is because there was a judicial admission in the record in this case that there was no fraud that this section has no application. In Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518, it was said: "A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged

by the opponent is true." See, also, Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768. A further reason why nothing is available to plaintiffs under section 81-335, R. R. S. 1943, is that the plaintiffs have not pleaded that there was fraud.

The basic question for determination on the pleadings, the evidence, and the judicial admission of the plaintiffs is narrowed to that of whether or not parties who have entered into a contract for the sale of securities with a corporation, on the strength of which they parted with money, and there has been a failure of performance on the part of the corporation, may look through the corporation to an officer or officers who acted as agent or agents and recover from him or them on the sole ground that the corporation and the agent or agents had not complied with the Blue-Sky Law by obtaining a permit for the sale of the securities contracted to be sold by the corporation.

Except as to the inferences which inhere in sections 81-335, 81-347, and 81-348, R. R. S. 1943, which, as pointed out, avail nothing to the plaintiffs in this case, there is nothing in the Blue-Sky Law which declares, under circumstances such as appear in this case, a right to bypass a contracting party and proceed directly in a civil action against the agent of the corporation in whose behalf a contract has been made even though the agent be an officer.

No cases under general law from this jurisdiction have been cited the effect of which is to say that under such circumstances a civil action may be maintained which so bypasses the contracting party. The decisions of this court are to the contrary. It is only where the corporate transaction is grounded in fraud, based on false information, or that the contract itself is void and the party seeking a recovery is not in pari delicto with the corporation, that there is personal liability on the part of officers as agents of the corporation.

In Fremont Carriage Mfg. Co. v. Thomsen, 65 Neb.

370, 91 N. W. 376, it was said: "Where one acting as the agent of a corporation makes a contract on its behalf, which is binding upon it, his acts in that behalf create no individual or personal liability against him."

In Ashby v. Peters, 124 Neb. 131, 245 N. W. 408, it was said: "The officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant." See, also, Paul v. Cameron, 127 Neb. 510, 256 N. W. 11; First Trust Co. v. Carlsen, 129 Neb. 118, 261 N. W. 333; Wells v. Carlsen, 130 Neb. 773, 266 N. W. 618; Allied Building Credits, Inc. v. Damicus, 167 Neb. 390, 93 N. W. 2d 210.

In Becker v. Wilcox, 81 Neb. 476, 116 N. W. 160, 129 Am. S. R. 690, 16 L. R. A. N. S. 571, it was said: "The rule that courts will not permit the recovery of the consideration paid upon an executed contract prohibited by statute does not apply to the vendee of a lottery ticket, for whose benefit the statute was enacted." The point of the opinion in this case is that what is meant by "contract prohibited by statute" is that the right to contract with regard to a particular subject matter is prohibited by statute, such as in that case, a lottery ticket. There is nothing in the opinion the effect of which is to say that the rule applies to a subject matter such as is involved here which is in itself a proper subject of commercial transaction not prohibited but only conditionally restricted.

In Rhines v. Skinner Packing Co., 108 Neb. 105, 187 N. W. 874, this court held that a contract for the sale of stock without a permit was void. This however was not in declaration of any principle of law of this state. It was in declaration of the public policy of the State of Missouri. In the opinion, it was said: "The sale, if a Missouri contract, seems to be void when tested by the public policy of Missouri, as declared by the judi-

ciary of that state in enforcing statutes of this kind." It was not declared in that opinion directly or by inference that the public policy there recognized represented the public policy of this state. No comparable public policy was ever declared in this state until the enactment of sections 81-347 and 81-348, R. R. S. 1943, which as has been stated was in 1955, whereas this transaction took place in 1952.

In the light of these observations the conclusion reached is that there is no liability in favor of plaintiffs and against the defendants on the pleadings and evidence in this case. The judgment is therefore reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

RUSSELL E. ARTHUR, FOR THE BENEFIT OF AND ON BEHALF OF THE CITY OF BEATRICE, IN GAGE COUNTY, NEBRASKA, A BODY POLITIC, AND THE TAXPAYERS AND RESIDENTS OF SAID CITY, APPELLEE, V. MARTIN O. TRINDEL, DOING BUSINESS AS M. O. TRINDEL TIRE & BATTERY COMPANY, APPELLANT, IMPLEADED WITH CITY OF BEATRICE, A MUNICIPAL CORPORATION, APPELLEE.

96 N. W. 2d 208

Filed April 17, 1959. No. 34543.

1. **Municipal Corporations.** Where a statute prohibits an officer of a municipality from having an interest in any contract with the municipality and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported contract may be recovered back at the suit of the municipality or of a taxpayer suing in its behalf.
2. ———. When a statute prohibits an officer of a municipality from entering into a contract with the city and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had.
3. ———. Such contracts are wholly void for all purposes as to everybody whose rights would be affected by them if valid; such contracts require no disaffirmance to avoid them; they cannot

be validated by ratification; and they are not susceptible of validation.

4. **Penalties.** If an act is prohibited by statute, an agreement in violation of the statute is void, although the act is not penalized, for it is the prohibition and not the penalty which makes the act illegal.

5. **Penalties: Forfeitures.** A statutory provision limiting the period for bringing an action to recover a penalty or forfeiture generally applies only to a penalty or forfeiture created by a penal statute for a dereliction of duty, or failure to perform specific acts, or for the commission of acts prohibited by statute.

6. **Constitutional Law.** Sections 16-325 and 16-502, R. R. S. 1943, are not unconstitutional as in violation of either Article I, section 3, Article I, section 15, or Article I, section 21, Constitution of Nebraska.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

McCown, Wullschleger & Baumfalk, for appellant.

Max Kier and *Janice L. Gradwohl,* for appellee Arthur.

Anne P. Carstens, for appellee City of Beatrice.

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

CHAPPELL, J.

