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REPORTS OF CASES

DECIDED BETWEEN

JULY 4, 1959 and MARCH 4, 1960

IN THE

Supreme Court of Nebraska

JANUARY TERM 1959, SEPTEMBER TERM 1959,
and
JANUARY TERM 1960

VOLUME CLXIX

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
ADOLPH E. WENKE, Associate Justice
PAUL E. BOSLAUGH, Associate Justice

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Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee, and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe, and Sarpy.	John M. Dierks	Neb. City
Third	Lancaster.	John L. Polk Harry Ankeny Harry A. Spencer Paul White	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas, and Washington.	James M. Fitzgerald Herbert Rhoades Arthur C. Thomsen James M. Patton Carroll O. Stauffer L. Ross Newkirk Patrick W. Lynch Jackson B. Chase Lawrence C. Krell	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York.	H. Emerson Kokjer John D. Zeilinger	Wahoo York
Sixth	Boone, Colfax, Dodge, Merrick, Nance, and Platte.	Russell A. Robinson Robert D. Flory	Fremont Columbus
Seventh	Fillmore, Nuckolls, Saline, and Thayer.	Stanley Bartos	Wilber
Eighth	Cedar, Dakota, Dixon, and Thurston.	John E. Newton	Ponca
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne.	Lyle E. Jackson Fay H. Pollock	Neligh Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster.	Edmund Nuss Norris Chadderdon	Hastings Holdrege
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley, and Wheeler.	Ernest G. Kroger William F. Manasil	Grand Island Burwell
Twelfth	Buffalo, Custer, Logan, and Sherman.	Eldridge G. Reed	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, and McPherson.	Isaac J. Nisley John H. Kuns	North Platte Kimball
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow.	Victor Westermark	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha, and Rock.	Dayton R. Mounts	Atkinson
Sixteenth	Box Butte, Cherry, Dawes, Sheridan, and Sioux.	Albert W. Crites	Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff.	Richard Van Steenberg	Mitchell
Eighteenth	Gage and Jefferson.	Ernest A. Hubka	Beatrice

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Admitted since the publication of Volume 168

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HENRY CLAY COX, JR.
LEROY E. ENDRES
ALLAN JAY GARFINKLE
ALLEN L. OVERCASH

IN MEMORIAM

GEORGE AGLER EBERLY

And now, at the hour of nine o'clock a.m., on this 21st day of September, A.D. 1959, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of George A. Eberly, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE FAY H. POLLOCK.

MAY IT PLEASE THE COURT:

The Committee appointed by the Court submits this statement as a memorial and tribute to the late George A. Eberly, who for some 17 years served as an eminent member of this Court. Its submission will be followed by personal expressions of other members of the Committee.

George A. Eberly was born at Fort Wayne, Indiana, on February 9, 1871. He died at Lincoln, Nebraska, on September 12, 1958, at the age of 87 years.

When he was two years of age, his parents moved to a farm near Stanton, Nebraska, where they lived in a sod house. His father, a Civil War veteran, farmed, became a county official, and was one of three founders of the Stanton National Bank, which George and his son have served as president.

He was one of two comprising the first graduating class of Stanton High School. He studied law in the office of W. W. Young, prominent Stanton attorney. He attended the University of Michigan, from which he received Bachelor of Laws and Master of Laws degrees. He entered into the practice of law at Stanton,

and served a total of 8 years as the County Attorney of Stanton County.

In July of 1925, he was appointed a judge of this Court, and served without opposition until his voluntary retirement in January, 1943.

He was a courageous, conscientious, industrious and able judge, one of highest integrity and character. He was especially zealous about the protection of individual rights and liberties.

Before writing the opinion holding the Nebraska Moratorium Law unconstitutional, he studied the opinions in more than a thousand cases. First Trust Co. v. Smith, 134 Neb. 84, 277 N. W. 762.

He dissented in the case departing from the rule in personal injury cases that insurance companies were real parties in interest whose interest could be disclosed to the jury. Fielding v. Publix Cars, 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306.

In the case of State ex rel. Sorensen v. Farmers State Bank, 121 Neb. 547, 237 N. W. 862, he vigorously dissented in these words:

> "Truly of such the prophet spake: 'And judgment is turned away backward, and justice standeth afar off: for truth is fallen in the street, and equity cannot enter.' Isa. 59:14."

George Eberly was a soldier. During the Spanish American War he served as a sergeant of a cavalry troop known as Grigsby's Rough Riders. He served in the National Guard as Captain, Major and Colonel, and commanded the Fourth Nebraska Infantry on the Mexican Border in 1917. In World War I he served as a Colonel in the Officers Reserve Corps, and to enhance his chances for combat service, voluntarily accepted demotion to Major.

He was a charter member of Stanton Post No. 88 of the American Legion. He served in various capacities in the United Spanish War Veterans, including the office of National Commander.

He received many honors. In 1948 the Lincoln Kiwanis

Club presented to him its annual award for distinguished service, previous recipients including such notables as General Pershing and Father Flanagan. The Stanton Masonic Lodge awarded him the Jordan Medal and its Fifty Year Badge. He was the first American soldier to be formally adopted by the Crow Tribe of American Indians.

Judge Eberly is survived by his wife, the former Rose Psotta; his daughter, Lola, now Mrs. John Negley, of San Bernardino, California; and his son, George Donald Eberly, of Stanton.

Some men gain honor from their official position. Judge Eberly was a man who reflected honor upon his office. He was a distinguished lawyer, jurist and citizen, held in highest esteem. In the spirit of our great Fraternity, let us so remember him.

September 21, 1959.

Respectfully submitted,
E. B. Perry
R. J. Shurtleff
Lyle E. Jackson
Earl J. Moyer
Bernard S. Gradwohl
Fay H. Pollock, Chairman

HONORABLE EARL J. MOYER.

MAY IT PLEASE THE COURT:

It is with a feeling of sadness and a deep sense of personal loss that I speak briefly, on this occasion, in memory of a former distinguished member of this Court, Honorable George A. Eberly.

Mr. Eberly was a sound lawyer, an able Judge, a man of honor and integrity, and a warm personal friend.

It was my privilege to know Judge Eberly long prior to his becoming a member of this Court. His family and my mother's family were pioneer settlers in Stanton County, Nebraska. The friendships formed in those early years were enduring and for a considerable period

my mother's eldest brother was associated with Judge Eberly in the banking business at Stanton. Because of this personal acquaintance I shall presume briefly to recall some of the engaging qualities of the man that made it far more natural for those who knew him well to greet him with the familiar "George" rather than with the more austere "Mr. Eberly" or "Judge Eberly" for, able lawyer that he was and that we knew him to be, I need not remind you that he was also a scholarly gentleman and a sincere and sympathetic friend.

Judge Eberly never lost interest in the community in which he was reared or in its people. After taking up his residence in Lincoln he returned to Stanton regularly and found great pleasure in greeting old friends and making new ones. He had the confidence and respect of those who knew him and I have never heard it said that he dealt unfairly with any man.

Throughout his life he was a humble, practicing Christian layman. If he could stay my speech on this occasion he would deter me from praising him for the performance of what he considered to be his simple Christian duty, and I shall respect what I so surely know would be his wish. However, may I offer this reflection. His persistent faith and his constant admonition respecting the proper place of humanity in the divine scheme of things fostered that simplicity of spirit which endeared him to all of us as a friend.

And it was as a friend that each one of us knew and loved him best. His simplicity, his geniality, his unflinching loyalty, conspired through many years to assure him a warm welcome in any company of men who had come to know him, and especially among members of our profession.

The loss of a friend is only doubtfully reparable. The President, the Governor, the Judge may die. Another President, another Governor, another Judge will assume his duties and adequately discharge them; because, fortunately for the State, official position has a highly impersonal quality. But who replaces a friend?

His chair may be occupied, his segment of our time consumed by others, but his handclasp, his smile, his counsel, his encouragement, all these and the other manifestations of his spirit, are not permitted substitution. Save as they linger in our memory, they die with the friend, never to be duplicated. And we would not have it otherwise.

So, in this hour when we are remembering the life and service of George Eberly, the Judge and lawyer, may not some of us be pardoned if we allow our recollection to dwell fondly and affectionately on the memory of George Eberly the scholarly gentleman, the faithful Christian, the sincere and devoted friend. For to us whose personal touch with him had its origin in the earlier years of his life, he bore those relations above all others.

HONORABLE R. J. SHURTLEFF.

MAY IT PLEASE THE COURT:

I will confine my remarks to early experiences with Mr. Eberly that I well remember.

I first met him during the second week of June, 1912. The week before I had graduated from the University and had been admitted to practice before this court and went immediately to Norfolk where I was employed by Charles H. Kelsey. One day the next week Mr. Kelsey handed me a proposed decree in an action to quiet title in Stanton County; said that Judge Graves was holding a session of court that afternoon, that I was to take the noon train and present the matter to the judge, informing him that it was an action to quiet title, service upon all defendants by publication, all defendants in default, that the proceedings were regular, and hand the decree to him for his signature.

When I reached the courtroom the judge and several lawyers were visiting around the table. I introduced myself, and I remember that Mr. Eberly, D. C. Chase, W. P. Cowan and John Ehrhardt, Stanton lawyers, were

present at that time. When the judge took the bench he called my matter up first, I got up and repeated what Mr. Kelsey had told me to say and the judge asked me if I had examined the file, I told him I had not. He then told me he could not give me a decree upon that showing, that he would pass the matter temporarily and for me to be seated. I sat down in dazed confusion.

In a few moments Mr. Eberly came over and told me that he thought he knew what was wrong and told me to get the file. I did and he and I went over the file together. Later the judge called up my case and asked me if I had examined the file. Taking no chances I said that Mr. Eberly and I had examined the file and had found everything regular. He then asked me to hand up my decree which he read and signed.

Mr. Eberly's kindness did not stop there. Knowing that I had some time before the train left for Norfolk he took me to his office and showed me his library. It was in a large separate room across the hall from his office. He was proud of his library, and it was probably the largest library in northeast Nebraska with the possible exception of that of ex-senator William V. Allen of Madison. He told me I was welcome to use it at any time.

Later when I opened my own office in Norfolk I did use it. I would go down on the noon train and work in the library. At those times he would usually visit with me about my problems and gave me valuable suggestions and sound advice. He was a friend of young lawyers.

The scene changes to the month of December, 1918. Coming back from Camp Funston, Kansas, I made connections with the Norfolk train at Fremont and followed the porter into the pullman. In a few moments Mr. Eberly came into the car wearing Major's leaves upon his uniform. We had both a reunion and a visit. The last I had heard of him he was a Colonel commanding a regiment at Camp Dodge in Iowa. He told me that

he had tried at various times over a long period of time through military channels to obtain an overseas assignment with an outfit serving in the field; that finally the war department offered him an opportunity to serve overseas if he would consent to a reduction in rank to Major, and this he immediately agreed to do. He had received orders for overseas service, and, as I recall, was at a point of embarkation awaiting the sailing of a transport when the Armistice was declared. A short time later he received orders cancelling his assignment, and as I remember it, mustering him out of the service. I have an indistinct recollection, and probably members of the family present in this courtroom will know whether my recollection is correct, that when the train pulled into Stanton I heard the sounds of a band upon the platform outside.

It was my custom thereafter, even when I met him informally after he was a member of this court, to call him "Colonel", and I never gained the impression that he was displeased by my so doing.

George A. Eberly was a hard working, conscientious and highly ethical lawyer and judge, a soldier among soldiers, and a man among men.

HONORABLE E. B. PERRY.

MAY IT PLEASE THE COURT:

My early acquaintance with George A. Eberly was as opposing counsel in a contested lawsuit, tried in Stanton, Nebraska, and presided over by the then District Judge, W. V. Allen. From thence, for almost five decades, I knew him as an advocate and a Supreme Court Associate Justice, a man respected, honored and admired; and a friend whose qualities and virtues, discovered, developed, time-tried and tested, are enshrined in the sacred recesses of the hearts of those who knew him as he lived.

In addition to his legal career, George A. Eberly had a separate military career; whether serving as a private

soldier, a rough rider, in the National Guard, as a captain, a major or a colonel, Judge Eberly performed with such patience, skill and perfection as to meet the approval and affection of every private, or officer in the service, with whom he came in contact.

There are varying types of men—there is he who gains honor from his profession, or from his official position; there is still another who reflects honor upon his profession, or upon his official place, be it ever so high. Judge Eberly belonged to the latter class. He rose, step by step, to the head of his profession; he received successive official promotions, honors the highest his fellow citizens had to confer—but we revere him not for the professional success he achieved, nor for the political honors he received.

He was an ornament to his profession; an honor to every office that he held; he was justly loved and honored by his wife, his children and grandchildren who survive him and join us today in our tribute to him.

HONORABLE BERNARD S. GRADWOHL.

MAY IT PLEASE THE COURT:

Only on rare occasions do we come to know a man who has even one quality so outstanding that it endears him to us all. Judge Eberly was not blessed with only one such quality; to him they were legion.

Many a heart will always be warmed with happy memories of his humaneness. Many a mind will constantly be enriched by reading and rereading the treasures in his judicial opinions. Many a spirit will ever be inspired by the vital spark which was an integral part of all of his undertakings, in every walk of life.

To state that Judge Eberly had an outstanding quality of humaneness is such an understatement. There was an enthusiasm, a happiness, in all of his work and play. That twinkle in his eyes could never be hidden.

In the preparation of his judicial opinions he was conscientious, painstaking and intent upon the achieving

of justice. His keen and discerning mind had a fortunate union with an indefatigable constitution and a hunger for truth.

Perhaps most remarkable of all was his extreme sense of balance. He was many-sided, in the fullest and most rounded sense of living. Take, as an example, his pronounced trait of humaneness. He carried this into every field of activity. Consistently with it, he could maintain the strictest judicial dignity while on the bench. He was gentle and believed firmly in the resolution of differences by the due processes of law. Consistently with this innate aversion to the use of force, he could devote much of his mind and physical strength to the maintenance of a sound military program for his country. Jovial to a delightful degree, he was a man of solid convictions and staunch in his defense of them. And while tolerant of the conduct of others, he established the highest possible standards for himself.

Such a life as this cannot be adequately eulogized by words. Judge Eberly's life was its own eulogy.

HONORABLE LYLE E. JACKSON.

MAY IT PLEASE THE COURT:

There is very little, if anything, that I can add to what has already been or will hereafter in this program be said, about Judge Eberly.

Any task undertaken by him was well done. His two main interests, outside of his family, were his career as a lawyer and judge, and service in the Military Forces. He believed in these two activities and gave his best efforts and ability to them. His efforts along that line were well known and fully appreciated.

He was an excellent lawyer. He was thorough in his investigation of the facts and the law and to my knowledge never espoused an unjust cause. He had great pride in his work.

He was tolerant and respected the efforts of those working with and opposed to him.

He gave freely of his time and means in worthy public activities.

It is my honest conviction that his efforts and his ability resulted beneficially to the public.

These traits, together with others which might be discussed, made him outstanding in both his professional and private life.

ASSOCIATE JUSTICE ADOLPH E. WENKE.

We meet here today to honor a former member of this court. Judge George A. Eberly served on this tribunal as an associate judge for a period of approximately 18 years, coming on the court in July of 1925 and serving continuously until January of 1943 when he chose not to be a candidate for reelection. He retired to private life on January 6, 1943.

My personal acquaintance with Judge Eberly began in February of 1924 when I moved to Stanton, Nebraska, to begin the practice of law. In the brief period that he remained in Stanton before moving to Lincoln, which he did when he became a member of this court, my experience with him in matters in which we were both involved as counsel gave me an opportunity to observe the high standards of ethics by which he conducted his practice of the law. He never sought to obtain any unfair advantage for his client and, I might add, never sought to take advantage of my lack of experience. He was most kind and helpful to me, as I know he was to other attorneys, for that was his nature.

Judge Eberly loved people and particularly those in Stanton, whom he knew so well, for that is where he grew up as a boy and lived until he became a member of this court. Whenever I came to Lincoln, while he was a member of this tribunal, I would, whenever opportunity presented itself, stop in his office and visit. On the occasion of those visits he would always inquire at length about the people back home, particularly the younger folks, for he was very much interested in the

youth of our land. I am sure that one of the greatest burdens that Judge Eberly had to bear during his service on this court was the fact that the work of an appellate judge, to a great extent, causes him to live a life apart from his friends for he must work in private and behind closed doors.

As a member of this court Judge Eberly gave unstintingly of his time and talents to its work. No labor was too great nor effort too long that would enable him to know the facts of the case at hand and the law applicable thereto and thus enable him to write an opinion that would give justice under law to the litigants involved. It is said that in one case involving a constitutional question he read more than one thousand opinions before coming to a conclusion. However, whenever he came to a conclusion, Judge Eberly would vigorously fight for its adoption in the conference room.

Judge Eberly firmly believed in a government, such as ours, based on justice under law. This was evidenced by his life long interest in and devotion to the military. The extent to which he believed in this government was dramatically demonstrated in this very court room shortly before our country entered World War II. At the time Judge Eberly and one of his associates, Judge Fred W. Messmore, had sons in the armed services. A counselor at the bar, in order to make a point, erroneously advised the court that this country had just declared war on Germany. Judge Eberly, believing this to be true, turned to his associate, Judge Messmore, and shook his hand, thus indicating his approval of what he thought had been done.

Judge Eberly, when a member of this court and while speaking of a former member thereof, on an occasion such as this said, "An ancient Greek philosopher once said: 'Four things belong to a Judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially.'" Judge Eberly was endowed with all of these.

It is necessary to understand the history upon which

the principles of our jurisprudence are grounded in order to properly and fully understand and apply them to any situation at hand. Judge Eberly had this understanding as evidenced by the opinions of which he was the author. In addition, his long years of experience as a practicing attorney of this state was one of the corner stones for the excellence of his judicial work. I could go on to enumerate other of his qualities as the basis for the excellence of the work he performed as a member of this tribunal, such as his intellect, his honesty, his keen sense of justice, his integrity and many others but it is unnecessary to do so for the reported record of his opinions, in the Nebraska reports, will stand forever as a silent tribute to a work well done.

CHIEF JUSTICE ROBERT G. SIMMONS.

We are grateful to those who have participated in this memorial service. We acknowledge the honor of the presence of Mrs. Eberly and members of the Eberly family.

A true friendship existed for many years between the late Judge Rose and Judge Eberly. We are pleased that Mrs. Rose is in attendance this morning. By her presence she adds the silent but sincere testimonial of Judge Rose.

The report of our committee and the several addresses will be extended on our permanent records and published in our permanent reports. Copies will also be furnished the family of Judge Eberly.

Gentlemen having business with the court will be heard after a short recess.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1959

IN RE APPEAL FROM THE ASSESSED VALUATION OF REAL ESTATE APPROVED BY THE BOARD OF EQUALIZATION FOR COUNTY OF LOGAN, NEBRASKA.

JOHN N. COLLIER ET AL., APPELLANTS, V. COUNTY OF LOGAN, NEBRASKA, ET AL., APPELLEES.

97 N. W. 2d 879

Filed July 17, 1959. No. 34588.

1. **Taxation: Appeal and Error.** An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.
2. **Taxation.** To secure a reduction in the assessed valuation of tangible property it must be demonstrated by evidence that the assessment is grossly excessive, or that its value has not been fairly and proportionately equalized, and is the result of arbitrary or unlawful action.
3. ———. 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 valuations 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.
4. ———. The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action.
5. ———. However, the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent

evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such values to be unreasonable resting upon the party complaining.

6. **Counties: Officers.** Unless prohibited by statute, a county board may adopt such means to assist county officers to properly discharge the duties of their offices as in its judgment it shall deem necessary.
7. **Taxation.** Under the provisions of section 77-112, R. S. Supp., 1955, the elements required to be considered where applicable in fixing the assessed value of tangible property are the earning capacity of the property, its relative location, its desirability and functional use, its reproduction cost less depreciation, and by comparison with other properties of known or recognized value.
8. ———. The burden of proof is upon a taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property resulting in a discriminatory, unjust, and unfair assessment.
9. **Taxation: Appeal and Error.** Where the evidence shows that the assessed value of tangible property has been determined by a formula in substantial compliance with section 77-112, R. S. Supp., 1955, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to such valuation.
10. ———: ———. To secure a reduction in the assessed value of tangible property it must be demonstrated by evidence that the assessment is grossly excessive or that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment.
11. **Taxation.** Individual discrepancies and inequalities in the valuation of real property for tax purposes must be corrected and equalized by the county board of equalization. The duties of the State Board of Equalization and Assessment are unrelated thereto and have no direct relationship to the duties of the county board of equalization. However, the final orders of each must be given effect.
12. ———. A real estate classification and reappraisal committee appointed under the provisions of section 77-1301, R. S. Supp.,

1955, does not put a binding value upon any property. It merely makes recommendations to the county assessor and furnishes evidence for the use of the county board of equalization. Its duties in no manner disturb the requirements as to uniformity of taxation. The same rule applies to professional appraisers duly employed by the reappraisal committee with approval of the county board.

13. **Taxation: Constitutional Law.** Approximation both as to value and uniformity is all that can be accomplished, because absolute mathematical equality in the valuation of properties for tax purposes is unattainable. Therefore, substantial compliance with the requirements of equalization and uniformity in taxation laid down by the federal and state constitutions is all that is required, and such provisions are satisfied when designed and manifest departures from the rule are avoided.

14. **Taxation.** The sale price of property may be taken into consideration in determining the actual value thereof for tax purposes, together with all other elements pertaining to such issue. However, sale price standing alone is not conclusive of the actual value of property for tax purposes and other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. The true test in all cases is to arrive at actual value, meaning value in the market in the ordinary course of trade.

15. ———. Generally, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained.

16. **Courts: Taxation.** Courts should not usurp the functions of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization.

APPEAL from the district court for Logan County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Crosby, Pansing & Guenzel and *Crosby & Nielsen*, for appellants.

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

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

CHAPPELL, J.

Plaintiffs, John N. Collier and his wife, Helen L. Collier, filed a protest with the board of equalization of Logan County, contending that their ranch lands were valued too high for tax purposes in 1957, and that such valuation was discriminatory as lacking in equality and uniformity with other real property in the county. After a public hearing thereof, along with 17 other comparable protests filed by other ranchers, the board of equalization rendered an order rejecting said protests. Therefrom plaintiffs and the other protestants appealed to the district court for Logan County, as provided by sections 77-1510 and 77-1511, R. R. S. 1943. Thereafter, plaintiffs filed their petition on appeal and defendants, County of Logan, its board of county commissioners, board of equalization, and county assessor, filed an answer traversing the allegations of plaintiffs' petition, and plaintiffs were given leave to enter a general denial as reply thereto.

After trial on the merits by the court, whereat voluminous evidence was adduced, the trial court rendered judgment, which found generally in favor of defendants and against plaintiffs. It found that plaintiffs' lands were not assessed too high; that their assessments were comparable to the assessments of other property within the county; and that plaintiffs were not discriminated against by the county assessor or board of equalization. The judgment then dismissed plaintiffs' petition and appeal, and taxed costs to plaintiffs. Thereafter plaintiffs' motion for new trial was overruled and they appealed to this court, assigning in substance as far as important here 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 the assignments. In that connection, plaintiffs also assigned that the trial court erred in the admission of evidence, but that contention is disposed of by the holding in Pierce v. Fon-

tenelle, 156 Neb. 235, 55 N. W. 2d 658, and same requires no further attention.

No new question of law is presented for decision. There are certain pertinent statutes and authorities which are applicable and controlling. In that respect, section 77-201, R. S. Supp., 1955, effective September 18, 1955, provided that all tangible and real property in this state, not expressly exempt therefrom, should be valued at its basic value and assessed at 50 percent of such basic value, which should be taken and considered as the taxable value upon which the levy should be made. Also, section 77-112, R. S. Supp., 1955, effective upon like date, provided that basic value should mean the value of property for taxation that is ascertained by using the following formula where applicable: "(1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; and (5) comparison with other property of known or recognized value." We point out that such sections were amended in 1957 and now appear as sections 77-201 and 77-112, R. R. S. 1943, but they did not become effective until September 20, 1957.

As recently as Matzke v. Board of Equalization, 167 Neb. 875, 95 N. W. 2d 61, we held that: "An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.

"To secure a reduction in the assessed valuation of tangible property it must be demonstrated by evidence that the assessment is grossly excessive, or that its value has not been fairly and proportionately equalized, and is the result of arbitrary or unlawful action."