Plaintiff, Russell E. Arthur, brought this action as a resident and taxpayer for and on behalf of the city of Beatrice and its taxpayers against defendant, Martin O. Trindel, doing business as M. O. Trindel Tire & Battery Company. Plaintiff sought recovery of all money allegedly paid to defendant for all material and services furnished the city by defendant from April 8, 1952, to December 12, 1955, while he was a salaried member of the city's board of public works.

Plaintiff's petition, filed March 15, 1957, set forth the provisions of section 16-325, R. R. S. 1943, and Beatrice City Ordinance No. 574, both of which prohibited a direct or indirect interest of any member of the board of public works in the purchase of any material to be

used or applied for municipal purposes, and of section 16-502, R. R. S. 1943, which prohibits any officer of the city from being interested directly or indirectly in any contract to which the city or any one for its benefit is a party, and that any such interests shall make such contract void. Plaintiff's petition also set out the various sums of money paid defendant by the city on such contracts during the period from April 8, 1952, to December 12, 1955, and prayed for judgment therefor, together with interest thereon. Included in plaintiff's petition was an allegation that demand had been made on the mayor and city council to bring an action for recovery of such sums but they had refused to do so.

Defendant's answer admitted that plaintiff was a resident and taxpayer of Beatrice, a city of the first class; admitted the provisions of sections 16-325 and 16-502, R. R. S. 1943, and Beatrice City Ordinance No. 574; and admitted that at all times involved defendant was engaged in business in Beatrice as M. O. Trindel Tire & Battery Company, and was a member of the city's board of public works. Defendant also denied generally and alleged that the sums claimed by plaintiff were the fair and reasonable market value of the merchandise and services furnished by defendant; that the city was a necessary party in the action; and that the controversy could not be determined unless it was joined as plaintiff or defendant. Defendant alleged that at all times involved the city had a duly appointed city attorney, but no precedent demand was made upon said attorney, as required by section 16-319, R. S. Supp., 1955, to prosecute this action, and it was prematurely brought by plaintiff. Defendant also alleged in substance that all sums allegedly claimed by plaintiff were received by defendant more than 1 year prior to commencement of this action, which was an action upon a statute for a penalty, and that as sections 16-325 and 16-502, R. R. S. 1943, have been heretofore construed and applied by this court, said action was barred by the 1-year statute of

limitations. In the alternative, defendant alleged that the various sums paid defendant by the city, beginning April 8, 1952, to and including March 10, 1953, were received by defendant more than 4 years before commencement of this action, and, in any event, recovery thereof was barred by the 4-year statute of limitations.

As far as important here, defendant then alleged that sections 16-325 and 16-502, R. R. S. 1943, as construed and applied by this court, were unconstitutional as in violation of Article I, section 15, Constitution of Nebraska, which provides that all penalties shall be proportioned to the nature of the offense and as in violation of Article I, section 21, Constitution of Nebraska, which provides that the property of no person shall be taken for public use without just compensation therefor. As presented to the trial court in motion for new trial, defendant also alleged that said sections, as construed and applied by this court, were unconstitutional as in violation of Article I, section 3, Constitution of Nebraska, which provides that no person shall be deprived of property without due process of law.

Defendant's answer also alleged that plaintiff was a member of the city council since April 13, 1954; that all items claimed by plaintiff thereafter had been duly submitted and allowed by the city council, and that plaintiff, as a member thereof, had not objected but had approved the allowance and payment of all claims submitted by defendant since April 13, 1954; that plaintiff had taken no appeal therefrom; and that as a result of his conduct he was estopped from maintaining this equitable action, and same was barred by laches. Defendant's prayer was for dismissal of plaintiff's petition and judgment for defendant. Plaintiff's reply was a general denial.

Both plaintiff and defendant submitted requests for admissions to the opposing party. Subsequently, they were duly answered, affidavits were filed by the parties, and, as ordered by the court, the city of Beatrice, herein

called the city, was made a party defendant. Thereupon it filed an answer admitting, as did defendant's answer, certain allegations of plaintiff's petition, but denying that the city was liable for the actions of defendant, or that it was liable to plaintiff on the grounds alleged in plaintiff's petition. The city then prayed for dismissal of the action against the city, and that it should be held free from any liability or from payment of any costs. Thereafter the city filed a stipulation admitting all facts admitted by plaintiff and defendant, and denying all allegations which plaintiff had denied.

Thereupon plaintiff filed a motion for summary judgment in his favor, based upon the pleadings, interrogatories, admissions, stipulations, and affidavits of plaintiff and defendant, and defendant likewise filed a motion for summary judgment in favor of defendant. However, defendant's motion was also in the alternative, seeking a summary judgment in favor of defendant upon the sums received by him, beginning April 8, 1952, to and including March 10, 1953, which defendant alleged were barred by the 4-year statute of limitations.

After a hearing on said motions for summary judgment, whereat evidence was adduced, consisting of the respective requests for admissions, answers thereto, affidavits of the parties, and stipulations, which now appear in the bill of exceptions before this court, a summary judgment was rendered. It found that the 4-year statute of limitations applied, and that plaintiff was entitled to recover for all items of material, merchandise, or supplies sold and delivered to the city by defendant within a 4-year period preceding the filing of plaintiff's petition. Those items totaled the sum of $463.43, and a judgment was awarded plaintiff and against defendant for the benefit and on behalf of the city for $463.43, together with interest at 6 percent from December 12, 1955, until date of payment. All costs were taxed to defendant. It was also ordered that out of the pro-

ceeds of the judgment there should be paid plaintiff an allowance of $136 for attorney's fees and the balance of the judgment should be disbursed to the city, except costs, which should be distributed as taxed, with any costs paid by plaintiff to be refunded to him. There is no question here about such allowance of attorney's fees, because the city consented thereto and has filed a brief supporting plaintiff's right to affirmance, and assigning "We do not find any error in the ruling of the trial court."

Thereafter, defendant's motion for new trial was overruled, and he appealed, assigning in substance that the trial court erred as follows: (1) In allowing plaintiff to prosecute the action because he had not made precedent demand upon the city attorney to bring the same, and in allowing plaintiff to maintain this equitable action and recover for sums accrued after April 13, 1954, which he had approved as a member of the city council; (2) in failing to apply the 1-year statute of limitations and refusing to dismiss plaintiff's action; and (3) in not holding that sections 16-325 and 16-502, R. R. S. 1943, were unconstitutional as in violation of Article I, section 3, Article I, section 15, and Article I, section 21, Constitution of Nebraska. We do not sustain the assignments.

No contention is made that there was any controverted issue of fact for determination. The admitted material facts are as follows: During the period here involved, from April 8, 1952, to December 12, 1955, plaintiff was a resident and taxpayer of Beatrice, a city of the first class. During that same period defendant Trindel was a paid member of the city's board of public works, and engaged in business in said city under the name and style of M. O. Trindel Tire & Battery Company. At numerous times from April 8, 1952, to December 12, 1955, defendant sold to the city and its departments merchandise, supplies, and services, and received from the city the sum of $1,098.99 therefor. All

of that sum was received by defendant more than 1 year prior to the filing of this action on March 15, 1957. However, during the 4-year period prior to the filing of this action, defendant had so received the sum of $463.43. From April 13, 1954, plaintiff was a member of the Beatrice city council and as such, from that time until December 12, 1955, had approved the allowance and payment of all claims filed by defendant with the city for merchandise and services. However, on May 28, 1956, the city's finance committee reported in writing to the mayor and city council that defendant, while a salaried member of the board of public works, had sold merchandise and supplies to the city from April 8, 1952, to December 12, 1955, for which defendant had been paid the sum of $1,098.99 by the city, whereupon plaintiff requested that the city council take legal action to recover all the sums paid to defendant under such contracts with the city. Nevertheless, on motion made by a member of the council, which motion was duly seconded, such report of the finance committee was ordered accepted and placed on file by the council, but it also ordered that no action should be taken against defendant because: " 'It would appear that no intent to violate the law is shown by the contents of said report.' " In that connection, at all times during the period in controversy and thereafter, the city had a duly appointed and acting city attorney upon whom no demand was made by plaintiff to bring this action.

Defendant has assigned and argued that plaintiff could not maintain this action because no precedent demand was made upon the city attorney to do so. We do not agree. In that connection, section 16-319, R. S. Supp., 1955, provides in part: "The city attorney shall commence, prosecute, and defend all suits and actions necessary to be commenced, prosecuted, or defended on behalf of the city, *or that may be ordered by the council.*" (Italics supplied.)

In the instant case, precedent demand was made as

aforesaid upon the mayor and council to bring the action, but it had refused, as alleged in plaintiff's petition and admitted by defendant. Such procedure was used and approved in Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291, and Heese v. Wenke, 161 Neb. 311, 73 N. W. 2d 223.

Under the provisions of section 16-319, R. S. Supp., 1955, it is apparent that the council could have ordered the city attorney to bring the action, but upon demand it refused to do so. To have made demand on the city attorney under the circumstances presented here would have been an idle ceremony and useless procedure. Authorities relied upon by defendant are clearly distinguishable upon the facts and applicable statutory provisions. Further, in this action the city was made a party defendant as requested by defendant Trindel, whereupon it entered an appearance and filed an answer adverse to plaintiff's petition. True, subsequently the city stipulated that it admitted all facts admitted by plaintiff and defendant, and denied all allegations which plaintiff denied. Nevertheless, such conduct gives credence to the fact that to have made precedent demand upon the city attorney would have accomplished nothing and was not required under the circumstances and applicable statute.

Defendant also assigned and argued that plaintiff was estopped from maintaining this action on behalf of the city for items allowed and paid defendant after April 13, 1954, and until December 12, 1955, because as a member of the council plaintiff had approved their allowance and payment to defendant, and that in any event plaintiff's action was barred by laches. We do not agree. In that connection, contracts such as here involved are wholly void for all purposes as to everybody whose rights would be affected by them if valid, and such contracts require "no disaffirmance to avoid" them; they "cannot be validated by ratification"; and they are not "susceptible of validation." See, 12 Am.

Jur., Contracts, § 10, p. 507; 63 C. J. S., Municipal Corporations, § 1009, p. 597; Heese v. Wenke, *supra;* Warren v. County of Stanton, 145 Neb. 220, 15 N. W. 2d 757.

It should also be stated that plaintiff herein is not suing for his own particular benefit but for the use and benefit of the city and its taxpayers. The opinions in Neisius v. Henry, *supra,* and Heese v. Wenke, *supra,* discussed and disposed of the issue of laches therein. By analogy, we conclude that defendant's contention here with regard to laches has no merit.

We turn then to defendant's contention that plaintiff's action was barred by section 25-208, R. R. S. 1943, which provides in part that: "The following actions can only be brought within the periods herein stated: Within one year, * * * an action upon a statute for a penalty or forfeiture, * * *." We conclude that defendant's contention has no merit. Rather, we hold that section 25-206, R. R. S. 1943, which provides: "An action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within four years," is controlling here.

As far as important here, section 16-325, R. R. S. 1943, simply permits cities of the first class to create a board of public works by ordinance, such as ordinance No. 574, enacted by the city of Beatrice. Such section prohibits members of such board from directly or indirectly being interested in the purchase of any material to be used or applied for municipal purposes. Also, as far as important here, section 16-502, R. R. S. 1943, simply prohibits any officer of the city from being interested directly or indirectly in any contract to which the city or anyone for its benefit is a party, and provides that such interests in any such contract shall void the obligation thereof on the part of the city. It also provides that no officer of the city shall receive any pay or perquisites from the city other than his salary, as provided

by ordinance and the law relating to cities of the first class. Such sections are merely declaratory of the common law, and of public policy, which declare that such contracts are void. See, 63 C. J. S., Municipal Corporations, § 988, p. 551, and authorities cited.