Also, as held in Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307: "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 valuations 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.

"The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action.

"The presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the party complaining." See, also, Adams v. Board of Equalization, 168 Neb. 286, 95 N. W. 2d 627.

Further, as held in Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489: "Unless prohibited by statute, a county board may adopt such means to assist county officers to properly discharge the duties of their offices as in its judgment it shall deem necessary."

In Newman v. County of Dawson, 167 Neb. 666, 94 N. W. 2d 47, we held: "Under the provisions of section 77-112, R. S. Supp., 1955, the elements required to be considered in fixing the assessed value of tangible property are the earning capacity of the property, its relative location, its desirability and functional use, its reproduction cost less depreciation, and by comparison with other properties of known or recognized value.

"The burden of proof is upon a taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property resulting in a discriminatory, unjust, and unfair assessment.

"Where the evidence shows that the assessed value of tangible property has been determined by a formula in

substantial compliance with section 77-112, R. S. Supp., 1955, which has been uniformly and impartially applied, such assessed value will not ordinarily be disturbed on appeal on evidence indicating a mere difference of opinion as to such valuation.

"To secure a reduction in the assessed value of tangible property it must be demonstrated by evidence that the assessment is grossly excessive or that its value has not been fairly and proportionately equalized, and is a result of arbitrary or unlawful action. The evidence must be such as to indicate the exercise of arbitrary action or the failure of plain legal duty, and not a mere error in judgment."

In LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455, we held that: "Individual discrepancies and inequalities in the valuation of real property for tax purposes must be corrected and equalized by the county board of equalization. The duties of the State Board of Equalization and Assessment are unrelated thereto and have no direct relationship to the duties of the county board of equalization. However, the final orders of each must be given effect.

"A real estate classification and reappraisal committee appointed under the provisions of section 77-1301, R. R. S. 1943, does not put a binding value upon any property. It merely makes recommendations to the county assessor and furnishes evidence for the use of the county board of equalization. Its duties in no manner disturb the requirements as to uniformity of taxation. (The same rule applies to professional appraisers duly employed by the reappraisal committee with approval of the county board.)

"Approximation both as to value and uniformity is all that can be accomplished, because absolute mathematical equality in the valuation of properties for tax purposes is unattainable. Therefore, substantial compliance with the requirements of equalization and uniformity in taxation laid down by the federal and state

constitutions is all that is required, and such provisions are satisfied when designed and manifest departures from the rule are avoided.

"The sale price of property may be taken into consideration in determining the actual value thereof for tax purposes, together with all other elements pertaining to such issue. However, sale price standing alone is not conclusive of the actual value of property for tax purposes and other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. The true test in all cases is to arrive at actual value, meaning value in the market in the ordinary course of trade.

"The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value, or that its value has not been fairly and properly equalized when considered in connection with the assessment of all other property, so that this disparity and lack of uniformity result in a discriminatory, unjust, and unfair assessment.

"Generally, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained.

"Courts should not usurp the functions of tribunals created by law for ascertaining the actual value of property for tax purposes or constitute themselves a taxing board or board of equalization." See, also, Lucas v. Board of Equalization, 165 Neb. 315, 85 N. W. 2d 638.

In the light of such rules, we have examined the record. Because some 17 other comparable cases are still pending in the district court for Logan County, we have cited numerous applicable authorities and we will sum-

marize the evidence at length. In doing so, we will designate John N. Collier as plaintiff, and when speaking of both plaintiffs we will designate them as such. Also, the defendants will generally be designated as such when speaking of them collectively, but the board of county commissioners will generally be called the county board; the board of equalization will be designated as such; and the county reappraisal committee will be called the committee.

The record discloses the following relevant and material evidence: R. K. Haskell, who has been county clerk and ex officio county assessor, register of deeds, and clerk of the district court for Logan County, and has served as secretary of the county board of equalization since 1946, during a period of 12 years, was called as a witness by plaintiffs. As such, he kept and maintained the records required of him. Until 1955, he did all the appraisal work for the county. In the spring of 1955, the county board deemed it advisable to have a reappraisal of the entire county, so the board, as authorized by section 77-1301, R. S. Supp., 1955, duly appointed a reappraisal committee of three men who were residents of Logan County. It is well here to point out that one member of such committee was an implement dealer in Stapleton who was interested in the reappraisal of town property and land in the south part of the county which was adjacent to Lincoln County; another member was a rancher; and the other member was a rancher and farmer. That committee then contacted a representative of Wilkens and Associates, who were professional appraisers, hereinafter called Wilkens. Following a conference with such representatives by the county board and committee, a contract was entered into with Wilkens and approved by the county board on April 4, 1955, by which Wilkens agreed, for a stated consideration, to appraise all improvements and real property in the county. A copy of that contract appears in the record attached to a deposition of a representative of Wil-

kens. The provisions and specifications of that contract require no repetition here.

In June 1955, an appraiser employed by Wilkens, who had a part-time assistant appraiser and clerical help, began the reappraisal work, in cooperation with and approval of the committee. It should be pointed out here that an office in the courthouse was provided for that purpose by the county board. In that connection, the county assessor testified that the reappraisal work began by using the regular county map; a county topographical map; a geodetic survey map of the county; photographs of the kind used by the agricultural stabilization and conservation offices; and a code valuation manual containing a list of tentative land values for the different types of land found in Logan County, which figures were arrived at and agreed upon by Wilkens and the committee, based upon their judgment of values and general sales of such types of land. The appraiser identified the land, the type and amount thereof, its owner, and code classifications showing actual value in 40-acre tracts on card forms prepared and used by Wilkens for that purpose. A sample of such cards and also those used in connection with the appraisal of plaintiffs' lands appear in the record. When the reappraisal had been completed, such cards were turned over to the assessor who filed them and set up his real estate book by taking basic value at 70 percent of actual value then taking 50 percent thereof as the assessed value upon which the levy was made in 1956. In 1957 the assessor's books were extended again in the same manner, except that basic value was called actual value and 35 percent thereof, or one-half of 70 percent of actual value, was figured as the assessed value on which the levy was made.

In that connection, Wilkens and the committee fixed the appraisals of the actual value of lands at "80 percent of what it would sell for" so that such appraisals would carry over and be of use for more than one year. Al-

though no jurisdictional element is shown to be lacking, plaintiffs argued that such an appraisal was unlawful and void. In other words, plaintiffs complain that actual value was originally fixed at 80 percent of market value, and that basic value for 1956 was fixed at 70 percent of that value, which was carried over into 1957 as actual value, but plaintiffs' assessed value on which the levy was made was only 35 percent, or one-half of such 70 percent. We conclude that such procedure was irregular but not void, and that same was entirely favorable and beneficial to plaintiffs who are in no position to complain of such procedure. Section 77-1853, R. R. S. 1943, specifically provides in part that: "Irregularities in making or equalizing assessments, or in making the returns thereof, shall not * * * in any manner invalidate the tax levied on any property or charged against any person." We quoted and applied such section in Gamboni v. County of Otoe, *supra*. Also, as said in State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716: "The object of the law of uniformity is accomplished if all property within the taxing jurisdiction is assessed at a uniform standard of value, as compared with its actual market value, even though there be great disparity between values as assessed for taxes and the value as fixed in the open markets by barter, exchange, or by buying and selling, and other commercial transactions in which values and prices enter as important factors." Plaintiffs' contention has no merit.

The county assessor, as a witness for plaintiffs, also testified that when the county board of equalization met in May 1957, his real estate books had been extended by him, and that thereafter he made up his tax books and imposed the tax based on the county levy times the assessed value, which were then submitted to the county treasurer for collection of taxes when due. He also testified that he had known plaintiffs' land and its topography for more than 40 years; that he had been on it a good many times; and that he knew the nature of its

soils and the kinds of crops grown thereon. He testified that before he had extended the reappraisals on his books, he personally and in his official capacity as assessor, went all over the lands in the county; that he checked the values as he saw and knew them with the values placed on them by Wilkens and the committee; that he made some changes in the reappraisal cards; and that he used the Wilkens' appraisal as an aid in fixing the values on the lands, but that he made an independent examination and adopted the Wilkens' appraisals only when he thought that they should not be changed. He testified that he went over and appraised the lands in the county, including plaintiffs, and that by and large he accepted the values of the lands as made by Wilkens, but that he did so only after he had gone over the lands and approved such values. In the light of such evidence and that hereinafter set forth, it cannot be said, as contended by plaintiffs, that the assessor did not make a personal inspection of plaintiffs' property but relied upon and accepted values thereof fixed by a professional appraiser and the committee.

The lands owned by plaintiffs are described in their petition on appeal. The voluminous description thereof need not be repeated here. It is sufficient to say, as testified by plaintiff, that they are divided into two separate tracts which are operated as a unit, supplementing each other, but are generally designated as the east and west ranches. The west ranch contains 2,320 acres as deeded, but U. S. Highway No. 83 which crosses it takes out about 20 acres, leaving roughly 2,300 acres of range or pasture land, used for summer grazing of plaintiffs' cattle. That land is fairly level in small areas to large hills, but is generally rolling with quite a portion of level land in patches which have been cultivated and let "grow back" to grass. There is a substantial grove of trees but no improvements on the west ranch. Its soil is sandy with a trace of humus in places, and it grows the usual types of grasses found through-

out such area. However, it has no so-called hay land. Plaintiffs purchased the west ranch in May 1948, for $12.50 an acre, and plaintiff gave as an opinion that lands generally around there were selling for more than they were worth and that their west ranch was worth about $12.50 to $14 an acre in 1957. In recent years plaintiffs usually had about 300 head of cattle on the ranch, and last year they got about 115 stacks of hay from their east ranch where their cattle were wintered. That east ranch contains 2,560 acres. In was purchased by plaintiffs in 1950 for a trifle over $19 an acre and was admittedly worth more than $19 an acre in 1957. It has some semi-wet hay land on it and less grazing land than the west ranch, so the two of them make a balanced unit with the west ranch worth less per acre because the land is not as good and it has no hay land upon it.

In that connection, the actual value of plaintiffs' west ranch was fixed at an average of $17.54 an acre and the actual value of plaintiffs' east ranch was fixed at an average of $18.70 an acre for 1957. For that period the average assessed value of plaintiffs' west ranch was fixed at $6.36 an acre, upon which there was levied a tax averaging 23 cents an acre. On the other hand, the average assessed value of plaintiffs' east ranch was fixed at $6.53 an acre, upon which there was levied a tax averaging slightly more than 25 cents an acre. Primarily, plaintiffs' contention is that such values of their west ranch were too high as compared to their better east ranch and some other ranches in the area, and that both ranches were valued too high as compared with values placed on wet hay meadow and farm lands in the south half of the county, whereby plaintiffs were discriminated against. Plaintiffs' theory was that comparatively one acre of such lands should have been valued upon a ratio or equivalent of five acres of grazing land instead of two acres thereof, as was allegedly done by defendants. That contention cannot prevail because such wet hay meadow lands are generally part of farm lands and not

substantially similar to grazing lands. Also, wet hay meadow lands are not sold as such on the market except as a part of farm or ranch lands with which they were classified. Further, the reappraisal was made not only for the purpose of raising values but for the purpose of equalizing such lands with grazing lands, and there is ample evidence that the ratio as made by defendants was not discriminatory as claimed by plaintiffs.

Plaintiffs and other ranchers had an expert loan appraiser inspect their lands in Logan County and examine the assessments thereof. He began that work in October 1957, and spent 34 days doing so. He testified as a witness for plaintiffs that their west ranch was some below average in quality because it had about 400 acres of "go back" land which is now admittedly growing better, and had no hay land on it. His opinion was that the value of the west ranch was about $12 an acre, but that other ranch land in the area had a value of about $15 an acre. He testified that plaintiffs' east ranch was better because it had about 500 acres of subirrigated hay land and some "go back" on it, but that the rest of the land was common sandhill pasture except about 47 acres of sand blowout. His opinion was that without considering improvements, as was done by defendants, plaintiffs' east ranch was worth about $18 an acre because it was slightly better than other ranches in that area. He testified that valley hay land was worth about $75 an acre more or less, but that plaintiffs' hay land was not as good as valley hay land; that valley farm land in the south part of the county was worth about $65 to $70 an acre, but that for stated reasons it varied considerably in quality and value; that between 1955 and 1957 the value of farm lands was lowered about 30 percent by the committee, but ranch lands were raised in value about 40 to 50 percent for tax purposes; and that the average value of ranch land in the north half of the county was about $15 an acre while the average value of the wet hay land in the south half of the county was

an average of about $65 an acre, a ratio of about five to one, with farm lands having a ratio of about four to one. However, such opinion was not based on any actual sales. He admitted that the west ranch would pasture about one head of cattle per 20 acres, while the east ranch was a little better and would pasture about one head per 16 acres. He admitted that plaintiffs' lands were worth some more now than they were in 1948 and 1950, but that they were probably not worth much more; that loans by the Federal Land Bank had increased about 10 percent since 1945; that because of rains during the last 2 years, plaintiffs' lands were looking good now and hay cutting thereon was about half as good as that on valley land; that some of the valley lands were swampy and water logged; that he knew of no sales of land in the north half of the county near plaintiffs; and that his conclusion with reference to comparative ratios aforesaid was not necessarily based on any actual sales but was based simply upon his own opinion.

A retired rancher and owner of 8,520 acres, part of which was in Logan County, testified as a witness for plaintiffs. His lands consisted of grazing land, wet meadow land, and farm land, most of which is in the north half of the county and adjoins plaintiffs' west ranch on the south. Between 1955 and 1957 his farm land and wet hay land, which has quite a lot of swamp on it, was reduced in assessed value for tax purposes, but his grazing land was nearly doubled in value. His opinion was that average ranch land was worth about $15 an acre and average wet valley hay land was worth about $85 to $100 an acre, with average dry farm land worth about $65 an acre in 1957, which was about the same ratio as that given by plaintiffs' appraiser. He testified that he was familiar with plaintiffs' land; that the west ranch was a little below average in the area, but that the east ranch was fully as good or better than the average; and that in 1957 the west ranch was worth about $12.50 an acre and the east ranch was worth $20

an acre, without considering improvements thereon. He bought 920 acres adjoining his land on the east 3 years ago and paid $16 or $17 an acre for it. He also detailed the purchase of hay meadow, farm, and grass land in 1947 at a referee's sale for $28.22 an acre. Although he related other sales, he based his opinion mainly on what land he had purchased. He also has a suit like plaintiffs still pending in the district court for Logan County. He admitted that hay produced in the south valley is pretty rank, not the best quality or as good as hay raised in meadow lands in the hills during the wetter seasons; and that land values have risen on all types of land in the county.

Another ranch owner of 7,680 acres in the county was called as a witness by plaintiffs. He also has a similar suit pending in the district court for Logan County. He testified that his grazing land compared with the average grazing land in the county, including plaintiffs, and that he was familiar with wet hay and farm land in the south part of the county, which in his opinion was worth from $80 to $100 an acre, and has a ratio in value of about four to one greater than grazing land in the north part of the county. Admittedly, he knew of no valley hay land sales as such, and that subirrigation would make a lot of difference in values. He was familiar with plaintiffs' west ranch, but never saw some of the east ranch. His opinion was that plaintiffs' west ranch was worth about $12 an acre.

A member of the county reappraisal committee was called as a witness for plaintiffs. He was the implement dealer heretofore mentioned and one of the committee who employed Wilkens to reappraise the county. He met with Wilkens four or five times when they talked dollar values that should be placed on the various classes and types of land. They drove out and looked at a hay meadow and agreed on a top value of $55 an acre for it. They also discussed the value of grazing land at one of the meetings, and he said that they set a top

value of $15 an acre on that type of land. However, another member of the committee denied that a top value of $15 an acre on grazing land was ever agreed upon. Rather, he said that it was $20 an acre, and that the implement dealer seldom attended meetings of the committee. Plaintiffs' witness aforesaid gave as his opinion that the land in the south part of the county had been valued fairly between various lands over the county.

The county assessor, as a witness for defendants, testified that during the last 12 years while serving as assessor he had traveled and walked over the entire county, including ranches and other lands in the county, almost every year to investigate and check the quality, quantity, and value of such lands for tax purposes, and that he had as assessor and register of deeds become acquainted with every land sale in the county for the last 12 years. During that period he had personally listed all such land transactions in the county and filed such land sales in the county. In doing so, he became so familiar with landowners and their land that if told their names he would immediately know the land they owned and lived on. As shown by sales before and during 1955, the condition of land values and assessments in the county showed great inequity between valuations of farm and wet hay land on the south side that were high in comparison with grazing land on the north side, which was assessed at a low figure. There are variations in the class and quality of hay meadows, but ranch land is pretty equal one with another. There have been no sales of wet hay land separately, but it is owned and used in connection with ranch and farm land and classified generally in connection therewith. His opinion was that wet hay meadow land was worth about $60 an acre, but that it was difficult to value, depending upon its topography and other elements, such as size of the ranch or farm connected with it, how badly it was needed, or how many cattle might or were run upon it, or how much hay land the owner already had, but that

all factors made $60 an acre a fair and reasonable value.

The assessor was familiar with plaintiffs' land. He had been over it about 50 times and was familiar with it since 1914. In 1955 he and the county board, after talking it over, considered it best to have a reappraisal in order to do away with inequities, so a reappraisal committee was duly appointed and approved and Wilkens was duly employed to make the appraisal, and they did so in parcels of 40-acre tracts on each owner's lands. When the card records thereof were all completed and the reappraisals were finished, such cards came to the assessor who prepared an extract from that information and his records, showing the 1955 and 1957 comparative actual values per acre, the assessed values per acre, the total tax, and the tax per acre. The appraisal cards relating to plaintiffs' land and the extract aforesaid appear as exhibits in the record. After the records were delivered to the assessor, he checked them against the lands which he had inspected and personally knew about, whereupon he made some changes and corrected some clerical errors. Thereafter he prepared his real estate book. In his opinion, the values were equally established as between lands in the county, and he accepted such valuations, using Wilkens' report as an aid, after making his own valuations. He was of the opinion that the valuations here involved were fair and equal between various lands in the county, taking into account the types and kinds of land, location thereof, situation as to roads and schools, topography, comparison with other land sales, a record of which appears in the evidence, and his own judgment based on his inspection of the lands and his knowledge of values.

The assessor's opinion was that plaintiffs' lands, considered as a unit, as they were used, had a reasonable market value of $25 to $30 an acre; that separately, plaintiffs' west ranch had a reasonable market value of $20 to $25 an acre; and that separately, plaintiffs' east ranch had a reasonable market value of $30 to $35 an

acre. In 1956, the assessor, the county attorney, and the county board as a board of equalization, went over plaintiffs' west ranch, 40 by 40. They also drove over the pasture on plaintiffs' east ranch, which was admittedly better than the west ranch, and took a good look at the east ranch, although they did not go over it 40 by 40. In 1955 the county committee assisted Wilkens in going over the whole county and setting values for equalization purposes. The assessor met with them occasionally until the reappraisal was completed. The assessor's opinion was that wet hay land, since there was no market for it separately, was not more valuable than farm land. His opinion was that all other land in the county had increased in market value during recent years, but that farm and wet hay land had stayed about the same while ranch land had sold quite regularly and gone up in price steadily. In that connection, he testified that in making the reappraisal Wilkens and the committee attempted to value all the lands at 80 percent of what it would sell for. The assessor did not change the values used in 1955, but he testified that the county board had direction from the State Board of Equalization and Assessment to raise and equalize the value of lands in Logan County.

A rancher for many years, who was a member of the reappraisal committee and owned 7,280 acres and a lease on one school section in Logan County, was called as a witness by defendants. He testified that hay lands had to be and generally were attached to some other land to be of value, and that they usually were so used and operated. He knew the lands in the county, having been over most of it, and as a member of the committee he and one other member thereof met with Wilkens about twice a week for 2 or 3 months whereat they discussed values and comparative values in attempting to equalize taxes in the county. They put such values in code form and on the reappraisal cards by agreement between Wilkens and the committee. They were with Wilkens

when values were placed on the lands and agreed thereto at such meetings in a room set aside for them in the courthouse. In doing so, they attempted to fix values as near as possible to sale value, bearing in mind fluctuations in price in order to make the appraisal last for more than one year. He testified that by agreement a value of $20 was fixed as top value for grazing land and $45 was fixed for meadow land; and that as Wilkens finished the appraisal cards, the committee checked them as they went along, section by section. Sometimes they went out and checked on the property and came to agreement. He and another member of such committee looked through all the appraisal cards and when that was all done gave them to the assessor. It was his opinion that grazing land section by section was valued at a comparable price and that the values of all lands had been adjusted fairly and equally without any discrimination between them. He so testified despite the fact that the tax values on his own grazing lands had been raised about 85 percent, and that it was properly so done by the reappraisal. He had been familiar with plaintiffs' ranches for 25 years. In his opinion, the value of plaintiffs' west ranch was $25 an acre; the value of plaintiffs' east ranch was $35 an acre; and that both ranches used as a unit were worth $30 an acre. He testified that described land comparable with plaintiffs sold 3 to 4 years ago for $25 an acre; that another sold within the last year for $30 an acre; and that another within the last 3 years sold for $28 an acre.

A farmer and rancher, who was another member of the reappraisal committee, was called as a witness by defendants. He had lived in that part of the country since 1907 and owned two sections of land in Logan County and some in McPherson County. He had owned some land in Logan County since 1917. He was generally familiar with all land in that county, and had been over plaintiffs' west ranch a great many times. He generally verified the testimony of the other member of the com-

mittee who testified for defendants. His opinion was that plaintiffs' west ranch was worth $25 an acre; that wet valley land in the county was worth $50 to $60 an acre; and that farm land was worth $30 to $65 an acre. He was not as familiar with plaintiffs' east ranch and had not been over it recently, so the court did not permit him to orally express his opinion on its value in 1957. He testified also that his own land had been doubled in valuation by the reappraisal, but that it was a fair valuation as compared to other lands in the county.

The chairman of the county board, who had been a member thereof since 1952, was called as a witness by defendants. He owns a cattle ranch in Logan County where he operates 8 or 9 thousand acres of land. He had lived on that land 39 years. His ranch has 5 to 6 hundred acres of meadow grass and alfalfa. There is some farm land on his ranch, but it is all planted to alfalfa and grass since 1950. He testified that the State Board of Equalization and Assessment had told the county officials that all real estate in Logan County would have to be equalized. Finding that a reappraisal by the assessor and county board was an impossible task, they consulted with other county boards and two or three different reappraisal companies. Upon the advice of the county attorney, the county board appointed a reappraisal committee in the spring of 1955 who, after investigation and consultation, recommended Wilkens, with whom a contract was made on April 4, 1955, to make an appraisal of county lands, and the county board approved the contract. An office was set up in the courthouse for Wilkens and the reappraisal committee. A code of valuation was then prepared and the county board went over it. He also knew about the reappraisal cards being made out by the appraisers. When those cards were completed they were informally brought to the board where in the presence of the county assessor some comparisons of land values were made. The reappraisal was completed in September or October 1955,

and the cards were given to the county assessor. The witness saw the assessor and his assistant use them to assist in fixing the 1956 schedules. Some changes were made in them. The witness was familiar with lands of the county, particularly on the west side. His opinion was that on March 1, 1957, the average value of grazing land was $25 to $30 an acre; that the average value of wet hay meadow land was $40 to $50 an acre; that farm land in the south and west was worth an average of about $40 an acre; and that the value of small areas of best farm land would fairly average $60 to $70 an acre. He knew of land sales in Logan County and the crops raised on the various types of land. He was familiar with plaintiffs' ranch, and operates land similar thereto in kind and value. He was on it and went over it pretty thoroughly in May or June 1956, to look at it as a member of the board of equalization, because a protest had been filed. The county assessor and county attorney went with the board. At that time they took out what had been fenced as blowouts, for which admittedly plaintiffs received $6 an acre, and the cost of fencing under the agricultural conservation program. The opinion of the commissioner was that on March 1, 1957, plaintiffs' west ranch had a fair and reasonable value of $28 an acre, and that plaintiffs' east ranch had a fair and reasonable value of $35 an acre. He testified that plaintiffs' west ranch land compared about the same as other grazing land in the north half of the county. His opinion, after looking at the land in the north part of the county, was that there was no discrimination; that there might be small inequities but nothing large; and that there was no discrimination as to one class of land against another in the whole county. In fixing the value of plaintiffs' land, he took into account its accessibility, its stock-carrying capacity, the number of cattle he had seen pastured, and what the land would sell for.