We find no provision in such statutes for the recovery of a penalty or forfeiture, and they are not required to do so in order to make such contracts void. As stated in 17 C. J. S., Contracts, § 203, p. 559, citing authorities: "If an act is prohibited by statute, an agreement in violation of the statute is void, although the act is not penalized, for it is the prohibition and not the penalty which makes the act illegal."

Also, as stated in 12 Am. Jur., Contracts, § 161, p. 656, citing authorities: "In order that there may be an implied prohibition, the imposition of a penalty is not essential. In other words, it is not necessary that a statute should impose a penalty for doing or omitting to do something in order to make void a contract which is opposed to its operation."

In such respect, defendant herein is in no different position than he would be in any other controversy involving a contract which is wholly void for all purposes and unenforceable. True, in cases such as that at bar, it may be said that defendant suffers a penalty by being required to return the money paid to him under the particular void contract, and that he thus forfeits his compensation for material and services, the extent of which is measured by the amount thereof in a remedial civil action as distinguished from "an action upon a statute for a penalty or forfeiture," as provided by section 25-208, R. R. S. 1943, which relates to actions that are penal in character. In that connection, we call attention to the fact that section 18-301, R. R. S. 1943, provides for the criminal prosecution and punishment by fine, of: "Any officer of any city in this state who shall be interested, directly or indirectly, in any contract to which the city is a party, or who shall enter

into any contract to furnish or shall furnish to any contractor or subcontractor with a city of which he is an officer, any material to be used in performing any contract with such city, * * *." However, such a criminal prosecution must of course be brought within the applicable statute of limitations, as provided by section 29-110, R. R. S. 1943.

The terms "penalty" and "forfeiture" are often declared to be synonymous, but they are not so in all cases. Generally speaking, the term "penalty" is pecuniary, and "forfeiture" is also a penalty by which one loses his rights and interest in property. Such terms may be used with relation either to punishment for violation of laws which are penal in character and enforceable by the state or its subdivisions, or with relation to violations of law or duty, civil and remedial in character, for the recovery of compensation or indemnity in a civil action by the party wronged by such a violation, as in the case at bar. In that connection, we said in School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24: "'Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.' Huntington v. Attrill, 146 U. S. 657, 36 L. Ed. 1123, 13 S. Ct. 224. Many types of cases for the recovery of damages for neglect or breach of duty operate to a certain extent as punishment. The distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from offending in like manner. A remedial statute, of course, is for the purpose of adjusting the rights of the parties as between themselves in respect to the

wrong alleged." See, also, Globe Publishing Co. v. State Bank of Nebraska, 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854; Department of Banking v. McMullen, 134 Neb. 338, 278 N. W. 551; School District of McCook v. City of McCook, 163 Neb. 817, 81 N. W. 2d 224; 23 Am. Jur., Forfeitures and Penalties, Part I, p. 598, Part II, p. 621; 37 C. J. S., Forfeitures, § 1, p. 4; 70 C. J. S., Penalties, § 1, p. 387. In other words, we conclude that the rights of a municipality to retain or recover the proceeds of void contracts such as those at bar are simply those which would accrue to any party under a void contract placed in a comparable position.

This court has construed and applied language identical in effect with that contained in sections 16-325 and 16-502, R. R. S. 1943. In Neisius v. Henry, on rehearing, 143 Neb. 273, 9 N. W. 2d 163, we applied the 10-year statute of limitations because the suit was upon defendant's bond and against both defendant and his surety. Be that as it may, we also said in the opinion on rehearing that: "It is urged that Henry could have been sued on his statutory liability without joining the surety, and that the statute of limitations would then be four years as provided by section 20-206. We do not disagree with this statement."

Also, in Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291, to which we adhered in the opinion on rehearing, we held: " 'Where a statute prohibits an officer of a village from having an interest in any contract with the village, and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported contract may be recovered back at the suit of the village or of a taxpayer suing in its behalf.' Village of Bellevue v. Sterba, 140 Neb. 744, 1 N. W. (2d) 820.

"When a statute prohibits an officer of a municipality from entering into a contract with the city, and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had." The same rules would

apply under sections 16-325 and 16-502, R. R. S. 1943. See, also, City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156; Heese v. Wenke, *supra.*

In such last-cited case, the first payment received by defendant officer was on June 14, 1950, and payments extended over a period until April 28, 1953. The action to recover the payments made to defendant was not filed until September 10, 1953, yet we said: "It is clear therefore that no part of the amount, for recovery of which suit was instituted, was barred by any statute of limitations."

Nevertheless, defendant argued that the present case was barred by the 1-year statute of limitations, and asserted that such issue was never heretofore raised in this court. We assume for purpose of argument only that such assertion is true, yet arrive at a conclusion contrary to defendant's contention. In 53 C. J. S., Limitations of Actions, § 89, p. 1059, citing authorities, it is said: "A statutory provision limiting the period for bringing an action to recover a penalty or forfeiture generally applies only to a penalty or forfeiture created by a penal statute for a dereliction of duty, or failure to perform specific acts, or for the commission of acts prohibited by statute." See, also, 23 Am. Jur., Forfeitures and Penalties, § 78, p. 661, citing authorities; Smith Engineering Works v. Custer, 194 Okl. 318, 151 P. 2d 404.

In that connection, McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1, was an action to have declared null and void an installment loan contract allegedly made in violation of the Installment Loan Act, and for a recovery by plaintiff of all payments received thereon from plaintiff. One contention made in that case was that in view of Article VII, section 5, Constitution of Nebraska, plaintiff had no standing in court because any penalty arising thereunder must be paid to the common schools in the place where it accrues. In that opinion, citing Graham v. Kibble, 9

Neb. 182, 2 N. W. 455; Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N. W. 133; Everson v. State, 66 Neb. 154, 92 N. W. 137; and School District of the City of Omaha v. Adams, *supra,* we said: "We do not think this constitutional provision has application here." In other words, by analogy from that case and others cited, we concluded that the provisions of the Installment Loan Act, which made contracts in violation thereof wholly void and unenforceable, were remedial and not penal in character, although the wrongdoer suffered a loss as a result of recovery from him by the individual wronged.

We conclude that, contrary to defendant's contention, plaintiff had a right, as a taxpayer, to prosecute and maintain this action for and on behalf of the city and its taxpayers; that the action was not one upon a statute for a penalty or forfeiture, which can only be brought within one year as provided by section 25-208, R. R. S. 1943, but rather was an action which can only be brought within four years as provided by section 25-206, R. R. S. 1943. We conclude that sections 16-325 and 16-502, R. R. S. 1943, are not unconstitutional as in violation of Article I, section 3, Constitution of Nebraska, because they do not deprive plaintiff of his property without due process of law.

In that connection, it is apparent that due process was accorded defendant in this very action wherein he had " 'reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.' " Webber v. City of Scottsbluff, 155 Neb. 48, 50 N. W. 2d 533.

We also conclude that sections 16-325 and 16-502, R. R. S. 1943, are not penal in character and do not as such impose a penalty for violation thereof, but are entirely civil and remedial, permitting recovery by the city or a taxpayer in its behalf as compensation or in-

demnity from a party to a contract void for all purposes, and that such statutes are not unconstitutional as in violation of Article I, section 15, Constitution of Nebraska, because any penalty suffered by defendant was not penal in character, such as are covered by Article I, section 15, Constitution of Nebraska. We further conclude that said sections are not unconstitutional as in violation of Article I, section 21, Constitution of Nebraska, because defendant's property was not taken for public use without just compensation within the provisions of that section of the Constitution. This is not a case wherein the city has attempted to exercise its delegated sovereign power and take defendant's property for public use. This is a case wherein defendant himself simply consented and voluntarily entered into a contract which the statute has made wholly void and unenforceable, and in which defendant had no vested rights.

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 Martin O. Trindel.

AFFIRMED.

MARIAN SIEVERS SCHLUETER, APPELLANT, V. SCHOOL DISTRICT NO. 42 OF MADISON COUNTY, APPELLEE.
96 N. W. 2d 203

Filed April 17, 1959. No. 34560.

1. **Schools and School Districts: Master and Servant.** The refusal of an employer to allow an employee to perform the duties required of him by his employment amounts to his dismissal from such employment.
2. ———: ———. The measure of damages in suits for breach of contracts for personal services is the amount of the salary agreed upon for the period involved less the amount which the servant earned or, with reasonable diligence, might have earned from other employment during that period.
3. ———: ———. In an action by an employee against his em-

ployer for damages for breach of contract arising from the wrongful discharge of the former the fact that the plaintiff obtained or, by the exercise of due diligence, might have obtained other employment is a matter of defense which the plaintiff is not required to anticipate in his petition.

4. ———: ———. The burden of proof is on the defendant to establish such defense and on failure thereof, or of showing other facts in mitigation of damages, the measure of damages is the contract price.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Reversed and remanded with directions.*

Frederick M. Deutsch and *William I. Hagen,* for appellant.

James F. Brogan, for appellee.

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

WENKE, J.

Marian Sievers Schlueter, formerly Marian Sievers, brought this action in the district court for Madison County against School District No. 42 of Madison County. Plaintiff claims the defendant unlawfully breached a teaching contract it had entered into with her for the school year of 1956-57 and, by reason of that fact, owes her the sum of $1,375. Plaintiff herein seeks to recover that amount with interest.

A jury returned a verdict for the plaintiff in the sum of $137.50 for the first half of January 1957. The trial court entered a judgment on the verdict for the plaintiff. Plaintiff then filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court overruled the motion and this appeal was taken from that ruling.

Appellee is a duly organized and existing school district located in Madison County. We shall herein refer to it as the district. Appellant, then Marian Sievers, taught school in this district for the school year of 1955-

56. On January 25, 1956, she entered into a written "Teacher's Contract" with the district for the school year of 1956-57. The district, by the terms of the contract, agreed to pay appellant for teaching at the rate of $275 a month for 9 months, commencing with September 1956, or a total of $2,475.

Appellant married Kenneth F. Schlueter on June 3, 1956. When the district's school opened in September 1956, appellant started teaching. She continued to teach during September, October, November, and December of 1956, and through Friday, January 11, 1957. The district paid her at the rate of $275 per month for September, October, November, and December 1956.

On January 3, 1957, appellant met with the district's school board consisting of William F. Mazuch, Mrs. Arthur Zessin, and Otto Schlueter. At that time the board caused the following notice to be delivered to appellant: "Mrs. Marian Schlueter Lindsay, Nebraska Dear Marian: Due to your present condition which makes it impossible for you to complete this year of teaching, we hereby notify you that on January 11, 1957 your contract is terminated. The law in Section 79-1234, Nebraska School Laws, 1955-56 states that (9) physical incapacity is just cause. We believe this is in the best interests of all concerned. Sincerely yours, William F. Mazuch, Mrs. Arthur Zessin, Otto Schlueter." Appellant's "condition" referred to in the foregoing notice, was the fact that she was then pregnant.

On Friday, January 11, 1957, school board member William F. Mazuch went to the district's schoolhouse and there met appellant. He told her the board had hired another teacher to start teaching on Monday, January 14, 1957, that her contract had been terminated, and asked that she turn the keys, which she had to the schoolhouse, over to him. Appellant refused to give Mr. Mazuch the keys she had and told him she would be back to teach on Monday.