The assistant to the county assessor of adjoining Lincoln County since 1955 was called as a witness by de-

fendants. He had charge of real estate assessments in Lincoln County. Prior thereto he had been employed as a land appraiser and was supervisor of appraisers in various counties for Wilkens. He had gone over the past land sales in Logan County and had made pencilled notations on exhibits Nos. 26 through 32 appearing in this record, which notations represent the actual appraised value per acre and the percentage in comparison to the sale value of the properties shown on such records. By such comparison the appraised values per acre by percentages were in all cases less than the sale values. With regard to plaintiffs' lands, the actual value listed on the appraisal card was only 61.36 percent of a $30 unit valuation thereof, as given by defendants' witnesses.

In rebuttal, plaintiffs offered some evidence with regard to rental values of and rents paid for school land and other lands in the county, which rentals had generally increased during the last few years. We do not deem it necessary to recite that evidence here because it could not upon any theory change the result.

In the light of the authorities heretofore cited, and the evidence heretofore set forth, we conclude upon trial de novo that plaintiffs have failed to meet the burden of proof required of them. Therefore, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

ANEITA F. RUEHLE, APPELLANT, V. EDWARD W. RUEHLE, APPELLEE.
97 N. W. 2d 868

Filed July 17, 1959. No. 34592.

1. **Appeal and Error.** Where a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to

determine the nature and terms of the judgment to be entered or the action to be taken thereon.

2. **Divorce.** Section 42-312, R. R. S. 1943, specifically provides that the court in a divorce action retains jurisdiction of the subject matter and the parties for the enforcement or modification of a judgment for maintenance of children, and prescribes the method by which a decree for child support may be modified.
3. ———. Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments.
4. ———. In a decree granting a wife a divorce and the custody of minor children, monthly installments of alimony and support become vested as they accrue, and unpaid, past-due portions thereof are final judgments beyond the power of the court to reduce by modification of the original decree.
5. **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 Lancaster County: LYLE E. JACKSON, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Charles Ledwith, for appellant.

Towle, Young & McManus, for appellee.

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

MESSMORE, J.

This is an appeal by Aneita F. Ruehle from a judgment rendered by the district court for Lancaster County on a mandate issued out of this court.

Numerous pleadings were filed in the trial court which, for the purpose of a determination of this appeal, need not be considered.

In determining this appeal, we first set forth the following: The plaintiff, Aneita F. Ruehle, moved the trial court to enter judgment on the mandate of the

Supreme Court of Nebraska. The case in which the mandate was issued out of the Supreme Court of Nebraska is Ruehle v. Ruehle, reported in 161 Neb. 691, 74 N. W. 2d 689.

The defendant, Edward W. Ruehle, filed objections to the motion for judgment on the mandate on the ground that it would be necessary for the trial court to take evidence in compliance with the opinion of the Supreme Court, relative to what amount of money the defendant had paid out for the support of the minor child of the parties, Jo Ann Ruehle. The defendant further alleged that in addition to payments made to the clerk of the district court for Lancaster County he had paid the aggregate sum of $2,275, between 1940 and 1948, to the plaintiff for support of their daughter, or directly to the daughter, Jo Ann. The defendant prayed the court to dismiss the motion of the plaintiff for judgment on the mandate, and petitioned the court for a hearing to ascertain the amount of child support, if any, due the plaintiff.

The plaintiff filed an answer and reply to the objections of the defendant in which she alleged that if the defendant made any payments directly to the minor child of the parties between 1940 and 1948, such payments were made voluntarily, and were not made in satisfaction of any accord arrived at by the parties; that the obligation of the defendant to make payments for the support of the minor child of the parties was never suspended during the temporary absence of the minor child of the parties from the home of the plaintiff; and that there was due the plaintiff from the defendant, on account of the judgment in the plaintiff's favor for the support of the minor child of the parties, the sum of $3,397.05 with interest at 6 percent per annum on the principal sum of $2,389.28 from June 13, 1956. The prayer was for dismissal of the objections of the defendant, and that the plaintiff recover judgment against the defendant for the sum of $3,397.05, plus in-

terest at 6 percent per annum on the principal sum of $2,389.28 from June 13, 1956, costs, and attorneys' fees.

For some reason not apparent in the record, each of the trial judges of the third judicial district disqualified himself. As a consequence, a judge of another judicial district was called in to hear the case. Trial was had and evidence taken. Judgment was rendered by the trial court as follows: "This court has reviewed the record and evidence and finds that, from February, 1942, to October, 1948, the defendant actually paid into court the sum of $30.00 per month, when, under the order of the Supreme Court, he should have paid $50.00 per month.

"In Addition to the aforesaid thirty dollar monthly payments the court finds that the defendant has actually paid to the plaintiff or to the daughter of the parties hereto for her support and maintenance, the sum of $2,313.71, and that said amount is in excess of the amount actually owing by defendant for child support herein.

"The court further finds that there is nothing due from defendant to plaintiff at this time."

The plaintiff filed a motion for new trial, which motion was overruled, and plaintiff perfected appeal to this court.

The plaintiff assigns as error that the trial court erred in allowing credit to the defendant to apply on a child support judgment requiring monthly cash payments to the clerk of the district court for Lancaster County, where the defendant had made payments of cash and had given gifts of other property to the minor child of the parties, none of which was requested or acquiesced in by, or even reached, the plaintiff, who was the owner of the judgment.

In the case of Asbra v. Dean, 160 Neb. 6, 68 N. W. 2d 696, this court said: "We have held where a mandate incorporates the opinion of the court by reference, they shall be construed together in determining the meaning of the mandate." See, also, State ex rel. Johnson v.

Hash, 145 Neb. 405, 16 N. W. 2d 734; Master Laboratories, Inc. v. Chesnut, 157 Neb. 317, 59 N. W. 2d 571; Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561; Glissmann v. Bauermeister, 146 Neb. 197, 19 N. W. 2d 43.

We make reference to the opinion in the case of Ruehle v. Ruehle, *supra,* as follows: "This is an action brought in the district court for Lancaster County by Edward W. Ruehle, the defendant in a divorce action brought by Aneita F. Ruehle, plaintiff therein, for the purpose of obtaining a judgment for child support rendered against him in the divorce action adjudged satisfied and released of record. The plaintiff in the divorce action, by cross-petition in the instant case, prayed for an accounting * * * for amounts payable as child support."

It appears that Aneita F. Ruehle obtained a decree of divorce from Edward W. Ruehle on May 18, 1939, and was awarded custody of their daughter Jo Ann, a minor child, until further order of the court and, in addition, the sum of $40 a month for child support to be paid to the clerk of the district court for Lancaster County on the first day of each month, to be delivered to Aneita F. Ruehle upon her receipt therefor. On November 29, 1939, Edward W. Ruehle filed a supplemental petition for modification of the original decree of divorce with reference to child support. To this petition Aneita F. Ruehle filed an answer and cross-petition requesting an increase in child support to $75 a month. A decree was entered by the trial court on February 15, 1940, finding that Edward W. Ruehle should pay child support in the amount of $50 a month commencing March 1, 1940, payable to the clerk of the district court until further order of the court.

The parties agreed that certain language in the opinion in Ruehle v. Ruehle, *supra,* contained on pages 693 and 696 thereof, constitutes the background for the present action. We quote therefrom: "By stipulation of the parties filed November 30, 1940, it appears that there were delinquent child support payments in the amount

of $229.84 for which Aneita F. Ruehle agreed to accept $104.92 in full payment. In addition, the defendant was to pay costs in the amount of $38.79 and attorney's fees in the amount of $63, and the amount of $15 on the first day of December 1940 and on the 15th day of December 1940, and on the same dates each month thereafter. In consideration of such payments, Aneita F. Ruehle was not to issue execution, garnishment, or other process against the defendant Edward W. Ruehle as long as the payments continued. On March 1, 1941, if all the payments had been promptly paid, Aneita F. Ruehle was to release her judgment for child support for the amounts accrued, and in the event payments were continued then at the expiration of each 3 months thereafter. The stipulation provided further that in the event Edward W. Ruehle failed to make any payments as therein provided, the plaintiff Aneita F. Ruehle, at her election, might terminate the agreement forthwith and take such steps as she desired to collect child support in the amount of $50 a month for such period of time as she had last receipted for in full. The stipulation provided further: '*It is not the intention of the parties to modify the decree of this court as it now stands, but that said decree shall remain in full force and effect,* subject, however to this agreement between the parties.' The stipulation was dated November 28, 1940." (Emphasis supplied.)

Further quoting from the opinion: "Edward W. Ruehle testified that he made payments to the clerk of the district court which approximated $15 each 2 weeks from December 1, 1940, to June 1949; that the daughter Jo Ann lived with her mother; that in the fall of 1948 Jo Ann changed her residence by entering Wesleyan University and moving onto the campus in Johnson Hall, girls' dormitory at University Place, on November 17, 1948, and from that time on did not live with her mother; that on October 12, 1948, prior to the time Jo Ann entered Wesleyan University, he had a conversation with Jo Ann and her mother relative to Jo Ann

moving from the mother's home to the school; that school had started at that time; that in the conversation had with Aneita F. Ruehle he asked her if Jo Ann had talked to her about going to Wesleyan to live in Johnson Hall, to which she replied that Jo Ann had; that he then asked her if it was agreeable for Jo Ann to move out, and received a reply that if it was Jo Ann's wish it was agreeable; and that he then asked her if Jo Ann had discussed the release of child support payments since he could not afford to pay child support in addition to paying all the expenses while Jo Ann attended the university and she replied that Jo Ann had. He further testified that he paid all of Jo Ann's expenses, tuition, board, room, sorority dues, and other items of expense, and the agreement was that he was to continue to pay child support payments into the district court until such time as it was determined whether or not Jo Ann would continue in school and be successful in her endeavors; that he paid the expenses of Jo Ann at the university and also $30 a month to the clerk of the district court until June 1949, with the understanding that Aneita F. Ruehle was to return the money paid into the clerk's office during such period of time that Jo Ann attended the university; and that Aneita F. Ruehle returned the payments in cash by giving the same to Jo Ann with instructions to return the money to her father. He further testified that in 1949 he stopped this method of making the payments upon the suggestion of Aneita F. Ruehle that it was a nuisance. During the summer of 1947 and 1948 Jo Ann worked at the Lincoln General Hospital as a nurses aid. In the fall of 1949 she entered Bryan Memorial Hospital to become a registered nurse. She continued her employment there until August 17, 1952. She was graduated from Wesleyan University in 1953. During the time she was taking training at Bryan Memorial Hospital he paid her expenses. Jo Ann subsequently married and moved to Los Angeles."

The following also appears in the opinion: "The stipulation, as appears in the instant case, in no sense modified the decree with reference to the child support, and it was so agreed by the parties as the stipulation discloses."

We went on to say in the opinion: "We are in accord that there is a complete accord and satisfaction of the child support that would have accrued or become due from and after October 12, 1948, by reason of an agreement that was far more beneficial to the interests of the daughter Jo Ann. * * *

"We conclude that there should be an accounting as to the child support payments which had accrued and were due up to October 12, 1948, with interest thereon at the legal rate, and that all credits should be given to the appellee for payments made by him for child support. The cause is remanded to the trial court for determination of the amount of child support due on this phase of the case. * * *

"For the reasons given in this opinion, the judgment of the district court is reversed and the cause remanded with directions to modify the decree in accordance with the opinion."

The mandate in Ruehle v. Ruehle, *supra,* commanded the district court, without delay, to proceed in conformity with the judgment and opinion of this court.

In the case of Ruehle v. Ruehle now appealed to this court, Edward W. Ruehle testified as to the amounts he was required to pay for the support of Jo Ann, the minor child of the parties, and the manner in which he was required to make such payments. He further testified that in addition to the payments of $30 a month to the clerk of the district court starting December 1, 1940, he made other payments in cash to Aneita F. Ruehle, or to his daughter Jo Ann; and that he kept a record of all payments made direct to Aneita F. Ruehle and to Jo Ann. There was introduced in evidence an account of these payments, outside of the

money paid in to the office of the clerk of the district court for child support. A compilation of these figures was made by Edward W. Ruehle and received in evidence.

On cross-examination he testified that he did not ascertain how Jo Ann spent the money he gave her for Christmas shopping or on other occasions; and that there was a policy of insurance for $2,000 written by him in a company he represented, upon which he paid the premiums and in which he was designated the beneficiary. This policy was on the life of Jo Ann. He further testified to the purchase of clothes for Jo Ann, and amounts given to her at different times to spend and for entertainment.

Aneita F. Ruehle testified that Jo Ann did not bring home to her any of the amounts given to her by Edward W. Ruehle. She knew nothing about the policy of insurance on the life of Jo Ann. She did not regard the money spent by Jo Ann while shopping with Ruehle's second wife, or attendance at entertainments, as contributions for child support. She further testified that at all times between December 1, 1940, and October 12, 1948, she had maintained a home where Jo Ann either lived or could come to visit.

The following are applicable to a determination of this appeal.

Section 42-312, R. R. S. 1943, specifically provides that the court in a divorce action retains jursidiction of the subject matter and the parties for the enforcement or modification of a judgment for maintenance of children, and prescribes the method by which a decree for child support may be modified.

Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments, and the party obligated to pay such amounts cannot

satisfy the sum in whole or in part by voluntarily furnishing such things as clothes, entertainment, spending money, etc., direct to the minor or minors. See Ruehle v. Ruehle, *supra*. See, also, § 42-318, R. R. S. 1943.

In Wassung v. Wassung, 136 Neb. 440, 286 N. W. 340, this court said: "The general rule is stated in 19 C. J. 359, as follows: 'Payments exacted by the original decree of divorce become vested in the payee as they accrue, and the court, on application to modify such decree, is without authority to reduce the amounts or modify the decree with reference thereto retrospectively; the modifying decree relates to the future only and from the time of its entry.' * * *

"Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, marriage, or the reaching of majority, such payments become vested in the payee as they accrue. The courts of this state are without authority to reduce the amounts of such accrued payments.

"This rule is consistent with the holdings of this court with reference to alimony and child support, down to and including the case of McIlwain v. McIlwain, 135 Neb. 705, 283 N. W. 845, and Graham v. Graham, 135 Neb. 761, 284 N. W. 280." See, also, Clark v. Clark, 139 Neb. 446, 297 N. W. 661; Schrader v. Schrader, 148 Neb. 162, 26 N. W. 2d 617; Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919.

Ruehle v. Ruehle, *supra*, contains some of the above-cited authorities which were likewise applicable to the appeal lodged in this court in that case.

In the case of Finnern v. Bruner, 167 Neb. 281, 92 N. W. 2d 785, this court said: "In Sullivan v. Sullivan, 141 Neb. 779, 4 N. W. 2d 919, this court held that: 'In a decree granting a wife a divorce and the custody of minor children, monthly installments of alimony and support become vested as they accrue, and unpaid, past-due portions thereof are final judgments beyond the

power of the court to reduce by modification of the original decree.' " Schrader v. Schrader, *supra,* is cited, also.

In Finnern v. Bruner, *supra,* the court concluded that the judgment of the trial court should be reversed and the cause remanded with directions to dismiss the plaintiff's petition and render judgment in favor of the personal representative of the estate of the deceased mother for the amount of the judgment for child support which remained unpaid, with interest at 6 percent upon unpaid weekly installments thereof as they accrued prior to September 15, 1935, and upon the principal amount thereof remaining unpaid from September 15, 1935, to date, bearing in mind that interest should not be compounded in any event.

The above is the kind of judgment which should have been entered on the mandate in the case of Ruehle v. Ruehle, *supra.*

The plaintiff in the instant case assigns as error the failure of the trial court to rule upon the plaintiff's motion for allowance of attorneys' fees. It is apparent from the record that attorneys' fees were not allowed in the district court. We conclude that there should be no allowance of attorneys' fees.

We conclude that the judgment of the trial court should be reversed and the cause remanded with directions to render judgment in favor of the plaintiff for the amount of child support which remains unpaid, with interest at 6 percent per annum upon the unpaid installments thereof as they accrued prior to October 12, 1948, and upon the principal amount thereof remaining unpaid from such date, bearing in mind that interest shall not be compounded in any event, defendant Edward W. Ruehle to pay all costs.

For the reasons given herein, we affirm the judgment of the district court in not allowing the attorneys' fees as costs in favor of the plaintiff; and we reverse the judgment of the district court as the same relates

to child support and remand the cause with directions to render judgment in conformity with this opinion.

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

CHAPPELL, J., concurring.

As far as important here, the mandate of this court in Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689, provided as follows: "* * * upon a trial of which cause in said Supreme Court during the January Term, A. D. 1956, a certified copy of the opinion of the Court being attached hereto and made a part hereof, the following judgment was rendered:

" 'This cause coming on to be heard upon appeal from the district court of Lancaster County, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court. *It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, reversed and the cause remanded with directions to modify the decree in accordance with the opinion of this court this day filed herein.* It is further considered, ordered and adjudged that appellant pay all costs incurred herein by her taxed at $20.00; and that appellees pay all costs incurred herein by them, taxed at $5.00; for all of which execution is hereby awarded, and that a mandate issue accordingly.'

"NOW, THEREFORE, You are commanded, without delay, to proceed in conformity with the judgment and opinion of this Court.

"WITNESS, The Honorable Robert G. Simmons, Chief Justice and the Seal of said Court, this nineteenth day of March, 1956. George H. Turner, Clerk. By Gerald S. Vitamvas, Deputy." (Italics supplied.)

As I view the matter, decision in this second appeal is controlled entirely by rules of law under which we are required to determine whether or not the trial court complied with the mandate in the rendition of its

judgment. I agree that the trial court did not do so.

In Asbra v. Dean, 160 Neb. 6, 68 N. W. 2d 696, citing authorities, we held: "The provisions of a mandate of this court should be considered as a whole in determining what was decided on appeal.

"When a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.

"When a mandate is in the same general language of the opinion in its directions to the lower court, reference may be made solely to the opinion to determine whether the lower court's decree is in accordance with the mandate."

Also, in Jurgensen v. Ainscow, 160 Neb. 208, 69 N. W. 2d 856, we held that: "When a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.

"When this court reverses a decree as to a matter finally determined thereby, and remands the cause with directions to enter a specific judgment or decree, the mandate of this court is final and conclusive upon all parties, as to all matters so directed, and no new defenses can be entertained or heard in opposition thereto.

"Public interest requires that there shall be an end to litigation, and when a cause has received the consideration of this court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate."

In Noble v. City of Lincoln, 158 Neb. 457, 63 N. W. 2d 475, we reaffirmed the general rules that: "The decision of questions presented to this court in reviewing the

proceedings of the district court becomes the law of the case and for purposes of the litigation settles conclusively the matters adjudicated expressly or by necessary implication.

"The law of the case applies to not only questions actually and formally presented but to all questions existing in the record and necessarily involved in the decision."

We have adhered to these general rules in many cases. See Nebraska Digest, Vol. 2, Appeal and Error, Key No. 1195.

Further, in County of Madison v. School District No. 2, 148 Neb. 218, 27 N. W. 2d 172, quoting from International Harvester Co. v. County of Douglas, 146 Neb. 555, 20 N. W. 2d 620, we said: "The rule is: '* * * the controlling effect of a decision must relate to the factual condition as stated in the opinion. To go behind facts so stated and materially to change the fact basis is to remove the decision as an authority.' " I believe that the case at bar is no exception to the foregoing rules.

The substance of the stipulation here involved, which was filed November 30, 1940, is set forth in the original opinion. As far as important here, that stipulation agreed that defendant was then delinquent in payments of child support to plaintiff in the amount of $229.84, for which plaintiff agreed to accept from defendant $104.92 in full payment, and defendant agreed to thereafter pay $30 a month, payable on the first and fifteenth of each month, beginning December 1, 1940, but that in the event defendant failed to make any such payments plaintiff at her election might terminate the agreement forthwith and take such steps as she desired to collect child support in the amount of $50 a month as ordered by the trial court in its modification of the original decree effective March 1, 1940.

In that connection, the stipulation, as quoted in the original opinion, specifically provided that: " 'It is not the intention of the parties to modify the decree of

this court as it now stands, but that the decree shall remain in full force and effect, subject, however to this agreement between the parties.' "

With regard thereto, after citing authorities, we specifically concluded in the original opinion that: "The stipulation, as appears in the instant case, in no sense modified the decree with reference to the child support, and it was so agreed by the parties as the stipulation discloses."

The opinion then went on to say: "The appellee contends that an accord and satisfaction prevailed in the instant case when the oral agreement between the appellant and the appellee was made on October 12, 1948, and that according to this agreement the *appellant agreed to release the judgment against the appellee for all child support that might have accrued and become due under the decree. We are not in accord with the appellee's contention in this respect.* We are in accord that there is a complete accord and satisfaction of the child support that would have accrued or become due from and after October 12, 1948, by reason of an agreement that was far more beneficial to the interests of the daughter Jo Ann. She had the benefit of an education and nurses training, and acquitted herself with honor, all through the efforts of the appellee by agreement with the appellant.

"We conclude that there should be an *accounting as to the child support payments which had accrued and were due up to October 12, 1948,* with interest thereon at the legal rate, and that all credits should be given to the appellee for payments made by him for child support. The cause is remanded to the trial court *for determination of the amount of child support due on this phase of the case.*" (Italics supplied.)

Black's Law Dictionary (3d Ed.), p. 28, citing authorities, defines "Accounting" as: "The making up and rendition of an account, either voluntarily or by order of a court. * * * In the latter case, it imports a rendi-

tion of a judgment for the balance ascertained to be due. * * * The term may include payment of the amount due." See, also, Words and Phrases (Perm. Ed.), Accounting, Vol. 1, p. 543.

An examination of the mandate and all of our original opinion discloses, as I view it, that by such accounting for and determination of child support payments which had accrued and were due from defendant under the decree prior to October 12, 1948, as claimed by plaintiff in her cross-petition and denied by the trial court, this court meant an accounting and determination of the difference between $229.84, the amount of child support which was admittedly delinquent and unpaid on December 1, 1940, under the decree effective March 1, 1940, and $104.92 paid by defendant thereon, and the difference between $30 a month paid as child support by defendant between December 1, 1940, and October 12, 1948, and the $50 a month for child support during the same period, as had been ordered by the trial court in its modification of the original decree, which order at all times, as the original opinion concluded, had remained in full force and effect. When such an accounting or determination is made, plaintiff would be entitled to a judgment for the total of such differences, including interest at the legal rate upon delinquent child support installments, as they had accrued and vested under the decree prior to October 12, 1948, and on the principal amount remaining unpaid from such date, with "no allowance of attorney's fees to be taxed as costs in behalf of" plaintiff, and that plaintiff should "be required to pay her own costs and attorney's fees."

In that connection, our original opinion finally said: "For the reasons given in this opinion, the judgment of the district court is reversed and the cause remanded with directions to modify the decree in accordance with the opinion."

Viewed entirely as a question of law, as aforesaid, I agree that the opinion of Messmore, J., which has been

submitted and adopted in the present second appeal, disposes of the case in the manner required by applicable and controlling rules of law.

SIMMONS, C. J., dissenting.

The court's opinion in this case does not touch the issue which is here for determination. We are not called upon nor do we have the right to redetermine the questions decided in Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689.

That decision became final. The trial court was bound by it. We are bound by it.

I have no disagreement with the rules of law as stated by the court which are: "Where a mandate of the Supreme Court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon." "Section 42-312, R. R. S. 1943, specifically provides that the court in a divorce action retains jurisdiction of the subject matter and the parties for the enforcement or modification of a judgment for maintenance of children, and prescribes the method by which a decree for child support may be modified." "Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments." "In a decree granting a wife a divorce and the custody of minor children, monthly installments of alimony and support become vested as they accrue, and unpaid, past-due portions thereof are final judgments beyond the power of the court to reduce by modification of the original decree."

For reasons stated later herein there is no proposal to change, alter, or reduce accrued and unpaid child support payments. They are fully recognized.

I agree with the rules of law stated in the concurring opinion, as follows: "When this court reverses a decree as to a matter finally determined thereby, and remands the cause with directions to enter a specific judgment or decree, the mandate of this court is final and conclusive upon all parties, as to all matters so directed, and no new defenses can be entertained or heard in opposition thereto." "The decision of questions presented to this court in reviewing the proceedings of the district court becomes the law of the case and for purposes of the litigation settles conclusively the matters adjudicated expressly or by necessary implication."