On Monday, January 14, 1957, appellant reported at

the district's schoolhouse to teach. When she got there she discovered a padlock on the door of the schoolhouse which prevented her from entering it. Shortly thereafter the members of the school board arrived at the school, bringing with them the new teacher they had hired to take appellant's place. The school board dismissed school for the day, locked the door to the school, and left. The following notice was caused to be served on appellant: "January 14, 1957 Dear Mrs. Schlueter: In addition to the reasons given in our letter of January 3, 1957, we hereby give you the following additional reasons for terminating your contract: 1. Installing a substitute teacher without the knowledge or consent of the Board. 2. Failing to comply with reasonable rules and regulations of the Board with reference to making up missed school days and other matters. 3. Failing to come to school on time. 4. Improper supervision of playground. 5. Dismissing school without permission of the Board when not required by sickness, accident or other unavoidable necessity. 6. Breaching your contract in other ways. MADISON COUNTY SCHOOL DISTRICT NO. 42 By Mrs. Arthur Zessin William F. Mazuch."

Appellant again reported at the school to teach on Tuesday, January 15, 1957. Shortly after she arrived the sheriff of Madison County came to the school. On behalf of the district he served her with a "Notice to Quit School Premises" and told her he would have to put her in jail if she didn't leave the premises. She left shortly thereafter. As stated in School Dist. No. 1 of Jefferson County v. Parker, 82 Colo. 385, 260 P. 521: "The refusal by the defendant to allow the plaintiff to perform the duties required by her employment amounted to her dismissal from such employment."

The "Teacher's Contract" referred to contains the following provision: "IT IS UNDERSTOOD, That this contract may be terminated only by mutual agreement, or by the operation of law, * * *."

Section 79-1234, R. R. S. 1943, provides: "Any teacher's certificate may be revoked by the State Board of Education for just cause. Just cause may consist of any one or more of the following: (1) Incompetence, (2) immorality, (3) intemperance, (4) cruelty, (5) crime against the law of the state, (6) *negligence of duty,* (7) *general negligence of the business of the school,* (8) unprofessional conduct, or (9) *physical* or mental *incapacity.* The revocation of the certificate shall terminate the employment of such teacher, but such teacher must be paid up to the time of receiving notice of revocation. The board shall immediately notify the secretary of the school district or board of education where such teacher is employed. It shall also notify the teacher of such revocation and shall enter its action in such case in the books or records of its office; Provided, no certificate shall be revoked without due notice from the board and an opportunity given the teacher to explain or defend his conduct. Any person failing to appear at a hearing called for the purpose of considering the revocation of his certificate, shall be deemed guilty of the charges preferred and shall have his certificate revoked immediately." (Emphasis ours.) The district made no attempt to comply with this statute.

In an identical situation in Greer v. Chelewski, 162 Neb. 450, 76 N. W. 2d 438, we said: "In view of the authority so granted by the Legislature, which has full authority to deal with the subject, we find nothing illegal or unreasonable in the school district having contractually delegated its right to discharge appellant for good cause to the state Superintendent of Public Instruction. (State Board of Education since January 6, 1955; see §§ 79-1234 and 79-338, R. R. S. 1943.) We think appellant sufficiently offered to perform her part of the contract but was prevented from doing so by the school district without any right on its part to do so. In view thereof we find appellant has a right to recover for the unpaid balance of her wages." The fact

that appellant, subsequent to the breach, became temporarily unable to perform any teaching duties, because of the birth of the child with which she was pregnant, would be immaterial for the district had unlawfully breached the contract prior thereto by discharging her. As stated in Miller v. Sealy Oil Mill & Mfg. Co. (Tex. Civ. App.), 166 S. W. 1182: "The time appellant was sick after his discharge could not be deducted from his damages. Appellee should not be allowed to defend against its breach of a contract by showing the misfortune of appellant; * * *."

Appellee cites Hong v. Independent School Dist. No. 245, 181 Minn. 309, 232 N. W. 329, 72 A. L. R. 280, and Auran v. Mentor School Dist. No. 1, 60 N. D. 223, 233 N. W. 644, as here applicable. The question of dismissal or termination of a teaching contract by the employer was not involved in either of those cases. In both cases the employer was forced to act when the employee failed to perform her duties. In Hong v. Independent School Dist. No. 245, *supra,* the teacher had not sufficiently recovered from an operation for appendicitis on September 10, when school opened, so as to be able to teach nor was she able to do so until October 17, a period of 5 weeks and 2 days of school time. In Auran v. Mentor School Dist. No. 1, *supra,* the teacher quit on January 18 because she was not able to carry on with her teaching duties due to her physical condition. In both cases it was held the employer was released from the contract by the inability of the employee to perform. These cases are not applicable to the situation herein presented where the teacher was unlawfully discharged. Appellee also cites our case of Kuhl v. School District, 155 Neb. 357, 51 N. W. 2d 746, but it has no application here. In that case we held two of the three teaching contracts involved to have been void at their inception and that the district (employer) was prevented from carrying out all three contracts by operation of law when the district was enjoined by the

courts from opening and holding school during the school year for which the contracts involved had been entered into.

As we said in Stoffel v. Metcalfe Constr. Co., 145 Neb. 450, 17 N. W. 2d 3: "The measure of damages in suits for breach of contracts for personal services is the amount of the salary agreed upon for the period involved, less the amount which the servant earned, or with reasonable diligence might have earned from other employment during that period."

"In an action by an employee against his employer for damages for breach of contract, arising from the wrongful discharge of the former, that the plaintiff obtained, or by the exercise of due diligence, might have obtained, other employment, is a matter of defense, which the plaintiff is not required to anticipate in his petition. * * * The burden of proof is on the defendant to establish such defense, and on failure thereof, or of showing other facts in mitigation of damages, the measure of damages is the contract price." Wirth v. Calhoun, 64 Neb. 316, 89 N. W. 785. See, also, International Text-Book Co. v. Martin, 82 Neb. 403, 117 N. W. 994; Helwig v. Aulabaugh, 83 Neb. 542, 120 N. W. 162; Kring v. School District, 105 Neb. 864, 182 N. W. 481; Annotation, 134 A. L. R. 242.

However, appellant pleaded she was unable to secure other employment in her profession as a teacher because all positions therefor had been filled, which allegation appellee denied. Appellant testified she sought employment as a teacher by making inquiry for such in the office of the county superintendent of Antelope County, that being the county in which she then lived. She was advised that none was available. The trial court, by its instructions No. 5 and No. 6, placed the burden of proof on this issue on the appellant.

"The burden of proof in its proper sense rests, throughout the case, as to each issue, on the party originally having the burden as to such issue." In re Estate of

Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573. "* * * when a party affirmatively pleads a fact which is material to the issue, he thereby assumes the burden of proving the existence of such fact." Fairchild v. Fairchild Clay Products Co., 141 Neb. 356, 3 N. W. 2d 581. See, also, Pierce v. Miller, 107 Neb. 851, 187 N. W. 105; In re Estate of Hagan, *supra;* Masonic Temple Craft v. Stamm, 152 Neb. 604, 42 N. W. 2d 178; Hammer v. Estate of Hammer, 155 Neb. 303, 51 N. W. 2d 609. "As stated in 31 C. J. S. 709, sec. 104: 'The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party.' " In re Estate of Hagan, *supra.*

The material facts on which the appellant's right to recover depend are correctly stated in 35 Am. Jur., Master and Servant, § 60, p. 494, as follows: "* * * the general rule is that in an action for alleged wrongful discharge, he is not bound to show affirmatively as a part of his case that other employment was sought and could not be found, but may rest his case upon proof of the contract of service, its breach, and damages which are determined by the contract price for services."

We do not think the burden of proof as to the defense of mitigation of damages shifted to appellant merely because of the allegations in her petition relating thereto and the evidence which she offered in support thereof for they were not material to any issue of fact upon which her right to recover depended. See, In re Estate of Jones, 83 Neb. 841, 120 N. W. 439; Kring v. School District, *supra.* Therefore the trial court erred by placing this burden on the appellant. See, Myers v. Willmeroth, 150 Neb. 416, 34 N. W. 2d 756; Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21.

But appellee seeks to avoid the effect of this error by applying thereto the following rule: "* * * 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." Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658. See, also, Dyer v. Ilg, 156 Neb. 568, 57 N. W. 2d 84; Missouri P. Ry. Co. v. Fox, 60 Neb. 531, 83 N. W. 744. It is apparent that appellee defended on the ground that its termination of the contract and discharge of appellant were justified and, because thereof, did not seek to mitigate the amount of damages which appellant sought to recover. The record does not present a situation to which the principle contended for by appellee has application for, in the absence of such defense having been properly pleaded and evidence offered in support thereof, it presented no issue for a jury.

We think the appellant's motion for judgment notwithstanding the verdict should have been sustained as there was no issue for a jury to try. We therefore reverse the judgment of the trial court overruling such motion and remand the cause to the district court to sustain such motion and render a judgment for appellant in the sum of $1,375 with interest on the respective amounts thereof, as prayed, from the time they became due and owing.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN HUTCHENS, APPELLEE, V. JOHN A. KUKER, APPELLANT.
96 N. W. 2d 228

Filed April 24, 1959. No. 34519.

1. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.
2. **Libel and Slander.** Any language, the nature and meaning of which are to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace, is slanderous per se.

3. ———. One who is liable for a libel or for a slander actionable per se is liable for at least nominal damages.
4. **Appeal and Error.** In an action at law where a jury has been waived it is not within the province of this court to resolve conflicts in 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.
5. **Libel and Slander: Damages.** Words spoken imputing an indictable offense are actionable per se, and no special damage need be proved. The jury has a right, and it is its duty on proof of the cause of action, to award such damages as in its judgment would fairly compensate the plaintiff for the injury sustained.
6. ———: ———. It is proper in such a case for the court to instruct the jury that in fixing the amount of damages it may take into consideration the present and future injury to the plaintiff.
7. ———: ———. In determining compensatory damages in such a case, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error.
8. ———: ———. There is no absolute test of damages suffered under such circumstances and it is very difficult to determine the extent of the injury inflicted. It is peculiarly a matter for the jury to determine, and while there is a limit beyond which the jury should not be allowed to go, the court cannot interfere with its verdict in such cases unless it clearly appears that the verdict was induced by passion or prejudice or some consideration other than the evidence in the case.
9. ———: ———. The condition and situation in life of one injured by a slander may be shown in evidence, and may be considered by the jury upon the question of the amount of damages.
10. **Libel and Slander: Appeal and Error.** Unless the amount of a verdict for slander appears to be clearly wrong, or the result of passion or prejudice, or of an abuse of discretion, or of a serious mistake or gross error, or of an extravagant or unconscionable estimate of damages, it will not ordinarily be set aside on appeal as excessive.
11. ———: ———. The above rules apply to the judgment of a court making a finding of compensatory damages where a jury has been waived.

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

Robert Saxton, for appellant.

Wear, Boland, Mullin & Walsh and *A. Lee Bloomingdale,* for appellee.

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

SIMMONS, C. J.

This is an action to recover damages for slander.

Plaintiff alleged that he was an employee of defendant; that he voluntarily terminated the employment; and that thereafter the defendant maliciously and willfully published false and defamatory statements of the plaintiff that he, plaintiff, while employed by defendant, "got away with," "stole," "falsified the books and accounts," and "took" sums of money stated to be $15,000 to $20,000. Defendant's answer was a general denial.

Trial was had to the court, a jury having been waived. The court found generally for the plaintiff and rendered a judgment for the plaintiff against the defendant for the sum of $3,000.

A motion for a new trial was filed and overruled. Defendant appeals.