I hold that the law of the case rule requires an affirmance of the judgment of the trial court.

The opinion in Ruehle v. Ruehle, *supra,* discussed first the pleadings and evidence and then announced this conclusion: "We conclude that there should be an accounting as to the child support payments which had accrued and were due up to October 12, 1948, with interest thereon at the legal rate, and that all credits should be given to the appellee for payments made by him for child support." It then remanded the cause "to the trial court for determination of the amount of child support due on this phase of the case."

Neither by the conclusion above quoted nor by the directions of the remand was the trial court limited to a determination of the "amount of the judgment for child support which remains unpaid." This last quote is taken from Finnern v. Bruner, 167 Neb. 281, 92 N. W. 2d 785, which the court now says is "the kind of judgment which should have been entered on the mandate" in this case. But the Finnern judgment is not the judgment which the court ordered in the first opinion of this case.

The conclusion of the court in the first opinion above quoted is in two parts. First it directs an accounting as to the child support payments which had accrued and were due to October 12, 1948, with interest thereon at the legal rate. Had the court stopped there in its conclu-

sion, and had it remanded the cause for determination on that basis there would be no disagreement between us now.

The rules of law relied on by the court would then be applicable, and are applicable to a determination of the accrued unpaid amount of the decree. The Finnern opinion would then be applicable.

But the court did not stop there. It further directed "that all credits should be given to the appellee for payments made by him for child support."

Obviously that involves subtracting the "payments made" by Mr. Ruehle "for child support" from the amount accrued, due and unpaid on the judgment. The difference, if any, would be the amount of the judgment to be entered against Mr. Ruehle. I point out that the amount of those payments was an issue in the first case which was determined here for the opinion recites that Mr. Ruehle "alleged that the child support payments were *made directly to* Aneita F. Ruehle or to the clerk of the district court until September 1948, * * *." (Emphasis supplied.)

It is obvious that the trial court accepted the conclusion of this court in the first opinion in this case and complied with the directions of the remand. Its decision is now reversed by ignoring that part of the conclusion which directs that "all credits should be given" Mr. Ruehle "for payments made by him for child support."

The first part of the conclusion required but a simple computation of the amount due on the decree, the second part of the conclusion required an accounting of payments made for child support to Mrs. Ruehle and giving Mr. Ruehle credit for those payments.

The court's opinion ignores the second provision of the remand order and in effect reads it out of the remand order. We are not here concerned with the correctness of the remand order. We are concerned with the fact of the remand order. It became the law of the case.

What, then, is the law of the case rule referred to, but

not stated, in the concurring opinion. It is: As early as 1899 in an opinion by Norval, J., in Farmers & Merchants Bank v. German Nat. Bank, 59 Neb. 229, 80 N. W. 820, this court held: "When a cause is remanded by this court with directions as to further proceedings, the court below has no power to do anything but carry out the directions thus given it."

In Story v. Robertson, 5 Neb. (Unoff.) 404, 98 N. W. 825, in an opinion by Fawcett, C., it was held: "When the district court received the mandate of this court it was its duty to do just what it did in this case, literally obey the mandate."

In Regouby v. Dawson County Irr. Co., 128 Neb. 531, 259 N. W. 365, in an opinion by Chappell, District Judge, we reversed the judgment and remanded the cause with directions to "compute the damages in accordance with the opinion of this court * * *." We held: "* * * when a case is sent back by the supreme court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein."

In Elliott v. Gooch Feed Mill Co., 147 Neb. 612, 24 N. W. 2d 561, in an opinion by Messmore, J., we held: " 'When a judgment of the district court is reversed and a cause remanded with specific directions, it is the duty of the district court to follow the mandate.' "

In De Lair v. De Lair, 148 Neb. 393, 27 N. W. 2d 540, in an opinion by Wenke, J., we held: "When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein."

In Rhoades v. State Real Estate Commission, 153 Neb. 625, 45 N. W. 2d 628, in an opinion by Boslaugh, J., we held: "When a case is remanded by this court to the district court with directions for its disposition, the district court must obey and perform the mandate of this court."

In Stocker v. Wells, 155 Neb. 472, 52 N. W. 2d 284, in an opinion by Chappell, J., we held: "When a case is sent back by the Supreme Court to the trial court with specific directions, the trial court has no alternative except to follow the directions given in the manner set forth therein."

In Jurgensen v. Ainscow, 160 Neb. 208, 69 N. W. 2d 856, in an opinion by Carter, J., we held: "When this court reverses a decree as to a matter finally determined thereby, and remands the cause with directions to enter a specific judgment or decree, the mandate of this court is final and conclusive upon all parties, as to all matters so directed, and no new defenses can be entertained or heard in opposition thereto."

I submit that the trial court here literally followed the mandate of the former opinion and its judgment in doing so should be affirmed.

There are two other matters that I deem should be mentioned. The court in its opinion, and the concurring opinion, holds Mr. Ruehle to the stipulation of facts which is set out in full in the dissenting opinion of Carter, J., in the first decision here. It, however, refuses to hold Mrs. Ruehle bound by the same stipulation. That need not be further discussed. The mere statement of the fact is sufficient.

The court denies Mrs. Ruehle an allowance of attorneys' fees. I agree. However, the reason given is: "Attorneys' fees in divorce proceedings will ordinarily be denied where there appears no reasonable justification for the position taken by the party claiming them."

The court, then, holds that there is "no reasonable justification for the position taken" by Mrs. Ruehle and at the same time grants her all relief she requests, save attorneys' fees.

I am authorized to say that Carter, J., and Boslaugh, J., concur in this dissent.

BERNARD M. MOLLNER ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS, JAMES W. PATTAVINA ET AL., INTERVENERS-APPELLEES.

98 N. W. 2d 33

Filed July 24, 1959. No. 34596.

1. **Constitutional Law: Municipal Corporations.** The purpose and effect of the home rule charter provisions of the Constitution are to render cities, entitled to the benefit of the provisions, as nearly independent as possible of state legislation.
2. **Statutes: Municipal Corporations.** Home rule charter cities as to all matters of strictly local concern operate free and independent of state legislation.
3. ———: ———. The right of a city to provide for a particular form of government in a home rule charter does not depend upon whether the Legislature by statutory enactment has authorized such form, nor is it subject to statutory conditions and limitations upon which the Legislature may have authorized a city to adopt it.
4. **Constitutional Law: Municipal Corporations.** A city may include in its home rule charter any provision for its government that does not conflict with the Constitution or any general law of the state.
5. **Municipal Corporations.** The exercise of the legislative power of a municipality is not always exclusive in the city council thereof. The electors of the city may be authorized to participate therein.
6. ———. It was proper for the electorate of the city of Omaha to make designated and properly identified provisions of the 1922 home rule charter of the city part of the new 1956 home rule charter so that they would be applicable to and would control local affairs of the city as enacted ordinances of identical subject matter could have done until the designated provisions were superseded by ordinances of the city.
7. **Pensions.** A vested right in or to a pension does not exist in the beneficiary until the event happens upon which the obligation to pay the pension depends.
8. ———. A change in pension provisions prior to when the right thereto vests and becomes absolute does not impair any property right of the beneficiary of the pension and is not illegal.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed and remanded with directions.*

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Donald H. Erickson, Benjamin M. Wall, and *Edward M. Stein,* for appellants.

Theodore L. Richling, for appellees.

Webb, Kelley, Green & Byam, for interveners-appellees.

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

BOSLAUGH, J.

The city of Omaha, a metropolitan city, by a majority vote of the electorate of the city adopted a home rule charter on July 18, 1922, as authorized by Article XI of the Constitution of Nebraska. It, as originally adopted, consisted of the provisions of the legislation of 1921 to incorporate metropolitan cities and to provide for the government, powers, and duties of cities of that class. Laws 1921, c. 116, p. 397. The city of Omaha has from the effective date of that charter operated as a home rule city. The city of Omaha was, as to local affairs, governed by the 1922 charter until it was amended and thereafter as it was amended from time to time until a new home rule charter, adopted by the electorate of the city of Omaha on November 6, 1956, became effective. The former will be referred to as the 1922 charter, the latter as the 1956 charter, and the city of Omaha will be designated the city.

Section 8.20 of the 1956 charter has three parts. The first consists of the following: "(1) The respective provisions of the following sections of the Omaha Home Rule Charter of 1922, as amended, to the extent that such provisions are not inconsistent with the provisions of this charter, shall be in full force and effect in like manner as ordinances until superseded in whole or in part, respectively, by ordinances which the Council may and is hereby authorized to enact: * * *." That is followed by a list of numbered sections of articles

identified by Roman numerals and following each section listed is a summary of the subject of it. The second states: "(2) The following sections of the Omaha Home Rule Charter of 1922, as amended, are hereby expressly repealed: * * *." That is followed by a list of numbered sections of articles identified by Roman numerals and following each section listed is a summary of the subject of it. The third declares: "(3) The following sections of the Omaha Home Rule Charter of 1922, as amended, all of which derive their force and effect both from the fact that they are laws of the State of Nebraska and provisions of the Omaha Home Rule Charter of 1922, as amended, shall not in the future have force and effect as charter provisions: * * *." That is followed by a list of numbered sections of articles identified by Roman numerals and following each section listed is a summary of the subject of it.

The plaintiffs in the district court will be herein called appellees. The interveners will be identified herein as they were in the trial court. The city and its officers will be herein designated appellants.

The validity of the entire 1956 charter was not an issue and was not considered or decided by the trial court. That was the finding and decision of that court and there is no cross-appeal. The validity or legal effect of subsection (1) of section 8.20 of the 1956 charter was and is an issue in this litigation. The trial court found: "THAT by Section 8.20 (1) of the Home Rule Charter of the City of Omaha, 1956, the electorate of Omaha retained certain specified Articles and Sections of the Omaha Home Rule Charter of 1922, as amended; that said Articles and Sections were retained as provisions of the Charter and not as Ordinances; that if an attempt was made in Sections 8.20 (1) of the Home Rule Charter of the City of Omaha, 1956, to repeal certain provisions of the existing Charter and at the same time to re-enact these provisions as Ordinances, such was and is not legal or valid; that the attempt to authorize

the City Council of Omaha to supersede by Ordinance any Charter provisions is illegal, ineffective and void; that, therefore, the provisions for compulsory retirement of city employees included in Ordinance No. 19728, which are inconsistent with the provisions of the Home Rule Charter of the City of Omaha, 1956, or with the Articles and Sections of the Omaha Home Rule Charter of 1922, as amended, which are retained, are invalid."

The conclusion of the trial court on this part of the case was that by section 8.20 (1) of the 1956 charter the electorate of the city retained the therein specified sections of the 1922 charter, as amended, as provisions of the existing charter and not as ordinances. The city council was permanently enjoined from attempting to supersede the sections or any of them in whole or in part, respectively, by ordinances, and appellants were enjoined from attempting to supersede or modify the provisions for compulsory retirement by other than procedures for proper amendment of the charter of the city by the electorate thereof.

The problem on this phase of the case concerns the authority of the electorate of Omaha to make designated and properly identified provisions of a prior home rule charter of the city a part of a new home rule charter of the city so that they would be applicable to and govern and control local affairs of the city as duly enacted ordinances containing the identical subject matter as the designated provisions could have done until the designated provisions were superseded by ordinances of the city which the council of the city was by the charter authorized to enact. A consideration of the stated problem invites a review of the purpose, nature, scope, permissible contents, and limitations of a home rule charter. The authority for home rule charters of cities is contained in sections 2 to 5, inclusive, of Article XI of the Constitution of the state. Section 2, adopted in 1912, includes the following: "Any city having a popu-

lation of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a convention of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city * * *, whose duty it shall be * * * to prepare and propose a charter for such city, which charter, when completed, with a prefatory synopsis, shall be signed by the officers and members of the convention, or a majority thereof, and delivered to the clerk of said city, who shall publish the same in full * * *." Section 5, adopted in 1920, contains this: "The charter of any city having a population of more than one hundred thousand inhabitants may be adopted as the home rule charter of such city by a majority vote of qualified electors of such city voting upon the question, * * * subject to the Constitution and laws of the State."

State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N. W. 499, contains the following: "The purpose of section 2, art. XI of the Constitution of Nebraska, providing that any city with more than 5,000 inhabitants 'may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state,' was to render such cities as nearly independent as possible of state legislation. * * * Liberal judicial construction has encouraged this salutary assumption by municipalities of the powers and responsibilities of local self-government. * * * Recurrently we discover that democracy is only the hearth-shadow of local self-government and try to preserve the crackle of its flame. * * * The extent of the powers which may be incorporated in a home rule charter was defined in Consumers Coal Co. v. City of Lincoln, *supra* (109 Neb. 51, 189 N. W. 643), as follows: 'We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the munici-

pality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, until it speaks.' * * * The constitutional limitation that a home rule charter must be consistent with and subject to the laws of the state simply means, therefore, that on matters of such general concern to the people of the state as to involve a public need or policy, the charter must yield to state legislation. * * * But in matters which are purely of local concern, or which only indirectly or remotely affect the people of the state outside the particular municipality, the provisions of a home rule charter will control over conflicting statutory enactments. * * * And the legislature cannot, even by a general law, affect the powers of a city under its home rule charter over matters which are essentially municipal affairs. * * * In adopting a home rule charter, however, the city had the right to make provision therein for any form of local government it desired, which was not in conflict with the letter and spirit of our Constitution. Its right to adopt a particular form of government was in no way dependent upon whether the legislature, by statutory enactment, had authorized such a form, nor was it subject to the statutory conditions and limitations upon which the legislature had authorized a city to adopt it."

In Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 276 N. W. 196, this court said: "A city may enact and put into its home rule charter any provisions for its government that it deems proper so long as they do not run contrary to the Constitution or to any general statute."

Noble v. City of Lincoln, 153 Neb. 79, 43 N. W. 2d 578, declares: "* * * in a city operating under a home rule charter the charter is the fundamental law

for the government of the city. It may contain * * * anything relating to its government which is not violative or in conflict with the United States Constitution or the Constitution or laws of this state. * * * The people of a city in the adoption * * * of a home rule charter act legislatively. * * * The significant difference between a city operating under a charter prescribed by the Legislature and one operating under a home rule charter is that while the two charters are legislative, in the former instance the legislative body is the state Legislature whereas in the latter it is the voters of the organized community itself. The power to act in each instance is constitutional but the action taken under the power is legislative."

Niklaus v. Miller, 159 Neb. 301, 66 N. W. 2d 824, speaking of a home rule charter, said: "As to all subjects of strictly local municipal concern such charter cities operate free and independent of state legislation."

Sandell v. City of Omaha, 115 Neb. 861, 215 N. W. 135, states: "The trend of judicial pronouncement appears to sanction an enlargement of the powers of the municipality for self-government, within constitutional limits, rather than a curtailment of such powers. And this on the broad and reasonable assumption that the city, in the formation of its charter, knows better than the legislature how to anticipate and to enact needful city ordinances."

A charter framed as the Constitution provides, within the limits prescribed, has the force and effect of one granted by legislative act. The words of the Constitution mean that the inhabitants may adopt a charter for the government of themselves as a city, including all that is necessary, desirable, or incidental to the government or affairs of the municipality. The power to form a charter may be likened to the power of a people to form a constitution. The charter of a home rule city is its constitution. The power of the electors to adopt a proposed charter carries with it the implied authority

to provide for the effective functioning of the new government under the proposed charter when adopted because the greater power necessarily includes the lesser and according to the theory of government provided by the constitutional provision for a home rule city the sovereign power is the people subject only to the constitution or any applicable general statute of the state. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Noble v. City of Lincoln, *supra;* Streat v. Vermilya, 268 Mich. 1, 255 N. W. 604; Young v. City of Seattle, 30 Wash. 2d 357, 191 P. 273, 3 A. L. R 2d 704; 5 McQuillin, Municipal Corporations (3d Ed.), § 15.19, p. 93.

Massa v. City of Cincinnati, 51 Ohio O. 101, 110 N. E. 2d 726, was an action by a taxpayer to enjoin the city manager of Cincinnati and the director of the department of public works of the city from further continuance of a course of conduct being pursued by them in reference to the improvement of streets. The city had adopted a charter and an administrative code. The court said a question in the case was whether the method of procedure in repairing and resurfacing the streets violated any provision of the constitution or any controlling statute of the state. The opinion in the case contains the following: "Prior to 1912 municipal corporations in this state derived their powers from the General Assembly, and had only such powers as were thus granted. In 1912 the people of Ohio made a new and different distribution of power. Since that time municipalities deprive (derive) their powers from the Constitution and not from the General Assembly. ARTICLE XVIII. 'Section 3. (Powers) Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.' * * * 'Section 7. (Home Rule) Any municipality may frame and adopt or amend a charter for its government and may,

subject to the provisions of Section 3 of this Article, exercise thereunder all powers of local self-government.' * * * Section 3 of Article XVIII has been before the Supreme Court in many cases. Some of those cases involved the question of whether certain matters were of purely local concern, or whether they were matters of state-wide concern. * * * In the case of Perryburg et al. v. Ridgeway, a taxpayer, et al., 108 Ohio St., 245, the Supreme Court squarely decided that matters with regard to streets were of purely local concern. * * * The Perryburg case would be decisive of the present controversy except for the fact that by the provisions of Article II, Section 1 of the city charter, Sections 4328, 4329 and 4331 of the General Code here in question have the force and effect of ordinances of the city. * * * Article II, Section 1 of the charter of the city of Cincinnati reads as follows: 'ARTICLE II. Legislative Power. Section 1. All legislative powers of the city shall be vested, subject to the terms of this charter and of the constitution of the state of Ohio, in the council. The laws of the state of Ohio not inconsistent with this charter, except those declared inoperative by ordinance of the council, shall have the force and effect of ordinances of the city of Cincinnati * * *.' This record fails to disclose that council has by ordinance declared any provision of the statute law here in question to be inoperative. * * * Having concluded that the repair and resurfacing of streets is a matter of purely local concern; that each municipality has the power under Article XVIII of the Constitution to proceed in any manner adopted by the municipal authorities, and having further concluded that by virtue of Article II, Section 1 of the charter adopted by the city, Sections 4328, 4329 and 4331 of the General Code, have in the instant case, the force and effect of ordinances of said city; and having further concluded that Section 13 of Article XVIII of the Constitution has not been violated, comes now the final determinative question in this case:

Has the city by its methods of resurfacing, violated the provisions of Sections 4328, 4329 and 4331 of the General Code?" The court then proceeded to a consideration and determination of that issue which is not important here. The important item is that the Ohio court held valid Article II, Section 1, of the charter of the city which adopted sections of the General Code and gave them the force and effect of ordinances of the city. The headnotes of the case are in part as follows: "By virtue of the provisions of Article XVIII, Section 3 of the Constitution, every municipality in Ohio has authority to exercise all powers of local self-government; and by virtue of Section 7 of that article every municipality has authority to frame and adopt a charter for its government. * * * The General Assembly of the state is without authority to limit the exercise, by a municipality, of all powers of local self-government. * * * Where the charter of a municipality provides that the laws of the state not inconsistent with such charter except those declared inoperative by ordinance of the council shall have the force and effect of city ordinances, such provision is binding on all municipal officers, and in the absence of an ordinance which declares inoperative state laws, the charter, the Administrative Code, state laws and municipal ordinances all must be given full force and effect in the exercise of any municipal function."

The practice of providing in the Constitution of the state that a certain provision thereof shall be in force until the Legislature provides otherwise has been indulged in in this state as proper and effective. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799; State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333, 37 N. W. 2d 502; State ex rel. Missouri P. Ry. Co. v. Clarke, 98 Neb. 566, 153 N. W. 623; In re Yellow Cab & Baggage Co., 126 Neb. 138, 253 N. W. 80. This is in principle what the electors of the city of Omaha did when they adopted the 1956 charter and therein provided that designated provisions of the 1922 charter

of the city should operate in the same manner as ordinances in the city of Omaha until they or any of them were superseded by ordinances which the council was authorized to enact.

The exercise of the legislative power or function of a municipality is not always exclusive in the city council thereof. The electors of the city may be and are often authorized to participate therein. In re Phahler, 150 Cal. 71, 88 P. 270, 11 L. R. A. N. S. 1092 (referred to as an authority in State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N. W. 499), makes these comments: "Much stress is placed by petitioner upon the fact that in section 8 of article XI of the constitution the words 'legislative authority' are used in designating the ordinary legislative body of the city. The use of these words is taken as indicating the intent of the constitution that no legislative power could be exercised except by some representative body such as a council, etc., which should have supreme authority as to all matters of legislative nature. We see no force in this contention. * * * The words 'legislative authority' as here used have no greater significance than such words as 'common council or other legislative body' would have had. They were simply intended to designate the particular body which it was recognized would exist under some name or other in every municipality as the proper official agency to submit propositions for amendments to charters, and were not intended to define the powers of that body, or place it in a position where it would be beyond restrictions by the organic act of the city. * * * That the electors of a duly organized local subdivision of this state may be authorized to directly participate in the exercise of the legislative power of such subdivision cannot, we think, be seriously disputed. There is certainly no provision of our constitution which expressly or by reasonable inference prohibits it. There is no decision of this court which holds that it is forbidden." Likewise, it may be con-

fidently asserted that there is no provision of the Constitution of Nebraska or any decision of this court which prohibits the electors of a city from directly participating in the exercise of legislative power of the city. On the contrary, there are provisions of the Constitution of the state which authorize the exercise of such power directly by the electors of the city.

The comments of appellees concerning Massa v. City of Cincinnati, *supra,* are an attempt to distinguish the grant of power by the Ohio Constitution to cities of that state from the authority conferred upon certain cities by the Constitution of Nebraska. The Ohio Constitution, as recited in the Massa case, says that municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local regulations as are not in conflict with general laws; and that any municipality may frame and adopt a charter for its government and may, subject to the foregoing provisions, exercise all powers of local self-government. This is precisely what the provisions of Article XI of the Constitution of Nebraska do, as has been determined by this court, for municipalities of Nebraska which are within the classes of cities described in that article of the Constitution. This court has variously stated this effect of the constitutional provision as is exhibited by the following: "Liberal judicial construction has encouraged this salutary assumption by municipalities of the powers and responsibilities of local self-government." State ex rel. Fischer v. City of Lincoln, *supra.* "The trend of judicial pronouncement appears to sanction an enlargement of the powers of the municipality for self-government, within constitutional limits, rather than a curtailment of such powers." Sandell v. City of Omaha, *supra.* " 'The purpose of the constitutional provision * * * is to render cities independent of state legislation as to all subjects which are of strictly municipal concern * * *.' " Eppley Hotels Co. v. City of Lincoln, *supra.* "As to all subjects of

strictly local municipal concern such charter cities operate free and independent of state legislation." Niklaus v. Miller, *supra.* It could hardly be made clearer or more conclusive that cities included in the provisions of Article XI of the Constitution of this state have authority to exercise all powers of local self-government. That is exactly the construction given them. The constitutional grant of power to these cities is self-executing in the sense that no legislative action is necessary in order to make it available to the municipalities of the classes to which it applies.

It is provided in section 2 of Article XI of the Constitution that a prefatory synopsis as prepared by the convention should be published with the proposed charter in full in a newspaper of general circulation in the city three times, once each week, before the election for adoption or rejection of the charter was held. The 1956 charter by its terms changed the governing body of the city, was complete in itself, and was described in the synopsis as and it purported to be on its face a new charter of the city. The section says that the charter submitted at the election, if ratified by a majority vote of the electors of the city, shall supersede any existing charter and all amendments thereof.

In Streat v. Vermilya, *supra,* the Michigan court said: "A city may not have two separate and distinct charters at the same time. * * * The proposed new charter, if adopted, will entirely supersede the former charter."

State ex rel. Rose v. Hindley, 67 Wash. 240, 121 P. 447, states: "This court has many times noticed and followed the rule that a new law purporting to be the whole law upon the subject-matter of which it relates repeals a former general law on that subject, even though the new law contains no express repealing clause. * * * It follows that, since the new charter was adopted as a new and complete charter, and in no sense as an amendment of the old one, it thereby became the entire organic law of the city, and all the provisions of the

old charter were thereby effectually repealed, although we do not find in the new charter any express repealing language directed against the old charter." See, also, Grobbel v. City of Detroit, 181 Mich. 364, 149 N. W. 675; 6 McQuillin, Municipal Corporations (3d Ed.), § 21.25, p. 216.