Defendant here makes four assignments of error. The first three in varying ways present the contention that the court erred in awarding more than nominal damages. The fourth assignment is that the court erred in the admission, over objection, of hearsay testimony, and in failing to sustain motions to dismiss made at the close of plaintiff's evidence and at the close of all evidence.

As to the first part of the fourth assignment, the rule is: In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which ob-

jection is urged. Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51.

Defendant does not comply with this rule and hence we put aside the contention as to error in the admission of evidence.

As to the second phase of the assignment, defendant in his brief here states: "The trial court under evaluation of the evidence in the pending case could have awarded nominal damages on the grounds the slander alleged was actionable per se and damages presumed. But actual damages must have been proved to allow more than nominal damages."

The applicable rules are: Any language, the nature and meaning of which are to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace, is libelous per se. Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559.

One who is liable for a libel or for a slander actionable per se is liable for at least nominal damages. Rimmer v. Chadron Printing Co., 156 Neb. 533, 56 N. W. 2d 806.

Under these circumstances it is obvious that the court did not err in denying the motions to dismiss.

There remain in the appeal, then, the questions: (1) Was plaintiff entitled to recover compensatory damages? (2) Were the award and judgment for $3,000 excessive?

We determine these two questions adversely to the defendant and affirm the judgment of the trial court.

The cause having been tried to the court, a jury being waived, the applicable rule is: In an action at law where a jury has been waived it is not within the province of this court to resolve conflicts in 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. Capital Bridge Co. v. County of Saunders, 164 Neb. 304, 83 N. W. 2d 18.

The writer of this opinion unsuccessfully challenged the soundness of the above rule in that case. Nevertheless it is the rule followed by the court, and is to be followed here.

We state the evidence, limiting it to that which goes to the question of damages and, where there is a conflict, stating that which is favorable to the plaintiff as is required by the above rule.

Plaintiff at the time the slander here involved occurred was a man 37 years of age, married, and the father of six children. He is a university graduate and an accountant. Prior to July 1955, he conducted a general accounting business in Omaha and Council Bluffs. He was recommended to and employed by defendant on a part-time basis to do accounting work. In July 1955, he entered defendant's employ to do full-time accounting and general work on a commission basis at defendant's places of business in Fort Calhoun and Nashville, Nebraska. Defendant agreed to give plaintiff a written contract but did not do so. After the first month plaintiff was paid monthly advances on his commissions which were to be calculated later.

In September 1956, plaintiff quit defendant's employ. At that time he took $450 without defendant's knowledge—which plaintiff calculated was about half of his then earned and unpaid commissions. He left a note showing that he had taken $150 in cash, reciting that it was to apply on commissions due. He wrote a check for $300 payable to himself and endorsed on it: "To Apply on Commissions Earned." Later plaintiff sued defendant for these commissions. Defendant paid substantially all plaintiff claimed, and the action was dismissed.

Within hours after plaintiff left defendant's employ, defendant began to publish the slanderous statements about which complaint is made, and they soon became a matter of community knowledge in the 300-population town of Fort Calhoun.

Some of plaintiff's old friends avoided him. Accounting clients that he had formerly served ceased to give him business. Fellow employees where plaintiff's wife worked ceased talking when she came near. Plaintiff became nervous, irritable, and worried, and spent sleepless nights. Antagonistic telephone calls were made to plaintiff at his home about the charges.

A week or two after plaintiff ceased his employment with defendant he was employed by a large industrial firm as an accountant doing budget work. His pay was more than he had been receiving from defendant. Later plaintiff was offered and accepted a promotion to work in Missouri at an increase in salary of $300 a month. The supervising official learned of the charges made by defendant and withdrew the offer of the higher paid position. Plaintiff continued his work with the new employer in his then position, and was so employed at the time of the trial.

What then is the measure of damages?

In Herzog v. Campbell, 47 Neb. 370, 66 N. W. 424, we held: "Words spoken imputing an indictable offense are actionable per se, and no special damage need be proved." We said: "The jury had a right, and it was its duty on proof of the cause of action, to award such damages as in its judgment would fairly compensate the plaintiff for the injury sustained; * * *."

In Bloomfield v. Pinn, 84 Neb. 472, 121 N. W. 716, we held: "It is proper in such a case for the court to instruct the jury that in fixing the amount of damages they may take into consideration the present and future injury to the plaintiff."

In Thomas v. Shea, 90 Neb. 823, 134 N. W. 933, Ann. Cas. 1913B 695, we held: "In determining compensatory damages in such a case, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error."

In Bigley v. National Fidelity & Casualty Co., 94 Neb. 813, 144 N. W. 810, 50 L. R. A. N. S. 1040, we held: "There is no absolute test of damages suffered under such circumstances and it is very difficult to determine the extent of the injury inflicted. * * * It is peculiarly a matter for the jury to determine, and while * * * there is a limit beyond which the jury could not be allowed to go, the court cannot interfere with their verdict in such cases, unless it clearly appears that the verdict was induced by passion or prejudice or some consideration other than the evidence in the case."

In Estelle v. Daily News Publishing Co., 101 Neb. 610, 164 N. W. 558, we held: "The condition and situation in life of one injured by a libel may be shown in evidence, and may be considered by the jury upon the question of the amount of damages."

In Hall v. Vakiner, 124 Neb. 741, 248 N. W. 70, we held: "In an action for slander, the amount of damages recoverable is largely in the discretion of the jury. * * * Unless the amount of a verdict for slander appears to be clearly wrong, or the result of passion or prejudice, or of an abuse of discretion, or of a serious mistake or gross error, or of an extravagant on unconscionable estimate of damages, it will not ordinarily be set aside on appeal as excessive * * *."

The above rules apply to the judgment of a court making a finding of compensatory damages where a jury has been waived.

We see no persuasive reason for disturbing the judgment of the trial court. Its judgment is affirmed.

AFFIRMED.

CHAPPELL, J., concurs in result.