The 1956 charter by its terms disposed of all provisions of the 1922 charter and did not attempt to retain any part of the 1922 charter as such. The conclusion of the trial court that by section 8.20 (1) of the 1956 charter the electors of the city retained therein specific sections of the 1922 charter, as amended, as provisions of the existing charter and not as ordinances and that the city council of the city should be and was enjoined from attempting to supersede the sections or any of them, respectively, by ordinances, was incorrect and is without legal foundation. It was legally competent for the qualified voters of the city to make designated and properly identified provisions of the prior 1922 home rule charter of the city a part of the new 1956 home rule charter of the city so that they would be applicable to and would govern and control local affairs of the city as duly enacted ordinances containing the identical subject matter as the designated provisions could have done until the designated provisions were superseded by ordinances of the city which the council of the city was by the charter of the city authorized to enact.

Appellees alleged as follows: The 1956 charter provides the city council will not lessen the benefits or rights of employees in the city service on May 26, 1957, from those which the employees would receive under the pension and retirement systems in effect on that date, and no retirement rights or allowances of city employees would be affected by the adoption of the charter. There was on that date no compulsory retirement age for members of the Omaha police department. A section of ordinance No. 19728 of the city says that

such employees must retire when they attain age 60 unless retained on a year-to-year basis for cause shown and subject to a physical examination and that employees shall in no case be retained in the classified service after attaining the age of 65. Under the pension and retirement system contained in the 1922 charter, as amended, the maximum pension benefits would be secured only upon completing approximately 28 years of service. No compulsory retirement age was required by that charter and the maximum pension benefits which a retired employee could have received were $1,800 a year. The lowest pay of any member of the police department is in excess of $3,600 per year under the 1922 charter. No member of the police department was required to retire at any given age and could work and receive full salary and benefits so long as he was physically able to perform the duties of his position. The compulsory age requirements of the purported ordinance deprive every member of the police department of rights which he had on May 27, 1957. Joseph Lukas, one of the appellees, because of his age and length of service, will be deprived of earned pension or retirement rights or allowances and will receive lesser benefits or rights if the purported ordinance is permitted to take effect. This will cause irreparable damage to him. William Barger, because of his age and length of service, may be deprived of pension and retirement rights and will be irreparably damaged if the purported ordinance is permitted to become effective. Section 69-12.9 (a) of the ordinance of July 8, 1958, No. 19728, hereafter identified as the ordinance, requires a civilian employee to retire upon attainment of age 65 unless his service is extended on a year-to-year basis and the extension is contingent upon it being for the best interests of the city and upon securing approval from the personnel board not later than 30 days prior to such retirement. The ordinance was passed on July 8, 1958, and by its terms became effective 15 days after its

passage. It is because thereof impossible to meet the requirements of the ordinance and all civilian employees 65 years of age and over on the effective date are deprived of rights upon such purported ordinance being effective, and such employees will sustain irreparable damage.

The interveners allege that each of them is an employee of the fire department and an employee of the city and that they represent themselves and all others similarly situated. The purported ordinance of the city, contrary to the provisions of the 1956 charter, contains section 69-12.9 (b) for the compulsory retirement of employees upon the attainment of age 60 and this provision provides lesser pension benefits or rights for members of the fire department of the city than those members would have been entitled to have on May 26, 1957, under the pension and retirement system in effect on that date, contrary to section 6.09 of the 1956 charter. The purported ordinance is contrary to law.

The trial court found and adjudged that the provisions for the compulsory retirement of employees of the city as contained in the ordinance were inconsistent with the 1956 charter or with the articles and sections of the 1922 charter, as amended, which were retained and the said provisions of the ordinance were invalid. The court found and adjudged also that the compulsory retirement provisions of the ordinance were invalid for the reason they lessened the benefits or rights of certain employees of the city in the service thereof on May 26, 1957, contrary to section 6.09 of the 1956 charter.

The relevant parts of section 6.09 of the 1956 charter are: "The Council shall have authority to establish a pension and retirement system or systems for any or all groups of officers and employes in the service of the city. * * * The minimum or optional age of retirement for policemen and firemen shall not be less than fifty-five years, and for officers and employes of the civilian service shall not be less than sixty years. Pro-

visions for vesting may be included. The legal right to a pension or benefit for the members and beneficiaries entitled thereto shall become effective when such pensions or benefits become payable, and the same shall not be impaired, abrogated, or diminished thereafter. * * * In the establishment of any new system or systems pursuant to this action, the Council shall not in any way provide lesser benefits or rights for employees in the city service on May 26, 1957 than those employes would receive under the pension and retirement systems in effect on that date."

The ordinance provides classified civilian employees may retire at age 60, having a minimum of 10 years of service, and must retire at 65 except that upon request of the department head the employee may be retained in the interests of the city beyond age 65 on a year-to-year basis, subject to physical examination, but in no case may such employee be retained after attaining age 70; and police and fire uniformed personnel may retire at age 55 and must retire at age 60 except they may be retained on a year-to-year basis beyond age 60 in the interests of the city, subject to physical examination, but must retire at age 65 after January 1, 1959.

A civilian employee 67 1/12 years of age, with 23 years of service, had secured permission to continue his employment after he was 65 years of age but he complains he could not comply with the ordinance because it names an effective date 15 days after its passage and that a request for the continuance of his employment by the city could not be made by the head of his department 30 days before the effective date of the ordinance. This contention has no substance. The ordinance provides the request for retention in the service of the city shall be made by the department head to the personnel board for approval "not later than thirty days prior to the contemplated date of retirement." It is not required to be made not later than 30 days prior to the effective date of the ordinance. This employee had

not received any notification of being retired; in fact, he had made application for and had been granted permission to continue in the employment of the city.

The compulsory retirement provisions of the 1922 charter were contained in Article XXI, section 11 thereof, and were as follows: "On and after January 1, 1950, any member who shall have attained the age of 65 years shall be retired, except elective officials and officials appointed by the City Council. Upon written request of the member and approval by the department head, the Board may continue a member in service after age 65, but in no case beyond age 70, except that any elective official may continue as a member of the system during his tenure of office. * * * Any member whose employment is terminated under the conditions of this section and who has less than 10 years of total service shall receive, in lieu of a service retirement allowance, a refund of his total contributions plus accumulated interest as provided in Section 15." There was nothing therein concerning the length of time any employee could be retained on duty by the city in the period after he attained 60 years of age and until he arrived at 70 years of age. The ordinance contains similar provisions, except as to the age factor, relative to the retirement of police and fire personnel. They may retire at age 55 and must retire at age 60 except they may, on the conditions designated, be retained on a year-to-year basis but in no case beyond age 65.

If the employment of any employee was terminated when he had less than 10 years of service, he was entitled only to a refund of his total contributions plus specified interest and by section 12 of the same article of the 1922 charter the retirement benefits were payable upon retirement of an employee if he had attained the minimum age of 60 and had completed at least 10 years of total service as stated in section 10 thereof. The retirement age as fixed in the ordinance does not in any way change these benefits or rights. The retire-

ment age may affect and control whether an employee continues his service for the years necessary to qualify for a retirement pension but there is no legal requirement which compels an employer to continue the services of an employee regardless of his age in order that he may qualify for a pension. Since the mandatory retirement ages stated in the ordinance are above the minimum specified in the charter, the determination of the mandatory retirement age is a legislative matter referred to the reasonable discretion of the city.

Boyle v. City of Philadelphia, 338 Pa. 129, 12 A. 2d 43, was litigation instituted by and on behalf of certain members of the fire and police bureaus of the city of Philadelphia to restrain the enforcement of those provisions of the city budget ordinance of December 15, 1939, affecting firemen and policemen of the age and position of the plaintiffs who were afterwards appellants in the reviewing court. The question presented for decision was whether the council of the city of Philadelphia by provisions made part of a budget ordinance might provide for the compulsory retirement at the age of 65 and for the classification as second class at the age of 60 all laddermen and horsemen of the fire bureau and all patrolmen of the police bureau. In the opinion it is said: "Appellants also urge that this system of compulsory retirement violates the Pension Act of May 20, 1915, * * *. Appellees on the other hand insist that policemen and firemen were protected by pension or retirement pay prior to the Act of 1915, and are by section 10 of that Act expressly exempted from its terms. However, it makes no difference, since by the establishment of a pension or retirement pay the legislature does not guarantee to public employees a tenure for the period of service specified as necessary to fulfill the pension requirements, nor does it intend thereby to interfere with the full right of a municipality to dismiss its employees for cause or for reasons of efficiency or economy. Underlying all pen-

sion legislation is the necessary principle that one who has been legally discharged prior to serving the prescribed term cannot share in the pension or retirement benefits."

Ellsworth v. City of Portland, 142 Me. 200, 49 A. 2d 169, involved a situation resulting from the discharge of two police captains of the city on May 1, 1946, and the placing of them on the pension pay roll. Each of them claimed that such action of the city was without his consent and was unlawful. They sought mandamus against the municipal officers to have the order discharging them expunged and to have them restored to their positions as permanent members of the police force with the rank of captain. They claimed the action of the city was in violation of a statute which was a part of the charter of the city enacted in 1923 which provided that except for cause " 'neither the city council nor the civil service commission shall have power or authority to reduce, terminate, or diminish in any away (way) the pay, term of office, or pension or retirement privileges of the members of the police department or of the fire department of the City of Portland as now enjoyed by them * * *.' " The court said: "Whatever may have been the rights of the petitioners under the statute as originally drafted, the legislature had the right to amend the powers of the city in this respect, and in our opinion the amendment passed in 1927 controls; for, except as otherwise provided by the constitution, there is no vested right in a public office. * * * This amendment in our opinion gave to the city the right at its option, either on its own initiative or at the request of the individual member of the force, to honorably discharge any such officer coming within these provisions and to place him on the pension roll * * *."

In Humbeutel v. City of New York, 125 N. Y. S. 2d 198, the court said: "The plaintiffs contend that the law is invalid in that it is unreasonable and arbitrary. This might be said of every pension law. The court has

taken judicial notice of the various retirement laws, federal state and city. The mere fact that the law is unreasonable and arbitrary will not permit intervention by the courts. It is only where the law is so arbitrary and so unreasonable that it offends public sensibility that the courts may interfere."

The 1922 charter, Article VII-A, section 2, provided that any member of the police or fire department of the city who had served 25 years or over, in the aggregate, as a member in any capacity, of the departments of the city and also of the age of 55 years or more, was entitled to retire from service and should be allowed a pension. The 1922 charter also stated that upon reasonable notice and hearing the council had power to require any person eligible for retirement pension to retire and accept the same. The effect of the provisions of the 1922 charter was that a pension right thereunder vested when the pension provided became payable. Civilian employees were entitled to refunds of contributions to the pension system upon severance of employment before eligibility for pension and to pension "upon retirement." As to policemen and firemen, 25 years of service were required as a qualification for a pension. That charter also stated in Article VII-A, section 13: "Such contribution shall not give rise to any vested rights on the part of such members by reason of said contribution, unless and until said member has completed all the requirements for a pension herein provided." The present charter is consistent with the former one and the general law on the subject. It says the right to pension for persons entitled thereto shall become effective when the pension becomes payable and it shall not thereafter be impaired, abrogated, or diminished. The ordinance does not change or modify any pension system; in fact, there is no proof that any appellee or any intervener has any vested right in or to a pension.

Lickert v. City of Omaha, 144 Neb. 75, 12 N. W. 2d

644, considered the validity of an ordinance which submitted amendments to the charter of a city which were adopted by an election and became part of the charter June 30, 1942. This made changes in the pension system as it applied to the police department. Therein this court declared: "The existence of legislation making pension and retirement provisions for members of a police department and the acceptance or retention of employment as a member of a police department does not establish a contract, between the member and the city, that such members will thereafter be granted the retirement and pension benefits provided in such legislation. * * * Until the particular event happens upon which the pension is to be paid there is no vested right in the police officer to such payments. * * * The legislative change amending the pension provisions, previous to the happening of one or more of the conditions mentioned in the act, impairs no absolute right of property in the police officer." See, also, Sullivan v. City of Omaha, 146 Neb. 297, 19 N. W. 2d 510; Vanous v. City of Omaha, 148 Neb. 685, 28 N. W. 2d 560.

The findings and adjudication of the trial court as to section 8.20 (1) of the 1956 charter and the provisions of the ordinance for compulsory retirement of city employees as stated above are incorrect.

There were many parts of the ordinance found by the trial court to be invalid for various reasons such as conflict of the ordinance with the 1956 charter, attempt of the ordinance to delegate to individuals or the personnel board legislative powers, and inconsistency of the ordinance with itself. A detailed discussion of all the matters involved in and affected by the findings could not be contained in the reasonable confines of an opinion. An examination and study of the record have resulted in conclusions concerning the findings in these respects as follows:

The trial court found that subsections (1) to (4), inclusive, and subsection (8) of section 6.05 of the 1956

charter relate to persons seeking employment by the city and the remainder of the section concerns the employed personnel of the city and that the first subsection mentioned above requires that all persons seeking employment by the city take a competitive examination. This is correct. A consideration of the ordinance as a whole convinces that noncompetitive examinations are only incident to reallocated positions. The examinations concerned an employee or employees who have filled the position or positions that are reallocated. This does not involve in any way the original employment or the re-employment of a former employee. It does involve promotion and additional or new duties. It is not a violation of any provision of the charter relating to those seeking original employment by the city. Such examinations are authorized by the charter which provides for the promotion of employees from lower to higher positions in the classified service through an examination program which will foster a municipal career service. Such provisions are in fact only a proper transitional means to carry out the plan and object of the system for the benefit of the employee who is thereby promoted. There is no objectionable conflict in this regard between the charter and the ordinance.

The court found that the ordinance states that promotional examinations shall be of like kind and character as those for original appointment to the service and that the ordinance contains provisions for noncompetitive examinations for certain appointments and promotions and hence it is inconsistent with the charter and is also inconsistent with itself. The ordinance provides that examinations are to test capacity and fitness; may include written, oral, physical, or performance tests; and may consider factors such as education, experience, aptitude, knowledge, character, physical fitness, or other qualifications and attributes relative to fitness. There would seem to be no objectionable features to promotional examinations being of the same kind and

character as those for original appointments. In addition they consider quality and length of service. Noncompetitive examinations for promotions have been considered and disposed of in the immediately preceding discussion of the subject and what is said in relation thereto need not be here repeated. A careful examination of the ordinance and the charter has failed to establish any inconsistency existing in the provisions referred to by the court. The court has not pointed out any specific inconsistency. The petition in the case has no specific allegation pertaining to this and the petition of intervention only generally states the provisions for noncompetitive examinations in the ordinance are contrary to the provisions of the 1956 charter. The sections of the ordinance pertaining to examinations are not inconsistent but are clear, definite, and complete. The finding of the court concerning this is contrary to the record.

A finding of the trial court is that the ordinance violates the charter by providing that promotional examinations shall take into consideration the quality and length of service, where records are available, to provide the basis for such rating but the charter says the ordinance shall provide the methods of awarding pay increases and promotions based on merit and seniority. There is no evidence that there are any such records available and any attempt to evaluate merit and seniority on that basis would be mere speculation and improper. The provision of the ordinance which uses the elements of "quality and length of service" is tantamount to the terms "merit and seniority" in the charter. The ordinance provides for compensation of employees, for the preparation and adoption of a pay plan, and specifically provides for salary advancements or pay increases based on merit and each year of service to the extent of permitting a 2-step salary increase where deserved and an automatic increase upon completion of a 6-month probationary period. It also provides for a

pay increase upon promotion. The pay plan presently before the personnel board contains pay ranges and information for increments. The charter requires the personnel rules and regulations to be submitted to the council within 8 months after the appointment of the first personnel director but the classification plan and pay plan are required to be submitted to the personnel board only within 1 year of the appointment of the first director. The compensation or pay plan is required to be forwarded, with no time limit specified, to the mayor who in turn, without time limit, submits it with comments to the council for adoption as an ordinance. This shows that the charter requires and contemplates the adoption of personnel rules and regulations prior to the adoption of a classification plan and prior to the adoption of a pay plan by the process above mentioned. The ordinance also requires that a proper and suitable compensation and pay plan be adopted and does this by a verbatim repetition of a section of the charter. The record shows that the pay plan is presently before the personnel board. The ordinance comprehensively establishes rules relating to the classification plan which is also before the personnel board for consideration and evaluation and involves about 187 classifications among approximately 1,600 employees. The finding of the court in this regard cannot be sustained.

The trial court found that the ordinance includes neither a method of holding or grading competitive examinations and that section 6.05 of the 1956 charter requires the personnel rules to contain such provisions. The record does not sustain this finding. The ordinance prescribes the method of holding examinations in minute detail. Likewise, the method of grading competitive examinations is fully specified, including procedure for review and correction of any error in grading upon claim of error by the applicant.

The provisions of the ordinance are adequate to satisfy the requirements of the charter in reference to the

compensation or pay plan, promotion to foster a career service, and for increases and promotions based upon merit and seniority. The finding to the contrary is not sustained by the record.

A finding of the court is that a part of the ordinance designated "Selection By Examination" is vague and indefinite and fails to comply with the charter. The finding is no more informative or specific than that statement and is without support in the record. The section of the ordinance clearly provides for all regular appointments to be based on merit and fitness to be determined by examinations, as far as practicable, relating to capacity and ability to efficiently discharge the duties. It permits limitation to regular employees in the service if it is determined that there are sufficient in number and qualifications to provide adequate competition.

The trial court found a violation of the charter because in its language the ordinance attempts to delegate to the personnel director power to establish methods of holding and grading certain examinations. This relates to authority of the personnel board to delegate to the personnel director when the character or conditions of employment make it impracticable to supply the needs of the service by appointments in accordance with other prescribed procedures to fill positions involving unskilled labor, domestic attendants, or custodial work by the employment of such other procedures as the personnel director determines to be appropriate to assure selection of such employees on the basis of merit and fitness, but the section requires an examination to be utilized by the director as a basis of selection of employees for the positions. There is no claim that any party to this case is or can be even remotely affected by this section. It does not merit the condemnation assigned to it by the trial court.

The trial court found the ordinance failed to provide for hours of work and overtime pay in the manner re-

quired by the charter. The charter requires the personnel rules to provide for hours of work and overtime pay. The ordinance, concerning hours of work, says that each department head shall submit to the personnel director a report stating the present hours of work for all subdivisions of the department and these hours of work shall remain in effect until this section of the rules has been amended. It also says, concerning overtime payment, that each department head shall submit to the personnel director a report stating the present practices of the department controlling compensation for overtime work. These practices shall remain in effect until this section of the rules has been amended. These provisions do not comply with the mandatory charter requirement that hours of work and overtime pay must be provided in the personnel rules. The finding of the court in this regard is correct.

An insufficiency in the ordinance was found by the court because, as stated in the finding, it does not set out the manner in which disciplinary actions may be taken and the kind of actions permitted for specific causes. Disciplinary actions are provided in detail in more than 20 specifications followed by provisions for reprimand, suspension, demotion, or dismissal for violation thereof. Written reprimand and procedure for demotion, suspension, or dismissal are provided and the maximum time of suspension is fixed. Investigations, hearings, and appeals are specified. The personnel board may increase, decrease, or modify any penalty imposed. The decisions and actions in this respect are subject to all remedies available to officer or employee in the courts. The ordinance is sufficient and does not conflict with the charter.

The trial court said the ordinance failed to state the procedure for assignments of responsibility for making investigations, bringing charges, and taking other necessary actions in connection with violation of section 6.11 of the charter. The charter provision prohibits

discrimination because of race, politics, or religion, retention of those advocating overthrow of the government by force or violence, political or fund-raising activities, or holding of office in any political party; and provides for forfeiture by an employee of his position if he seeks an elective office, specified employment with any other public body, or a gift or payment regarding any test or promotion, but reserves his right to express opinions and to cast votes. Any person who willfully or corruptly violates any of the provisions of it is subject to dismissal and such other punishment as may be provided by law. The charter requires the personnel board to make any investigation which it may consider desirable concerning personnel administration in the city service and to report to the mayor and council its findings, conclusions, and recommendations. There is a provision in the ordinance which says that in connection with the review of an appeal or for any other purpose necessary to determine the adherence to any provision of the charter regarding personnel administration of these rules, the personnel board and the personnel director or either of them may conduct such investigations as are necessary. The functions and duties of the personnel board specified in section 6.04 of the charter are repeated verbatim in the ordinance. The charter makes the personnel director, the administrative head of the personnel department, responsible for the proper conduct of all administrative affairs of the department and for the execution of a personnel program prescribed in the charter, in the ordinance, and rules consistent therewith. The finding of the court in this respect is not sustained by the record.

A finding of the trial court is that the ordinance violates the charter by reducing vacation benefits and granting less earned vacation leave. The ordinance grants vacation leave of 1 day each month for less than 5 years of employment, 1½ days per month after 5 years of employment, accumulation to a maximum of

24 days, and other specific provisions regarding leaves. The charter provides that it shall not affect or impair employee vacation or sick leave accrued or the validity of eligible lists created under the charter provisions, ordinance, and rules in force at the time the charter took effect. The present charter does not provide any requirement that thereafter vacation leaves must continue at either a stated minimum or a greater rate. This is an administrative matter. If the basis of the finding of the court is that vacation leave accrued by employees prior to the effective date of the ordinance is adversely affected, then the conclusion is incorrect. The ordinance provides in case of employee's accumulation of vacation leave with pay exceeds 24 days on the effective date of the ordinance, such excess accumulation shall be taken at least at the rate of one-fourth of such excess accumulation per year in addition to current accruals of vacation leave with pay until liquidated. Any excess accumulations remaining 4 years from the effective date of these rules shall be forfeited. A requirement that accrued annual vacation leave be taken within a reasonable specified time is an administrative matter. Any accumulated vacation leave is preserved by the ordinance but it is not indefinitely or forever continued. The latter would be neither feasible nor sensible. This objection to the ordinance is unfounded.

The 1956 charter provides that a person occupying a position in the classified service of the city when the charter took effect, who had completed a period of probationary service, should be continued in that classification without examination or working tests until and unless lawfully reclassified or separated therefrom. The ordinance in section 69-4.3 states that an employee holding a position in the classified service who has not attained permanent status but who has served faithfully and adequately in his present position, as certified by the depatrment head, for a period of 6 months should

be given the status of a regular employee in his present position upon passing a noncompetitive examination. The trial court properly found that the above provisions are in conflict to the extent that the provisions of the ordinance requiring the employee to submit to an examination conflicts with the provision of the charter that his status shall continue without examination. To the extent of that conflict the ordinance is ineffective and an employee of the description contained in the charter and the ordinance is entitled to the status of a regular employee in his present position without an examination.

The trial court found that section 69-16.5 (e) is in conflict with the charter because it is an attempt to delegate legislative authority. The charter vests legislative powers in the council and states that personnel rules shall provide procedure and responsibility for taking necessary action in connection with violation of section 6.11 of the charter. The provision of the ordinance above referred to prohibits fund-raising activities by employees without prior approval of the personnel board. Prescribed standards under which the personnel board may approve such fund-raising activities require the personnel board to approve and publish a list of fund-raising activities which in its judgment comply with the standards set forth therein, and provide that such list shall not be restrictive but shall serve as a guide and authorize changes therein from time to time within the standards set forth in the subsection. The section of the charter above mentioned states that no nonelective officer or employee of the city service shall actively participate in any campaign, solicit or contribute funds for any political purpose, or hold office in any political party other than to exercise his right as a citizen to express his opinion and to cast his vote. The ordinance provides standards governing the board's approval. There is no basis therefore for saying that the ordinance attempts to grant

legislative power to the board. The finding of the court in this regard is without merit.

The trial court found that the statement of the ordinance that the city council should approve personnel rules and any amendment or revision of them conflicts with the charter provision that the council should enact a set of personnel rules and the charter provision that legislative powers are vested in the council. This is an instance of the use of loose and inaccurate language, but the charter provisions govern and the intention is clear that the approval spoken of in the ordinance must be in the form of an ordinance of the city. It is obvious that any amendment of an ordinance must be by another ordinance or by a superior law. The ordinance does not say how the council should approve any amendment or revision. The finding of the court cannot be sustained.

The charter states that the pay plan shall become effective when adopted as an ordinance by the council. Any amendment of it requires the same character of adoption by that body. The ordinance says the council shall approve the pay plan and any amendments thereto. The court found that these sections were in conflict and that the ordinance disregarded the fact that the charter vested all legislative power in the council. The court disregarded the ordinance as a whole and the parts thereof which should be considered together as relating to the same subject. The ordinance recites verbatim the provision of the charter that the pay plan shall become effective when adopted as an ordinance by the council and amendments to the plan shall require the same approval as the original adoption of the plan. The adoption of the plan and any amendment of it is required by the charter to be done by ordinance. The approval reference in the ordinance does not provide the method by which the adoption of the plan could be accomplished. The ordinance could not change the charter and the intention is clear that approval as used

in the charter was to be accomplished by a method of the character the charter makes mandatory, that is, by ordinance. The finding of the court in this respect is without support.

The judgment should be and it is reversed and the cause remanded to the district court for Douglas County with instructions to render and enter a judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1959

ACE CONSTRUCTION COMPANY, APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

98 N. W. 2d 367

Filed October 9, 1959. No. 34555.

1. **Taxation.** The presumption is that when an officer or an assessing body values property for assessment purposes, he or it acts fairly and impartially and the burden is on the property owner to establish that the assessment of the property is improper or excessive.
2. ———. The domicile of the owner is the taxable situs assigned to tangible personal property where an actual situs has not been acquired elsewhere.
3. ———. The state which is the domicile of the owner of tangibles is the situs of tangible personal property temporarily in another state but not permanently located there.
4. ———. Tangible personal property belonging to a corporation is assessed in the taxing area of the principal place of business of the corporation unless otherwise provided by statute or unless it has acquired an actual situs elsewhere.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Morgan, Carnazzo & Todero, for appellant.

Eugene F. Fitzgerald, John J. Hanley, and *John C. Burke,* for appellee.

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

BOSLAUGH, J.

This appeal contests the correctness of an adjudication of the district court for Douglas County sustaining the conclusion of the county board of equalization which determined the valuation of the tangible personal property of appellant for taxation purposes.

The basic value of the tangible personal property of appellant in Douglas County as exhibited by the 1956 schedule made and filed by it with the assessor of the county was $12,800. The assessor increased the value thereof to $55,000. The complaint of appellant made to the county board of equalization complained only that the valuation as fixed by the assessor was excessive and it asked the board to review and correct it. The board of equalization denied the complaint and sustained the valuation of the property as determined by the assessor. The petition of appellant on appeal to the district court stated that the valuation of its property as determined by the county assessor and the board of equalization was arbitrary and excessive and that appellant was found to be the owner of property which did not exist and property which was not owned by it in Douglas County or the State of Nebraska. Appellee denied the statements of the petition.

The district court found that appellant on March 1, 1956, owned personal property located outside of Douglas County of a value in excess of the value assessed by the taxing officials of that county; that appellant failed to sustain its burden by legal evidence that the property owned by it which was without the State of Nebraska had acquired a permanent situs in any other state as of March 1, 1956; and that Nebraska was the domicile of the owner of the property and it then had a taxable situs in Nebraska. The order of the board of equalization from which the appeal was taken was sustained by the district court. This appeal is from that adjudication.

The entire evidence was produced at the trial by

appellant. Appellant, a domestic corporation with its general office and place of business in Omaha, Douglas County, Nebraska, from which it directed all of its operations, was at the times important to this litigation engaged in the business of a general contractor but its engagements consisted principally of earth-moving operations. Appellant owned and had at its place of business office furniture, fixtures, and supplies appropriate for conducting the affairs of the corporation. Appellant owned other equipment suitable for conducting its operations consisting generally of tools, tractors, machinery, and other like appropriate items. This property, referred to herein as equipment, was used in its engagements in different states outside of Nebraska in the construction of projects for which it was engaged. As each project was completed, the equipment was then moved to another location in the same or another state. The equipment, the occasion of this litigation, had been used in other states and had not been in Douglas County or the State of Nebraska since 1954. It had been assessed for taxes by and the taxes levied thereon had been paid to South Dakota and Iowa in the years 1957 and 1958, respectively. The record is silent as to any assessment of the equipment for taxes outside of Nebraska in the year 1956. The cost of the equipment owned by appellant on March 1, 1956, was $219,757.70 and its book value on that date was $156,850. There is in the record no direct evidence as to the fair market or actual value of the equipment on that date. The equipment was all actually located and used in the business of appellant in states other than Nebraska in the year 1956.

The deficiency in the case of appellant is that there is no allegation made in its complaint to the board of equalization or in its petition in the district court, nor is there any evidence in the record, that any of the tangible personal property of appellant had on March 1, 1956, acquired a permanent situs in any state other than

the State of Nebraska. The presumption is that when an officer or an assessing body values property for assessment purposes, he or it acts fairly and impartially and the burden is on the property owner to establish that the assessment of the property is improper or excessive. Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489; Lucas v. Board of Equalization, 165 Neb. 315, 85 N. W. 2d 638; K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N. W. 2d 381; Ainsworth v. County of Fillmore, 166 Neb. 779, 90 N. W. 2d 360.

Tangible personal property, in the absence of statute and anything to show that it has acquired an actual situs elsewhere, has its situs at the domicile of the owner. Tangible personal property may not be taxed in a taxing area other than that of the domicile of the owner unless it has acquired a local or permanent location in that area and not a transient or temporary one, and the taxing area of the domicile of the owner remains the permanent situs for tax purposes notwithstanding occasional excursions of the property to foreign parts. Permanency of tangible personal property in a taxing area is determined by the ownership and use for which the property is designed and does not embrace the idea of a forever-fixed location or the thought that the owner bringing personal property in the area has no present intention of ever removing it; but it excludes the idea of mobile personal property which happens to be in the taxing area at the moment of the assessment of property which, for some definite purpose of the owner, has come to rest within the area for a limited time.

Ainsworth v. County of Fillmore, *supra,* declares: "The domicile of the owner is the taxable situs assigned to tangibles where an actual situs has not been acquired elsewhere. * * * The state which is the domicile of the owner of tangibles is the situs of tangible personal property temporarily in another state but not permanently located there." It is said in the opinion

in that case: "In order to have rendered this wheat nontaxable in Nebraska on March 1, 1957, it must not only have been on that date without the jurisdiction but also the situs must have had the character of permanency. * * * Under this rule * * * unless the property has acquired a permanent situs in the state where it is located, it becomes the duty of the court to adjudicate unfavorably to a contention that tangible property outside the state of the residence of the owner is not taxable to the owner in the state of his residence. * * * In this light it becomes necessary to say that permanent situs outside the State of Nebraska on March 1, 1957, was a fact essential to the right of plaintiffs to the relief prayed in this action. This essential fact has not been pleaded directly or by reasonable inference in the petition. The allegation of this fact was essential to the statement of a good cause of action."

Capital Construction Co. v. City of Des Moines, 211 Iowa 1228, 235 N. W. 476, states: "The evidence shows that the moving of this machinery to the state of Illinois was for the temporary purpose of completing a contract for pavement * * *. The absence of the machinery from the state of Iowa, therefore, was only temporary, and not of a permanent nature. This being true, the contention of the appellant as to taxing tangible property located in another state has no application. Were the rule otherwise, the owner of tangible personal property could move it beyond the limits of the state prior to January first of any year, and shortly thereafter return it within the state, and thus avoid taxation thereon. * * * Under the general rule universally recognized, not only in this state but elsewhere, tangible personal property belonging to a corporation is assessed in the assessment district of the principal place of business of said corporation, unless otherwise provided by law." See, also, George M. Brewster & Son, Inc. v. Borough of Bogota, 20 N. J. Super. 487, 90 A. 2d 58; Brock & Co. v. Board of Super-

visors, 8 Cal. 2d 286, 65 P. 2d 791, 110 A. L. R. 700; Annotation, 110 A. L. R. 707.

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

AFFIRMED.

HUGO F. KRUEGER, ALSO KNOWN AS HUGO KRUEGER, APPELLANT, V. MYRTLE KRUEGER ET AL., APPELLEES.
98 N. W. 2d 360

Filed October 9, 1959. No. 34606.

1. **Pleading: Evidence.** Statements, admissions, and allegations in pleadings upon which the case is tried are always in evidence for all the purposes of the trial; they are before the court, and may be used for any legitimate purpose.
2. ———: ———. A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.
3. **Wills: Evidence.** In construing a will the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto, and extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity.
4. **Wills: Quieting Title.** The original jurisdiction of the district court over an action to quiet the title to real estate is not affected by the fact that incident thereto there is involved the construction of a will.
5. **Wills: Evidence.** Where the description of the real property devised in a will is inaccurate, or there is a latent ambiguity with respect thereto, extrinsic evidence is competent to resolve the ambiguity and identify the property designated.
6. **Appeal and Error.** A judgment rendered by the district court which is free from error is not rendered invalid by the fact that the court gave an incorrect reason therefor.

APPEAL from the district court for Cuming County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Hutton & Hutton, for appellant.

H. M. Nicholson, for appellees.

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

MESSMORE, J.

This is an action brought in the district court for Cuming County by Hugo F. Krueger, also known as Hugo Krueger, plaintiff, against Myrtle Krueger, Flora Pestel, Alvin Pestel, husband of Flora Pestel, and all persons claiming any interest in or to certain tracts of land, defendants, the purpose of the action being to quiet title to certain land described in the petition in the plaintiff. The trial court rendered judgment which quieted title in the plaintiff to a 40-acre tract of land to which the defendants and cross-petitioners, Myrtle Krueger and Flora Pestel disclaimed any interest; quieted title in the cross-petitioners, Myrtle Krueger and Flora Pestel, to 80 acres of land to which said cross-petitioners claimed title; and rendered judgment against the plaintiff in favor of the defendants and cross-petitioners Myrtle Krueger and Flora Pestel in the amount of $800 for rent of the premises of which plaintiff was in possession and farming. The plaintiff filed a motion for new trial which was overruled, and plaintiff appealed.

For convenience we will refer to the plaintiff as Hugo Krueger; to the defendants and cross-petitioners as Myrtle Krueger and Flora Pestel; and to the father of the plaintiff and defendants as F. A. Krueger.

The land here involved is all in Cuming County. Consequently we will not repeat the description in detail.

The petition alleged that on January 13, 1919, F. A. Krueger became the owner of the southwest quarter of the northwest quarter, the northwest quarter of the northwest quarter, and the northeast quarter of the northwest quarter of Section 32, Township 23 North, Range 4 East of the 6th P. M., and the southeast quarter

of the northwest quarter of said section; that on June 25, 1932, F. A. Krueger executed and delivered to Hugo Krueger a deed which was filed of record August 15, 1932, conveying to him the northeast quarter of the northwest quarter, and the southeast quarter of the northwest quarter of Section 32; that F. A. Krueger made and executed a will on March 2, 1949, which provided in part: "3. I give and devise the north half of the north half of the northwest quarter of section 32, * * * to my daughter, Myrtle Krueger. 4. I give and devise the south half of the north half of the Northwest quarter of section 32, * * * to my daughter, Flora Pestel. 6. All the rest, residue, and remainder of my estate I give, devise, and bequeath to my son, Hugo Krueger," thereby purportedly devising the entire north half of the northwest quarter of Section 32; that however, F. A. Krueger at the time of his death had not been the owner of the east half of the northwest quarter of Section 32 since 1932, therefore, the attempted devise of the northeast quarter of the northwest quarter of Section 32 was a nullity, but the record was clouded with said attempted devise; that said cloud should be removed by the quieting of title in the plaintiff; that the deed records of Cuming County reflect that on the date of the death of F. A. Krueger, he was the owner of the west half of the northwest quarter of Section 32; that on August 1, 1957, two deeds were filed of record in Cuming County, purportedly passing the title to the west half of the northwest quarter of said section, or 80 acres, as follows: The east half of the west half of the northwest quarter of Section 32 to Flora Pestel, and the west half of the west half of the northwest quarter of Section 32 to Myrtle Krueger; that said deeds were executed by F. A. Krueger on December 15, 1937, in the presence of Otto F. Paege, and were at that time delivered to Paege for safekeeping in the Citizen's National Bank at Wisner, Nebraska, solely for F. A. Krueger who retained full control over said deeds which were never delivered

by the grantor to the purported grantees, Myrtle Krueger and Flora Pestel; and that said deeds therefore are not valid, but their existence on the record casts a cloud on the record which should be removed. The petition further alleged that the last will and testament of F. A. Krueger, which was probated in the county court of Cuming County, had full validity, force, and effect as to all of the real estate owned by F. A. Krueger at the time of his death. The prayer of the petition was that the title to said premises be quieted and confirmed in the following persons: The north half of the northwest quarter of the northwest quarter of Section 32, in Myrtle Krueger; the south half of the northwest quarter of the northwest quarter of Section 32, in Flora Pestel; and the northeast quarter of the northwest quarter, and the southwest quarter of the northwest quarter of Section 32, in Hugo Krueger.

The answer and cross-petition of the defendants Myrtle Krueger and Flora Pestel alleged that on and prior to December 15, 1937, F. A. Krueger was seized in fee simple of the west half of the northwest quarter of Section 32; that on said day he made, executed, and acknowledged two warranty deeds conveying the east half of the west half of said northwest quarter to Flora Pestel, his daughter, and the west half of the said west half of the northwest quarter to his daughter Myrtle Krueger; that he delivered said deeds to the Citizens National Bank of Wisner with oral instructions to deliver the same after his death to the grantees named therein; that F. A. Krueger intended at such time to part with all power to repossess said deeds, and intended the deeds to operate as a present conveyance, reserving to himself a life estate in the premises; that the deeds were so held by the bank, and, after the death of F. A. Krueger, were delivered to the cross-petitioners; and that by virtue thereof each cross-petitioner became seized of the premises described in the deed made to her. The cross-petitioners further alleged that their father in-

tended by his will to devise them the same land which he had theretofore conveyed to them, which was the land owned latest in point of time; and that the descriptions of the land in the will as to the north half of the northwest quarter were intended to mean the west half of the northwest quarter. The prayer was that cross-petitioners be decreed to be the owners of the west half of the northwest quarter in divided shares as fixed by the deeds made to them.

The plaintiff's answer and reply to the defendants' cross-petition specifically denied delivery of the deeds to the property here involved to any of the defendants and cross-petitioners, and that anyone but the plaintiff had any interest in the northeast quarter of the quarter section here involved; specifically alleged that the will of F. A. Krueger, deceased, was executed after the execution of the deeds in question and that said will disposed of the real estate of the deceased as he intended; and generally denied the cause of action set forth in defendants' cross-petition. For reply it denied all allegations of the cross-petition not admitted, and renewed the prayer of the petition.

The record discloses by stipulation that Frank A. Krueger, usually known as F. A. Krueger, died on January 28, 1957. His wife, Emerette Krueger, died on July 13, 1933. Frank A. Krueger and Emerette Krueger were the parents of four children, Hugo F. Krueger, Myrtle Krueger, Flora Pestel, and Esther Kind who is not a party to this suit. Prior to June 25, 1932, F. A. Krueger was the owner of the east half of the northwest quarter of Section 32. On the said day he and his wife jointly conveyed said premises to Hugo Krueger for a consideration of one dollar, free and clear of mortgage encumbrance. Prior to June 25, 1932, Emerette Krueger was the owner of the southwest quarter of the northeast quarter of Section 32. On the same day, her husband joining, she conveyed said premises to Hugo Krueger for a recited consideration of one dollar, free and clear

of mortgage encumbrance. Prior to December 15, 1937, F. A. Krueger was the owner of the southwest quarter of Section 29, Township 23, Range 4 in Cuming County. On said day he conveyed these premises to Fred A. Kind, his son-in-law and the husband of Esther Kind, for a recited consideration of five dollars, subject to a mortgage encumbrance. The grantee also covenanted in the conveyance to pay $2,000 to Myrtle Krueger in yearly installments of $100. Prior to December 15, 1937, F. A. Krueger was the owner of the west half of the northwest quarter of Section 32, which was free of mortgage encumbrance. Immediately prior to December 15, 1937, the lands described above were the only lands owned by F. A. Krueger, and thereafter, during his lifetime, he acquired ownership of no other lands.

Otto F. Paege testified that he had been a resident of Wisner, Nebraska, for 37 years, and was the cashier of the Citizens National Bank; that he had known F. A. Krueger all his life; and that he remembered when F. A. Krueger came into the bank, by himself, to have the deeds prepared. These deeds, one a warranty deed to Myrtle Krueger and the other a warranty deed to Flora Pestel, are in evidence. This witness prepared the deeds during banking hours. After the deeds were prepared, F. A. Krueger told this witness to give the deeds to the proper persons designated therein, after his death. The deeds were to be kept in the bank, and were put in envelopes and placed in the general files of the bank. The deeds remained there until after F. A. Krueger's death. This witness had not thought of the deeds for a number of years, and when the thought came to him, he located the deeds in the general files of the bank, held them for some time, and then delivered them in person by handing one of the deeds to Myrtle Krueger and the other to Flora Pestel who took the deeds out of the bank.

On cross-examination this witness testified that he did not deliver these deeds until July 1957; and that

between the time of the death of F. A. Krueger and the time the deeds were delivered they were in his possession as executor of the estate of F. A. Krueger, deceased, who died on January 28, 1957. He further testified that he located the deeds in the middle of February 1957.

A deposition of this witness was taken on March 31, 1958. We might sum up this part of the record as being to the effect that this witness gave contradictory statements as to whether or not the grantor of the deeds in question gave instructions to him to have the deeds delivered, or that the grantor could have the deeds at any time he desired. The grantor never at any time after the deeds were made, executed, and placed in the files of the bank, made any demand to have the deeds delivered to him. In fact, nothing was ever said about the deeds after the transaction had in the bank with this witness. Nothing was ever said by this witness to Krueger about the deeds during the time the same were in the bank. This witness did testify that he would have turned the deeds over to F. A. Krueger on Krueger's demand, but afterwards he said he would not have turned them over to Krueger if Krueger demanded them, on the theory that the bank could be involved in litigation if he turned the deeds over to Krueger upon demand.

The land in question was leased to Hugo Krueger who farmed it, with F. A. Krueger receiving rentals as designated in the lease. Hugo Krueger testified that he farmed the land in 1957 and 1958; and that he made no accounting for rent on the south 40 acres of which he had been in possession, that is, the south half of this 80 acres of land.

Elmer Matthies testified that he was a cousin of F. A. Krueger. He lived in Krueger's home during 3 months of the winter of 1930, and lived with the Pestels from 1933, off and on, until 1954. He further testified that F. A. Krueger was at the Pestels' home from 1940 until 1948, when he went to live with his son Hugo

Krueger, and lived there until he died. This witness was living with the Pestels at the time F. A. Krueger went to live with Hugo Krueger. He further testified that he was familiar with the 80 acres of land here involved, 40 acres of which is in controversy; that he had conversations with F. A. Krueger about this land on occasions when they were staying in the same place; and that when they would drive around and look at the crops Krueger would talk about the land. He remembered one occasion in particular in the summer of 1948 when he and Krueger were in the house alone and Krueger told him the 80 acres of land belonged to his two daughters, that he had made deeds to them. He did not say where the deeds were, but said that he was using the land for his income as long as he lived and that he had given all of his property away and divided it up where it should go. This witness further testified that he knew that 120 acres had been deeded to Hugo Krueger, which left F. A. Krueger only 80 acres of land; that F. A. Krueger told this witness that each of his daughters was getting 40 acres; and that the deeds were made to the daughters in 1937. On cross-examination this witness testified that F. A. Krueger did not say in what manner each daughter was getting 40 acres of land.

Fred Kind, a brother-in-law of the plaintiff, testified that he had been the owner of 160 acres of land since 1937. This land is north of the 80 acres in controversy. He further testified that the deed made to him was made on the same day that the deeds were made to the daughters of F. A. Krueger; and that the reasonable rental value of the land in question, being farmed by Hugo Krueger, for the years 1957 and 1958, would be $10 per acre.

It was stipulated that F. A. Krueger, during his lifetime, collected the rents, made repairs, and paid the taxes on the 80 acres of land in controversy, and retained control over the same.

The plaintiff assigns as error that the trial court erred in holding that there was a delivery of the deeds to the grantees and cross-petitioners; and that the trial court erred in not finding that the last will and testament of the deceased passed title to the land described therein to Hugo Krueger as provided for in the residuary clause of the will.

While the question of the delivery of the deeds is raised in this litigation, we conclude that it is not necessary to determine this issue in arriving at our decision in this case for reasons hereinafter stated.

Certain paragraphs of the last will and testament of F. A. Krueger, deceased, appear in the petition of the plaintiff and are referred to in the answer and cross-petition of the defendants. The will is not made a part of the record. The rule is as follows: Statements, admissions, and allegations in pleadings upon which the case is tried are always in evidence for all the purposes of trial; they are before the court, and may be used for any legitimate purpose. See, Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701; Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173.

A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner. See, Bonacci v. Cerra, *supra;* Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768.

This is a trial de novo in this court.

The final decree in the matter of the estate of F. A. Krueger, deceased, in the county court of Cuming County, Nebraska, in part, reads as follows: "That by his last will and testament the testator devised the north half of the north west quarter of section 32, township 23, range 4, in Cuming County, Nebraska. That at the

time of the execution of said instrument and at the time of his death the testator was the owner of the west half of said north west quarter, and did not own the north east quarter of the north west quarter of said section 32, which is a part of the tract devised by him. That since the death of the testator there have been placed of record deeds from him conveying said west half of the north west quarter. That because this Court lacks jurisdiction over title to land the meaning and effect of the transactions above described cannot be determined in this proceeding." It was decreed by the county court: "* * * that any real property of which the testator died seized be assigned in accordance with the terms of his last will and testament; * * *."

The plaintiff, Hugo Krueger, claims that as residuary devisee he is the owner of the southwest quarter of the northwest quarter, and ownership of this 40 acres is a question presented in this case.

It is obvious that a latent ambiguity exists in the will of F. A. Krueger, deceased. It is also apparent that he wanted to devise to his daughters Myrtle Krueger and Flora Pestel 40 acres of land each. It seems clear that the testator intended to describe the land he owned when he made and executed his will, and not the land belonging to someone else.

We deem the following authorities to be applicable to the instant case.

"In construing a will the whole thereof will be considered and from its four corners the court will determine the intent of the testator and give effect thereto, and extrinsic evidence is not admissible to determine the intent of the testator as expressed in his will unless there is a latent ambiguity." Borah v. Lincoln Hospital Assn., 153 Neb. 846, 46 N. W. 2d 166.

In Seebrock v. Fedawa, 33 Neb. 413, 50 N. W. 270, 29 Am. S. R. 488, a testator devised Lots 4 and 9 and the west half of Lot 10, in Block 32, in the city of Lincoln. He was not the owner of Lot 4, but did own Lots 3,

9, and the west half of Lot 10, and those were all the lots possessed by him in that block. It was held that Lot 3 passed by the will. The court said: "While it is true that oral evidence cannot be admitted to change the language of a written instrument, and particularly of a will, yet the universal rule at the present time is to admit oral proof to show that one term was used for another, or that an essential term, to make the definition perfect, was omitted or erroneously stated. For the purpose of arriving at the intention of the testator, therefore, the will is to be read in the light of the surrounding circumstances. Thus, suppose a party should devise the manor of B., and it should appear that the testator possessed two manors—one known as East B., and the other as West B.—parol evidence is admissible to explain the ambiguity by showing the testator's intention."

In the case of St. James Orphan Asylum v. Shelby, 75 Neb. 591, 106 N. W. 604, it was held that the original jurisdiction of the district court over an action to quiet the title to real estate is not affected by the fact that incident thereto there is involved the construction of a will; and that parol evidence is admissible to explain a latent ambiguity in a will, where such evidence is necessary to enable the court to ascertain the intention of the testator. This case used the same language relating to parol evidence to explain a latent ambiguity in a will as was used in Seebrock v. Fedawa, *supra*.

In Heywood v. Heywood, 92 Neb. 72, 137 N. W. 984, the court said: "In discussing the matter of ambiguity the Indiana court said: 'Whenever, therefore, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce or develop a latent ambiguity, not apparent upon the face of the will itself, since the ambiguity is disclosed by the introduction of extrinsic facts, the court may inquire into every other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied

by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator in his will be arrived at.' In stating affirmatively the purpose for which extrinsic evidence may be admitted, the court say it is 'to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances. Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328, 336, and cases cited.' " See, also, Borah v. Lincoln Hospital Assn., *supra.*

In 57 Am. Jur., Wills, § 1077, p. 695, it is said: "Where the description of the real property devised in a will is inaccurate, or there is a latent ambiguity with respect thereto, extrinsic evidence is competent to resolve the ambiguity and identify the property designated." Under note 16 numerous cases are cited, including Seebrock v. Fedawa, *supra,* and Pemberton v. Perrin, 94 Neb. 718, 144 N. W. 164, Ann. Cas. 1915B 68. While the case of Wallace v. Sheldon, 56 Neb. 55, 76 N. W. 418, overruled Seebrock v. Fedawa, *supra,* it was on a ground other than the rule heretofore expressed. See, also, Annotation, 94 A. L. R. 131. To cite other authorities holding as above stated would unnecessarily lengthen this opinion.

While the judgment of the district court did not show upon what ground it arrived at its judgment, the rule is that a judgment rendered by the district court which is free from error is not rendered invalid by the fact that the court gave an incorrect reason therefor. See A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687, and cases cited therein.

For the reasons given herein, the judgment of the district court is affirmed.

AFFIRMED.

SUN INSURANCE COMPANY OF NEW YORK, A CORPORATION, APPELLEE, V. AETNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT, A CORPORATION, ET AL., APPELLANTS.

98 N. W. 2d 692

Filed October 23, 1959. No. 34568.

1. **Automobiles: Statutes.** By section 60-601, R. S. Supp., 1955, a "person" is defined as "every natural person, firm, copartnership, association, or corporation."
2. ———: ———. By section 60-606, R. R. S. 1943, any person, desiring to act as a motor vehicle dealer or used motor vehicle dealer, must file with the titular head of the Department of Roads and Irrigation, designated as administrator, an application for a license under oath, in such form as prescribed by the administrator.
3. ———: ———. By section 60-611, R. S. Supp., 1955, the administrator may revoke the license when the licensee has been found guilty of willfully defrauding any retail buyer, to the buyer's damage, or any other person in the conduct of the licensee's business.
4. ———: ———. Section 60-619, R. S. Supp., 1955, requires a motor vehicle dealer to furnish a corporate surety bond in the penal sum of $10,000 on a form prescribed by the Attorney General, which bond shall provide that the applicant will faithfully perform all the terms and conditions of the license issued to the said applicant and truly and faithfully comply with all the provisions of his license and the acts of the Legislature relating thereto; the aggregate liability of the surety on the bond, in no event to exceed the penalty as provided in said bond.
5. **Statutes.** All statutes relating to the same subject are considered parts of a homogeneous system; so, too, all statutes in pari materia must be taken together and construed as if they were one law and effect be given to every provision.
6. **Insurance.** An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest.
7. **Statutes.** In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the preexisting law and any other laws relating to the same subject.

8. ———. The primary rule of construction of remedial statutes is to ascertain, declare, and give effect to the intention of the Legislature, as gathered from the language used.
9. ———. A remedial statute should be construed so as to afford all the relief within the power of the court which the language of the act indicates that the Legislature intended to grant.
10. **Bonds: Statutes.** A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute.
11. ———: ———. The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein.
12. **Principal and Surety.** Courts construe the contract of a surety company, acting for compensation, and of any other surety for hire, most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect.
13. **Statutes.** Where the general intent of the Legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful or uncertain, the courts may have recourse to historical facts or general information, in order to aid them in interpreting its provisions. However, where the statutes involved are clear and unambiguous, there is no necessity to resort to the historical facts or general information to aid the court in interpreting the statutes.
14. **Attorney and Client.** By statute, attorney's fees may be allowed and taxed as part of the costs against a surety on a bond guaranteeing that a motor vehicle dealer licensee will perform the terms and conditions of his license and the statutes relating to his business.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Reversed and remanded with directions.*

Sidner, Lee, Gunderson & Svoboda, Robert W. Haney, and *Thomas J. Walsh,* for appellants.

Spear, Lamme & Simmons, for appellee.

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

MESSMORE, J.

The Sun Insurance Company, a corporation, insti-

tuted this action in the district court for Dodge County as plaintiff, against the Aetna Insurance Company, a corporation, Mercantile Credit Company, a corporation, and Platte Valley Bank of North Bend, a corporation, as defendants. By order of the court, Illinois Appleton & Cox, Incorporated, and certain Underwriters at Lloyds of London were brought into the case as additional parties. The purpose of the action was to obtain a declaratory judgment to adjudicate plaintiff's liability and the division of any award money among claimants upon the statutory motor vehicle dealer's bond furnished by Lumir L. Urban, a motor vehicle dealer, pursuant to the provisions of section 60-606, R. R. S. 1943, and sections 60-601, 60-611, and 60-619, R. S. Supp., 1955. Cross-petitions were filed by all of the defendants praying for judgment on the bond. The trial court rendered judgment in favor of the plaintiff and against the defendants and dismissed the defendants' cross-petitions. Motions for new trial were filed by all of the defendants, and all were overruled. Defendants perfected appeal to this court.

For convenience we will refer to the parties as follows: Defendant Aetna Insurance Company, as Aetna; defendant Mercantile Credit Company, as credit company; defendant Platte Valley Bank of North Bend, as the bank; Illinois Appleton & Cox, Inc., if required, as Appleton & Cox; John Alfred Halford, representative of the Underwriters, as Halford; and Lumir L. Urban, who is not a defendant, as Urban.

We summarize the pleadings of the respective parties and eliminate therefrom certain facts which are covered in detail in the statement of facts appearing later in the opinion.

The plaintiff's petition alleges that in December 1955, Urban, an individual doing business as Urban Motors in Fremont, applied for a license to sell new and used cars, signed a bond as principal, and the plaintiff signed the bond as surety; that on December 6, 1955, a license

as a motor vehicle dealer for the year 1956 was issued to Urban by the proper authorities; that the bank carried a policy of insurance with Aetna, protecting the bank against loss on loans secured by chattels by reason of its failure to have the loans on automobiles endorsed on the certificates of title thereto; that under the terms of the policy, Aetna paid the bank $5,000 to reimburse it in part for the loss sustained on Urban loans; and that Aetna claims that it is subrogated to the rights of the bank in the amount of $5,000 by virtue of the terms of said insurance policy on a loan receipt which Aetna took at the time of its payment of such amount to the bank.

The plaintiff further alleges that the defendants have made claims against the plaintiff in varying amounts, as set forth in the petition, totaling $20,270; that each defendant claims it is covered by the bond of Urban which was signed by the plaintiff as surety for him although said claims of the defendants arise out of loans made on automobiles to Urban by defendants; and that there has arisen between the plaintiff and said defendants an actual controversy as to the rights, liabilities, duties, and legal relationships as between the plaintiff and defendants, and more particularly, the controversy between defendants and plaintiff that defendants claim said bond covers the loan of money by defendants to Urban for the purpose of purchasing automobiles for Urban. Plaintiff alleges it is not liable on the bond because the bond does not cover the seller of an automobile to Urban, or lenders of money to Urban, and that the bond is limited to and only for the protection of purchasers of automobiles from Urban.

The petition prays for judgment against the defendants; that a declaration and determination be made declaring the rights, duties, liabilities, responsibilities, and legal relations between the plaintiff and defendants; that it be determined that the plaintiff is not liable on the bond for the reasons stated; that the court declare the

bond only protects purchasers of automobiles from Urban because of the violation of any of the provisions of the bond; that the court declare and determine that defendants loaned money to Urban and therefore have no claim under the bond; and that in no event can liability of the plaintiff exceed $10,000, and if it should be discovered that there are legal claims of more than $10,000 against plaintiff under the bond, that the court then pro rate said claims allowing to each defendant its proper percentage of $10,000.

The credit company, in its answer and cross-petition, alleges that Urban, as a licensed automobile dealer covered by the plaintiff's bond, caused this defendant to suffer a loss in the sum of $9,870, which loss was caused because of the false and fraudulent representations and deceitfulness of Urban in representing the purchase of automobiles as before set forth in this pleading (which facts appear in the opinion); that Urban failed to comply with the provisions of his license and the laws of this state; and that as a result of said failure and the false representations this defendant has been damaged, which damage is a proper claim against the bond described in the plaintiff's petition, for which this defendant prays judgment in the amount of $9,870, together with interest, costs, and attorney's fees.

The answer and cross-petition of Appleton & Cox and Halford, representative of certain underwriters, alleges that the underwriters paid the credit company $3,500, being the maximum loss on one borrower, on the policy of insurance issued by this cross-petitioner to the credit company; that by virtue of said payment to the credit company, Halford is subrogated to any rights of the credit company to the extent of such payment; and that under the provisions of the bond, the defendants are entitled to recover from the plaintiff because of the violations of the statutes. They pray judgment in behalf of the credit company and Halford in the amount of $10,000, and costs.

The answer and cross-petition of Aetna and the bank alleges that on October 22, 1956, October 30, 1956, and November 28, 1956, the bank made loans of money to Urban for the purchase of automobiles; and that the bank required Urban to execute separate notes and trust receipts in its favor for the amount of the purchase price of each automobile and required Urban to deposit with the bank the original certificates of title to each automobile signed or endorsed in blank. This pleading then alleges certain facts relating to false and fraudulent representations made by Urban to the bank, and the borrowing of money from the bank for the purchase of automobiles. It further alleges that on or about December 13, 1956, there was in full force and effect a corporate surety bond in the penal sum of $10,000 executed by Urban as principal and the plaintiff as surety, whereby the plaintiff contracted to indemnify any person damaged by failure of Urban to perform the terms of the motor vehicle dealer's license; that by reason of the willful and fraudulent acts of Urban the bank has been damaged in the amount of $10,400 which amount is owing to the bank; that Aetna, by virtue of the willful and fraudulent acts of Urban, has loaned the bank the sum of $5,000 under the terms and conditions of a loan receipt received by Aetna; and that by reason of the willful and fraudulent acts of Urban, plaintiff is indebted to these defendants in the amount of $10,400. Aetna and the bank prayed that the court enter judgment against the plaintiff in the sum of $10,400; and that the court further enter judgment in favor of these defendants and against the plaintiff for all attorneys' fees incurred in this action.

There is no dispute as to the facts which are stipulated by the parties. However, to obtain a better understanding of what is involved in this appeal, we deem that a comprehensive statement of the facts is necessary.

The record discloses that in December 1955, Urban conducted a business identified as Urban Motors, with

its principal place of business in Fremont, Nebraska; that for the purpose of receiving a motor vehicle dealer's license as a new and used car dealer, as provided by statute, Urban applied for a license and signed a bond in the amount of $10,000 as principal, and the Sun Insurance Company signed said bond as surety; that on or about December 6, 1955, such a license was issued to Urban for the year 1956; and that during all times mentioned herein the bond and license were in full force and effect.

On or about October 16, 1956, Urban bought and took possession at West Des Moines, Iowa, of a 1957 Ford Fordor Customline automobile, obtaining an Iowa certificate of title therefor. On October 22, 1956, Urban borrowed $2,100 from the bank upon said automobile, signed a note in this amount and a trust receipt, depositing the same, plus the original Iowa certificate of title, signed in blank, to the same with the bank. On October 25, 1956, Urban obtained from the county treasurer of Polk County, Iowa, a duplicate certificate of title to the above-described automobile by falsely telling said treasurer that the original certificate of title to the said automobile had been lost. On October 26, 1956, Urban went to the county clerk of Dodge County, Nebraska, and obtained an original Nebraska certificate of title to the said automobile by showing this county clerk the Iowa duplicate certificate of title to the said automobile. Later on, on this same date, Urban borrowed $2,240 from the credit company upon the same automobile, signed a note for this amount, and a chattel mortgage, and deposited the note and chattel mortgage, plus the original Nebraska certificate of title with the credit company. Neither the bank nor the credit company had its mortgage or trust receipt recorded on the certificate of title held by it. On or about December 13, 1956, Urban called the manager of the credit company and informed him that he was going to sell the above-described automobile at a used car auction in Omaha

the next day, and requested permission to take this automobile from Fremont to the used car auction and for a release of the certificate of title. The manager of the credit company authorized Urban to take the automobile to the auction, and gave him the endorsed certificate of title upon Urban's verbal promise and representation that he would bring the proceeds received from the sale to the credit company. On or about December 14, 1956, Urban sold the automobile to a purchaser, whose name is unknown to the parties, delivered to the purchaser the original Nebraska certificate of title, and obtained payment from the purchaser.

On or about October 20, 1956, Urban bought and took possession of a 1957 Ford Fordor Fairlane automobile, obtaining a Nebraska certificate of title therefor. On October 22, 1956, Urban borrowed $2,600 from the bank upon said automobile, signed a note in this amount and a trust receipt, and deposited both of these instruments, plus the original certificate of title, signed in blank, to this automobile with the bank. On or about October 25, 1956, Urban obtained from the county clerk of Dodge County a duplicate certificate of title to said automobile by falsely telling said clerk that the original certificate of title to this automobile had been lost. On or about October 26, 1956, Urban borrowed $2,780 from the credit company upon said automobile, signed a note in this amount and a chattel mortgage, and deposited the note and chattel mortgage, plus the duplicate certificate of title to said automobile, with the credit company. Neither the bank nor the credit company had its mortgage or trust receipt recorded on the certificate of title held by it. On or about December 13, 1956, Urban called the manager of the credit company and informed him that Urban was going to sell the above automobile at a used car auction in Omaha the next day, asked permission to take this automobile to Omaha to be sold at said auction, and asked for a release of the certificate of title. The manager of the credit company

authorized Urban to take the automobile to the auction and gave him the endorsed certificate of title upon Urban's verbal representation that he would bring the proceeds received from the sale to the credit company. On or about December 14, 1956, Urban sold said automobile to a purchaser whose name is unknown to the parties, delivered to the purchaser the duplicate Nebraska certificate of title, and obtained payment from the purchaser.

From August to October 1956, Urban bought and took possession of the following automobiles, and borrowed the following sums of money from the bank upon said automobiles: October 30, 1956, a new 1957 Chevrolet 4-door sedan, $2,200; November 28, 1956, a new 1956 Mercury 4-door sedan, $2,250; November 28, 1956, a new 1956 Ford Victoria, $1,890; and November 28, 1956, a used 1955 Chevrolet Bel Air, $1,440. Urban, at the time of borrowing the above amounts, signed notes in the amounts indicated above, payable to the bank, and deposited them with the bank, together with trust receipts and the original certificates of title, signed in blank, to said automobiles. On various dates thereafter, Urban obtained from the county clerk of Dodge County, Nebraska, duplicate certificates of title to each of the above automobiles by falsely telling said clerk that the original certificates of title to the automobiles had been lost. The bank did not have its trust receipts recorded on the certificates of title. On later dates, unknown to the parties, Urban sold the above-described automobiles to buyers whose names are unknown to the parties, obtained payment from the buyers, and gave the latter the duplicate certificates of title to the said automobiles. Urban did not reimburse the bank on any of the above loans, but rather kept the proceeds of the sales.

Urban bought and took possession on November 6, 1956, of a 1956 Chevrolet 4-door sedan, upon which he borrowed $1,850 from the credit company. On Decem-

ber 3, 1956, Urban bought and took possession of a 1957 Buick Tudor Riviera, upon which he borrowed $3,000 from the credit company. At the time Urban borrowed the above amounts he signed notes payable to the credit company, and deposited them with the credit company, together with chattel mortgages and the original certificates of title to said automobiles, endorsed in blank. Urban, at the same time, agreed to keep the above-described automobiles on his lot in Fremont and at the time of sale to pay the amount on the indebtedness. The credit company did not have its mortgages recorded on the certificates of title. On or about December 13, 1956, Urban called the manager of the credit company and informed him that he was going to sell the above-described automobiles at a used car auction in Omaha the next day, and asked permission to take the automobiles to the auction and for a release of the certificates of title. The manager of the credit company authorized Urban to take the automobiles to the auction and gave him the endorsed certificates of title upon Urban's verbal representation that he would bring the proceeds received from the sale to the credit company. On or about December 14, 1956, Urban sold the said automobiles to purchasers whose names are unknown to the parties, delivered to the purchasers the original Nebraska certificates of title, and obtained payments from the purchasers.

After the above transactions Urban left Nebraska and on August 6, 1957, was arrested in California, returned to Nebraska, and charged in the district court for Dodge County with fraudulent transfer of property on two counts. A hearing was held in said court on August 29, 1957, at which hearing Urban pleaded nolo contendere. He was found guilty and placed on probation for a number of years.

Claims were made by the Underwriters, the credit company, Aetna, and the bank against the plaintiff as

surety on Urban's motor vehicle dealer's bond for losses sustained by them.

The credit company, Appleton & Cox, the representative of the Underwriters, and the bank assign as error that the findings, conclusions, and judgment of the trial court are contrary to law and to the evidence; and that the trial court erred in holding that the Legislature intended that the bond of a licensed motor vehicle dealer was limited to the protection of retail purchasers of motor vehicles.

The sections of the statutes here involved appear under Chapter 60, article 6, the Motor Vehicle Dealer's License Act. We set forth certain parts of section 60-606, R. R. S. 1943, and sections 60-601, 60-611, and 60-619, R. S. Supp., 1955.

Section 60-601, R. S. Supp., 1955, provides in part: "As used in this act, unless the context otherwise requires: * * * (3) Person shall mean every natural person, firm, copartnership, association, or corporation; * * * (8) Administrator shall mean the titular head of the Department of Roads and Irrigation, who shall be charged with the enforcement of this act; (9) Department shall mean the Department of Roads and Irrigation; * * *."

Section 60-606, R. R. S. 1943, provides in part: "Any person, desiring to act as a motor vehicle dealer, used motor vehicle dealer, * * * must file with the administrator an application for a license under oath. The application shall be in such form and detail as the administrator shall prescribe, setting forth the following information: (1) The name and address of the applicant and the name under which he intends to conduct business; * * * (2) the place or places, including the city, town or village and the street and street number, if any, where the business is to be conducted * * *."

Section 60-611, R. S. Supp., 1955, provides in part: "The administrator may, upon his own motion, and shall, upon a sworn complaint in writing of any person, in-

vestigate the action of any such person licensed as a motor vehicle dealer, used motor vehicle dealer, * * * and shall have the power to * * * revoke or suspend any license issued under this act upon proof of unfitness on the part of the applicant or licensee, and at any time when the applicant or licensee has been found guilty of (1) intentionally publishing advertising which is misleading or inaccurate in any material particular or in any way misrepresents any of the products or services of the business conducted, (2) knowingly purchasing, selling or dealing in stolen motor vehicles, (3) material misstatement in application for license, (4) willfully defrauding any retail buyer, to the buyer's damage, *or any other person in the conduct of the licensee's business,* (5) willfully failing to perform any written agreement with any retail buyer, (6) having made a fraudulent sale, transaction or repossession, (7) failure or refusal to furnish and keep in force any bond required, * * *." (Emphasis supplied.)

Section 60-619, R. S. Supp., 1955, provides: "Applicants for a motor vehicle dealer's license or for a used motor vehicle dealer's license shall, at the time of making application, furnish a corporate surety bond in the penal sum of ten thousand dollars on a form to be prescribed by the Attorney General of the State of Nebraska. The bond shall provide (1) that the applicant will faithfully perform all the terms and conditions of said license, (2) that the licensed dealer will fully indemnify any person by reason of any loss suffered because of (a) the substitution of any motor vehicle other than the one selected by the purchaser, (b) the dealer's failure to deliver to the purchaser a clear and marketable title, (c) the dealer's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer so as to deceive the purchaser as to the year, model of any vehicle, and (e) any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle, and (3) that the automo-

bile dealer shall well, truly, and faithfully comply with all the provisions of his license and the acts of the Legislature relating thereto. The aggregate liability of the surety, however, shall in no event exceed the penalty of said bond."

Sections 60-601, 60-606, and 60-611, R. R. S. 1943, were first enacted in 1937. Section 60-619, R. R. S. 1943, was first enacted in 1945, and provided for a bond in the penal sum of $2,500. Subsequently this section was amended to increase the bond to the penal sum of $10,000, and the amended section became effective on September 14, 1953. § 60-619, R. S. Supp., 1955. It contains the same provisions, otherwise, as the law enacted in 1945 on the same subject.

The following authorities are applicable.

In State ex rel. Menard v. Nichols, 167 Neb. 144, 91 N. W. 2d 308, this court said: "All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention. * * * All statutes in pari materia must be considered together and construed as if they were one law, and, if possible, effect given to each provision."

In In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, the court said: "All statutes relating to the same subject are considered parts of an homogeneous system; so, too, all statutes in pari materia must be taken together and construed as if they were one law and effect be given to every provision."

In Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366, it was held: "An arrangement between an insurer and an insured, whereby the former loaned to the latter the amount of a loss under the terms of a policy of insurance, to be repaid only if the insured made a recovery from a third person, is a lawful agreement and the loan thus made is not such a payment of insurance as to make the insurer the real party in interest." See, also, 46 C. J. S., Insurance, § 1209, p. 170; Shiman Bros. & Co. v. Nebras-

ka National Hotel Co., 143 Neb. 404, 9 N. W. 2d 807. Consequently, the loan by Aetna to the bank has in no way altered the status of the claim of the bank against the plaintiff insofar as this case is concerned, and this loan is not a material fact to be considered by the court in determining the validity of the claim of the bank, or any part thereof. This would also be true of the credit company.

In Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856, this court said: "In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the preexisting law and any other laws relating to the same subject."

We deem the foregoing sections of the statutes to be remedial in character, and in this connection the following authorities are applicable.

In 50 Am. Jur., Statutes, § 393, p. 417, it is said: "As in the case of all statutes, the primary rule of construction of remedial statutes is to ascertain, declare, and give effect to the intention of the legislature, as gathered from the language used. In the interpretation of remedial statutes, however, a special effort is made to avoid a technical construction of the language used, and to give it a fair construction so as to promote justice in the interest of the public good. The purpose of the act should be taken into consideration. The construction should be one which would be consistent with, and promote, preserve, and effect, the object of the statute, so as effectually to meet the beneficial end in view, and not one which would defeat the manifest purpose or design of the statute. * * * A remedial statute should be construed so as to afford all the relief within the power of the court which the language of the act indicates that the legislature intended to grant."

The bond furnished by the plaintiff for Urban was in the amount of $10,000. The principal provisions of

the bond are as follows: "NOW, THEREFORE, upon such license being issued to the said principal _____ above named, if the said principal _____ hereinabove named shall faithfully perform all of the terms and conditions of said license, and shall well, truly and faithfully comply as such licensee with all the provisions of said Act of the Legislature and shall fully indemnify any person by reason of any loss suffered because of (a) the substitution of any motor vehicle other than the one selected by the purchaser, (b) the licensee's failure to deliver to the purchaser, a clear and marketable title, (c) the licensee's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer so as to deceive the purchaser as to the year, model of any vehicle and (e) any false and fraudulent representations or deceitful practices, whatever in representing any motor vehicle; * * *." The bond was signed December 31, 1955, and became effective for the license year ending December 31, 1956. Urban signed the bond as principal and the plaintiff signed as surety.

When Urban borrowed money from the bank to purchase automobiles he gave trust receipts. These trust receipts provided in part as follows: "In consideration of the advancement of money as is set out on the reverse side of this trust receipt the trustee hereby agrees to purchase the above described articles for and in the name of the said Bank, and to store said articles in trust for said Bank or its assigns as its property, with liberty to sell the same for the account of said Bank or its assigns, and further agrees, in case of sale, to immediately pay the above amount advanced for the purchase of said articles, together with interest thereon at __% per annum * * *. It is agreed that any sale which Trustee may make of said articles shall be for the account of said Bank or its assigns, and the proceeds thereof shall be kept separate, capable of identification as the property of said Bank or its assigns, and such portion of the

proceeds as is necessary to pay the above amount advanced together with any other expense to which said Bank has been placed for insurance or taxes, shall be paid directly and immediately to said Bank. It is agreed that said Bank is under no liability to allow said articles to remain with the undersigned for any specific period of time, and its right to take possession of same shall not be subject to question."

The plaintiff's bond met the requirements of section 60-619, R. S. Supp., 1955, and contains the terms and conditions of said section. There is no question but that Urban breached the terms and conditions of the bond and clearly violated the terms and conditions of his motor vehicle dealer's license to the damage of the bank. The stipulated facts show without contradiction that Urban made false representations wherein he falsely represented to different public officials that the original automobile certificates of title which he deposited with the bank as security for the cash advances made by the bank to him, had been lost so that he, Urban, might obtain duplicate certificates of title to be used to defraud the bank of money advanced to him, and the bank's security therefor. The stipulated facts further show that Urban falsely represented to subsequent purchasers by these fraudulent duplicate certificates of title that the automobiles covered thereby were free and clear of liens and that he was the sole and only owner thereof and entitled to sell said automobiles. Further, the stipulated facts disclose that Urban misappropriated the money received from the subsequent purchasers of the said automobiles and owing to the bank and the credit company, and absconded from the state with the money, seeking to avoid criminal prosecution.

The contention of the plaintiff is that the coverage afforded by the bond does not extend to the bank and the credit company for the reason that its bond was only for the protection of purchasers of automobiles from Urban. As heretofore mentioned, the plaintiff's

bond met the requirements of section 60-619, R. S. Supp., 1955, which contained conditions required by subdivisions (c) and (e) of said section. The bond recited as one of the conditions set forth therein that the bond would be null and void unless Urban, as licensee "shall fully indemnify any person by reason of any loss suffered because of" the conditions imposed under subdivisions (c) and (e) of section 60-619, R. S. Supp., 1955. Condition (e) of the bond specifically indemnified against "any false and fraudulent representations or deceitful practices, whatever in representing any motor vehicle; * * *."

The Legislature, in section 60-601, R. S. Supp., 1955, defined the word "person" as "every natural person, firm, copartnership, association, or corporation." Without doubt, the bank and the credit company fall within the definition of a person as defined by said section.

As we interpret section 60-619, R. S. Supp., 1955, upon which the plaintiff's bond is based, the Legislature intended that persons other than purchasers might sustain damage or loss by reason of a motor vehicle dealer's misrepresentations, false and fraudulent acts, and misappropriation of funds or deceitful practices in representing a motor vehicle to the purchaser thereof. It is obvious that the Legislature intended that any person sustaining loss by reason of a motor vehicle dealer's conduct in engaging in acts prohibited by law would be entitled to recourse on such a bond as the plaintiff's bond in the instant case, regardless of the particular status of such person as defined in section 60-601, R. S. Supp., 1955.

The plaintiff's bond, being a statutory bond, must be interpreted in the light of section 60-619, R. S. Supp., 1955.

In 11 C. J. S., Bonds, § 39, p. 418, it is said: "A statutory bond will be construed in the light of the purpose for which it is required as expressed in the statute, * * *. Accordingly, in view of the fact that the public

has an interest in official and other statutory bonds, such bonds should be liberally construed to effect the purpose for which they were given, and the ordinary rules of construction give way."

It is also said in 11 C. J. S., Bonds, § 40, p. 420: "The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein. Where a bond is given under the authority of a statute in force when it is executed, in the absence of anything appearing to show a different intention it will be presumed that the intention of the parties was to execute such a bond as the law required, and such statute constitutes a part of the bond as if incorporated in it, and the bond must be construed in connection with the statute * * *." See, also, Philip Carey Co. v. Maryland Casualty Co., 201 Iowa 1063, 206 N. W. 808, 47 A. L. R. 495, and cases cited therein. See, also, Duke v. National Surety Co., 130 Wash. 276, 227 P. 2.

It is said in 50 Am. Jur., Suretyship, § 318, p. 1112: "On the other hand, the courts, with possibly one or two exceptions, construe the contract of a surety company, acting for compensation, and of any other surety for hire, most strongly against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect; the rule of strictissimi juris, on the ground that sureties are favored in law, has no application."

We believe the Legislature did not, by statutory enactment, limit the Motor Vehicle Dealer's License Act to just a retail buyer. The licensee loses his license for defrauding a retail buyer or any other person in the conduct of the licensee's business.

We need not repeat the facts relating to the credit company. Suffice it is to say that there can be no doubt but that the credit company was defrauded and deceived by representations made by Urban to it, and

by virtue thereof suffered a loss. False and fraudulent representations were made by Urban to the manager of the credit company as shown by the stipulated facts, by clearly misrepresenting the titles to the automobiles and by failure to return the money for the sale thereof allegedly at an automobile auction to be held in Omaha. The credit company is entitled to recover against the plaintiff on the plaintiff's bond in this action.

Some contention is made by the plaintiff that the trial court eliminated certain evidence relating to witnesses who appeared before the legislative committee with reference to the Motor Vehicle Dealer's License Act. The trial court did not admit the statement of the senator who introduced the legislative bill, that is, the Motor Vehicle Dealer's License Act. The rule is as stated in Nebraska District of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688: "Where the general intent of the legislature may readily be discerned, yet the language in which the law is expressed leaves the application doubtful or uncertain, the courts may have recourse to historical facts or general information, in order to aid them in interpreting its provisions."

In the instant case, the sections of the statutes involved are clear and unambiguous, and there would be no necessity to resort to the historical facts or general information to aid this court in interpreting the provisions of the said sections of the statutes.

For the reasons given herein, we conclude that the total liability of the plaintiff, as provided for in its bond, is the amount of $10,000, and the bank and the credit company are entitled to recover their proportionate share of the $10,000 as shown by the losses sustained by them. The defendant Aetna is entitled to be subrogated to the recovery obtained by the bank to the amount loaned by it to the bank by its contract with the bank in the amount of $5,000. Halford, designated as a defendant and representative of certain under-

writers as hereinbefore set forth, is entitled to be subrogated in the amount of $3,500 as against the amount to which the credit company is entitled to recover.

We further conclude that attorneys' fees shall be allowed the attorneys for the bank and the attorneys for the credit company in the amount of $1,200.00, to be divided equally, the attorneys' fees to be taxed as part of the costs against the plaintiff. See, §§ 44-201 and 44-359, R. R. S. 1943; Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co., 98 Neb. 863, 155 N. W. 235. We further conclude that plaintiff shall pay all costs in this court and in the district court.

The judgment of the trial court is reversed and the cause remanded with directions to render judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CLYDE WAITE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

98 N. W. 2d 688

Filed October 23, 1959. No. 34576.

1. **Indictments and Informations.** A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant.
2. **Intoxicating Liquors: Automobiles.** The word operate as used in section 39-727, R. S. Supp., 1957, relates to the actual physical handling of the controls of an automobile by a person while under the influence of intoxicating liquor.
3. **Appeal and Error.** While a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption.
4. **Continuances.** A trial court may in a proper case order a continuance on its own motion.

ERROR to the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Wellensiek & Morrissey, for plaintiff in error.

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

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

SIMMONS, C. J.

By information plaintiff in error, hereinafter called the defendant, was charged in one count in that he did "unlawfully operate or was the person in actual physical control of a motor vehicle * * * while * * * under the influence of alcoholic liquor * * *." In a second count it was charged that the offense complained of in the first count was a third offense.

The defendant, on a plea of not guilty, was tried to a jury on the issues presented. A verdict of guilty was returned. As a result of a hearing before the court the allegations of count II were found to be true. Defendant was sentenced to serve a term in the reformatory and forbidden to drive a motor vehicle, as provided by statute.

Defendant brings the cause here on error.

We affirm the judgment of the trial court.

Defendant makes 22 assignments of error here. Pursuant to the provisions of rule 8a2(4) we limit our decision to a consideration of errors assigned and discussed.

The first assignment of error to be so considered is that the State was permitted to endorse the names of witnesses on the information after the information was filed. The State knew the names of one group of witnesses when the information was filed.

The information was filed April 26, 1958. No names of witnesses were endorsed on it at that time. Defendant entered a plea of not guilty on July 17, 1958, and the case was then set for trial on October 13, 1958.

On October 9, 1958, the State asked leave to endorse the names of witnesses on the information. Leave

was granted over the objection of the defendant. The court, on defendant's motion, granted a continuance to November 3, 1958. On October 20, 1958, by agreement of parties the case was set for trial, and trial was had beginning October 27, 1958.

Defendant relies on the provisions of section 29-1602, R. R. S. 1943, which provides: "All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant. He shall subscribe his name thereto and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall then be known to him."

The prosecuting attorney did not comply with the provisions of the section. It was error. The question is: Was it prejudicial error?

Defendant relies on, among others, our decision in Sweenie v. State, 59 Neb. 269, 80 N. W. 815. He points out that the statute was thereafter changed. In our decision in McCartney v. State, 129 Neb. 716, 262 N. W. 679, we pointed out that prejudice will not be presumed but must be shown in this type of a case.

Finally we come to Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649, where there were no names endorsed on the information when filed. Later the State was permitted to endorse thereon the names of all the witnesses. The trial was had 2½ weeks later. It was held that prejudicial error was not shown. No claim of prejudice is made here. The defendant had the period from October 9 to November 3, 1958, to prepare for trial after the names of the witnesses were endorsed. He consented to trial on October 27, 1958. The result of the holding of the cases above cited is: A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or

after the trial has begun when there is no showing of prejudice to the rights of the defendant.

No prejudice appearing here, the assignment is not sustained.

Defendant next assigns as prejudicial error the admission of the testimony of two witnesses, who gave it as their opinion that the defendant was under the influence of intoxicating liquor. He objects that there was no proper foundation.

We are required by a later assignment to state the evidence as to defendant and his car somewhat in detail. It is sufficient, as to this assignment, to state that the defendant was observed by three witnesses consecutively in three periods of time totaling about an hour and a half.

The first witness was a game warden who came upon the defendant sitting in a car partly off the highway. This witness testified that he smelled intoxicating liquor on the defendant, observed his walk, his talk, and his appearance generally, and gave it as his opinion that the defendant was under the influence of intoxicating liquor. The defendant does not claim error in the admission of that testimony.

There is evidence that defendant admitted the drinking of beer before starting the trip when his car was stopped on the highway. He testified that after his car was stopped he then began to drink and consumed about a third of a pint of whiskey in a period fixed by him at 15 or 20 minutes, which was a period prior to his observation by the game warden.

At about the close of the first period of time defendant had a drink of whiskey. He had had a bottle on his person. The game warden testified that defendant had a "swallow" only, before the bottle was taken away from him. Defendant testified that he drank a third of a pint of whiskey at that time. Next in sequence he was seen and observed by a highway patrolman, and still later by the sheriff. Both officers testified as to

experience and their observations of defendant. Each gave it as his opinion that defendant was under the influence of intoxicating liquor when he observed him.

Defendant argues here that having drunk liquor intermediate the observations of the first and second witnesses, there is no foundation for the testimony of the last two witnesses. The witnesses were testifying as to the fact of intoxication when they observed defendant. The witnesses were not asked, nor did they purport to testify, as to when the defendant drank the liquor that caused the intoxication.

We see no merit in the assignment.

Defendant's next assignment goes to the sufficiency of the evidence to sustain a conviction.

The State's evidence was that when the game warden came upon the defendant he was sitting in the driver's seat, the motor was running, and the gears were in reverse position. The car had three wheels off the pavement (black-top). The left rear wheel was on the pavement. It was "steaming." The pavement was eroded under the wheel and debris was in front of and behind the wheel. The shoulder of the road was soft. Defendant told the game warden that he was stalled and wanted to be pulled out.

Defendant's testimony was that he had not driven the car, that a "fellow" was driving it, and that when they became stuck this party had gone to get help and never returned. Later the "fellow" was a woman, and later a woman and 5-year-old boy. He did not produce the person and refused to name him or her, whichever it might have been. The question of his credibility was for the jury, and obviously it did not believe him.

Defendant argues here that when he could not move the vehicle because it was stalled, he could not be guilty of operating a motor vehicle or being the person in actual physical control of it.

This contention is answered in Uldrich v. State, 162 Neb. 746, 77 N. W. 2d 305. There we held that section

39-727, R. S. Supp., 1957, defines one crime. We further approved as applicable the holding in Commonwealth v. Jordan, 310 Mass. 85, 37 N. E. 2d 123, 137 A. L. R. 474. That rule applied to our statute is: The word operate as used in section 39-727, R. S. Supp., 1957, relates to the actual physical handling of the controls of the vehicle by a person while under the influence of intoxicating liquor.

The evidence here is ample to sustain a conviction under that definition of the act. The assignment is not sustained.

After the verdict of the jury had been returned the court proceeded to hear the issues presented by count II. The court obviously was following the procedures prescribed in Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462. Defendant then objected to proceeding at that time because he had not had the notice required by the rule in Haffke v. State, *supra*. It appears that the county attorney had understood that notice had been waived. The court promptly ordered a continuance so that the notice could be given.

Defendant then stipulated the waiver of notice and consented to an immediate hearing. The State then offered the county court records showing the conviction of a Clyde Waite for violation of the act here involved. Defendant objected as to foundation evidently requiring proof of identity. It appears that in the prosecution there involved the defendant's present counsel was county attorney, and the present county attorney was defendant's counsel. The State called defendant's counsel as a witness. He objected to testifying against his own client. Defendant refused to stipulate as to identity.

The court then, according to the bill of exceptions, on its own motion ordered a continuance to enable the State to produce the testimony of the judge who tried the case. Defendant objected to the continuance and when the matter was heard thereafter objected to any

proceedings after the continuance. We are cognizant that the journal shows that the county attorney requested the continuance.

The rule is: While a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption. Kehl v. Omaha Nat. Bank, 126 Neb. 695, 254 N. W. 397.

We have here, then, a case where the trial court, for the obvious purpose of preventing the miscarriage of justice, ordered a continuance on his own motion. The county attorney did not invoke the provisions of section 25-1148, R. R. S. 1943. Defendant did not invoke its provisions. He objected to a continuance as such. He does not show prejudice. The court was obviously proceeding in the exercise of a sound judicial discretion.

The rule is that a trial court may in a proper case order a continuance on its own motion. See, 17 C. J. S., Continuances, § 10, p. 196; 12 Am. Jur., Continuances, § 4, p. 450; Fleming v. Jarrett (D.C.), 102 A. 2d 303; State ex rel. Clark v. Bailey, 99 Mont. 484, 44 P. 2d 740. This was a proper case in which to order a continuance.

There is no merit in the assignment.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ELVEN A. BUTTERFIELD, RESPONDENT.
98 N. W. 2d 714

Filed October 23, 1959. No. 34597.

1. **Attorney and Client.** The making of a false jurat or acknowledgment by an attorney, while acting as a notary public, is a moral delinquency, justifying his suspension or disbarment.
2. ———. The giving of false testimony by an attorney while

under oath is an act involving moral turpitude which justifies suspension or disbarment in a disciplinary proceeding regardless of the fact that he had not been theretofore convicted of the crime of perjury.

3. ———. Whether or not the reputation of an attorney is of material importance in any discipline case must necessarily depend largely upon the facts and circumstances thereof.

ORIGINAL ACTION. On motion of relator for judgment on the pleadings. *Judgment of suspension.*

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

Chambers, Holland, Dudgeon & Hastings, for respondent.

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

CHAPPELL, J.

This is a disciplinary action against respondent, Elven A. Butterfield, an attorney at law, duly licensed and admitted to practice in this state and a member of the Nebraska State Bar Association. The complaint filed in this court by the Advisory Committee of the Nebraska State Bar Association as relator charged respondent with unprofessional conduct in the practice of law and conduct in violation of the Canons of Professional Ethics adopted by this court.

In that connection, the complaint charged in substance that on or about May 25, 1956, respondent, as a duly commissioned, qualified, and acting notary public, executed a certificate of acknowledgment to a certain warranty deed wherein he certified that Irene Marston, together with her husband, Richard B. Marston, appeared before respondent in person and acknowledged execution of the deed to which his certificate was attached, and that later in the trial of an action in the district court for Holt County, entitled Marston v. Drobny, respondent testified under oath that said Irene Marston had not appeared before him and had never

acknowledged said warranty deed, and that by reason of the foregoing facts respondent either: (1) Executed a false certificate of acknowledgment, or (2) testified falsely in the trial of said cause. The prayer of the complaint was that this court order such disciplinary action as it deems reasonable and proper.

The case in which respondent allegedly executed a false certificate of acknowledgment and testified falsely under oath with relation thereto was appealed to this court and the opinion therein is reported as Marston v. Drobny, 166 Neb. 747, 90 N. W. 2d 408.

In the case here involved, respondent was permitted to file an amended answer to relator's complaint. Therein he admitted that he was duly licensed and admitted to practice law in this state in 1927; denied that he testified falsely as alleged; and admitted that on May 25, 1956, he was a duly commissioned, qualified, and acting notary public and that on that date he certified on the warranty deed that Irene Marston appeared before him in person and acknowledged the execution of said deed. Respondent then alleged that circumstances leading up to and including acknowledgment of the deed by his cousin, Irene Marston, were such that he did not intentionally pursue a course of misconduct designed to defraud or injure anyone. He thereafter set forth alleged facts surrounding the transaction, the effect of which was to allege that: "* * * he believed that she had signed the deed of her own free will and act and that the entire transaction was being made with her consent, * * *."

Subsequently, a motion for judgment on the pleadings, filed on behalf of relator by the Attorney General, was overruled by this court and a referee was duly appointed. After notice duly given and by agreement of the parties, a hearing was held by the referee on August 3, 1959, whereat respondent and his counsel were present. At such hearing evidence was adduced by the parties, and the cause was submitted. Subse-

quently, on September 3, 1959, a comprehensive report of the referee was duly filed in this court. Such report summarized the pleadings; set forth the issues; recited that a hearing was held thereon as aforesaid; set forth by reference from the record and at length all the relevant and material evidence adduced at the hearing; cited and discussed applicable and controlling rules of law; made findings of fact and conclusions of law; found respondent guilty as hereinafter set forth; and recommended "* * * that such disciplinary action be taken against Respondent as the court shall deem advisable under all the circumstances."

Thereafter respondent filed no written exceptions to the referee's report within 10 days after filing thereof in this court or at any time thereafter. Thus, on September 15, 1959, the Attorney General filed a "Motion for Final Judgment" praying that this court "consider the findings of the referee final and conclusive"; and render judgment "against the respondent and impose such disciplinary action as the court deems just and proper." A copy of such motion and notice of hearing thereof were admittedly received by counsel for respondent on September 15, 1959, and, in conformity with such notice, said motion was orally argued and submitted to this court by counsel for the parties without any further showing or objections by counsel for respondent.

In that connection, Rule 8 of the Rules for Disciplinary Proceedings in this court provides: "8. Motion for Final Judgment; Exceptions to Report. Within 10 days after the filing of such report, either party may file written exceptions to such report. If no exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require." Under the circumstances and proceedings as they appear in this case, and in the exercise of its discretion, this court considers the findings of the referee final and conclusive, and sustains relator's motion for final judgment.

The "Findings of Fact" made by the referee in his report, which were supported by more than a clear preponderance of the evidence theretofore set forth in such report, were as follows:

"A. -*General*

"Respondent was admitted to practice law in Nebraska in 1927, and has been engaged in the active practice of his profession at Neligh, Nebraska since 1928.

"He appears to have numerous friends anxious to testify to an excellent general reputation.

"B. -*Did He Execute a False Acknowledgment?*

"Giving the defendant the benefit of every doubt, and assuming that his testimony at this hearing is most beneficial to him, it appears that the Respondent prepared the deed; that he gave it to Mr. Marston; that Mr. Marston returned it to him; that in the interim Mrs. Marston had attached her signature; that such signature was not affixed in the presence of the Respondent; that the only time Respondent saw Mrs. Marston after he prepared the deed and before it was delivered was when he saw her in front of the land bank in O'Neill the day the deed was delivered; that the only conversation between Mrs. Marston and the Respondent at that time was that Mrs. Marston asked if he would need her any more, that he said he would not if all the papers were signed, and that she replied that they were all signed; that she knew she had signed the deed and that the parties were there at that time to complete a sale of the Marston farm; that the Respondent assumed such conversation to constitute an acknowledgment by Mrs. Marston that she had signed such deed as her free and voluntary act.

"The Respondent executed the acknowledgment and attached his notarial seal sometime on or before June 7, 1956, but intentionally caused the date of both the deed and the acknowledgment to be shown as January 2, 1957.

"C. -*Did He Testify Falsely in the Case of Marston v. Drobney?*

"In the Drobney case Respondent testified he never saw Mrs. Marston in O'Neill or had any conversation with her, until *after* the deed had been delivered in the land bank, and that she had never acknowledged it to him at any time. The testimony of the Respondent was similar to the testimony of Irene Marston, one of the plaintiffs in the case. The Respondent was at all times during that trial, one of the attorneys of record for the plaintiffs, although his testimony resulted from being called as a witness by the defendants, and cross-examined for the plaintiffs."

The "Conclusions of Law" made by the referee in his report were as follows:

"1. The Supreme Court has jurisdiction of the person of the Respondent and of the subject matter of the proceeding.

"2. The conversation between Mrs. Marston and the Respondent, with her knowledge that she had signed the deed and that settlement was to be made at that time, and without in any way protesting to the Respondent, was sufficient to constitute a valid acknowledgment. The procedure and lack of formalities were definitely irregular, but it cannot be said that such irregularities would justify finding the acknowledgment false for this reason, and in this respect I find for the Respondent.

"3. The execution by the Respondent of the acknowledgment on or before June 7, 1956, and showing the date thereof to have been Jan. 2, 1957, was false, and in this respect I find for the Relator.

"4. Since the events as related at this hearing by the Respondent and his principal corroborating witness, Mrs. Marston, and which now coincide very closely in the more important details with the testimony of Marvin and Otto Drobney given in the original trial in District Court, show that the Respondent and Mrs. Marston did see each other and did have a conversation relative to the deed and other papers sufficient to justify the

Respondent to execute an acknowledgment prior to the deed being deposited in the bank, the conclusion is inescapable that when Respondent testified in the Drobney case in response to a question as to whether Mr. and Mrs. Marston were there and he replied that Mr. Marston and the Drobney boys were then and when he said that she had never at any time acknowledged that deed, he gave false testimony. Respondent's entire testimony was corroborative of that of the plaintiff, Mrs. Marston, with a very obvious lack of effort to offer any explanations or clarifications at that time that would in any way justify a finding that the acknowledgment was valid in that action. Had Respondent given the same testimony in the Drobney case as he gave at this hearing relative to the acknowledgment of the deed, this action would probably never have been instituted. I regret to find that any lawyer may have given false testimony, but I must find for the Relator on this issue."

We turn then to section 76-218, R. R. S. 1943, which provides in part: "Every officer within this state authorized to take the acknowledgment or proof of any conveyance, * * * who shall be guilty of knowingly stating an untruth, * * * in relation to the taking or the certifying of the proof or acknowledgment, * * * of any such conveyance, * * * shall upon conviction be adjudged guilty of a misdemeanor, and be subject to punishment by fine not exceeding five hundred dollars, and imprisonment not exceeding one year, and shall also be liable in damages to the party injured."

As stated in Annotation, 9 A. L. R. 196, citing numerous authorities: "The making of a false jurat or acknowledgment by an attorney, while acting as a notary public or commissioner of deeds, is a moral delinquency, justifying his suspension or disbarment." See, also, Annotation, 43 A. L. R. 108; 5 Am. Jur., Attorneys at Law, § 278, p. 428, and authorities cited therein.

On the other hand, in Annotation, 9 A. L. R. 200, numerous authorities are cited and discussed which con-

clude that the giving of false testimony by an attorney at law while under oath is an act involving moral turpitude which justifies suspension or disbarment in a disciplinary proceeding regardless of the fact that he had not been theretofore convicted of the crime of perjury. See, also, Annotation, 43 A. L. R. 110; Annotation, 55 A. L. R. 1375; In re Disbarment of Hertz, 169 Minn. 431, 211 N. W. 678.

In that connection, also, section 7-105, R. R. S. 1943, provides in part: "It is the duty of an attorney and counselor: (1) To maintain the respect due to the courts of justice and to judicial officers; * * * (3) to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; * * * (5) to abstain from all offensive practices * * *." In that connection also, section 28-701, R. R. S. 1943, provides in part: "Whoever, having taken oath or made affirmation in any judicial proceeding, * * * or in any other matter where, by law, an oath or affirmation is required, shall, upon such oath or affirmation willfully and corruptly depose, affirm or declare any matter to be fact, knowing the same to be false, or shall in like manner deny any matter to be fact, knowing same to be true, shall be deemed guilty of perjury, and shall be fined in any sum not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the penitentiary not more than fourteen years and not less than one year."

This court has repeatedly stated and affirmed or reaffirmed the rules of law which are applicable and controlling in disciplinary cases comparable in all material respects with that at bar. Such rules will not be repeated here. We deem it sufficient to cite State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583; State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136; State ex rel. Nebraska State Bar Assn. v. Fitzgerald, 165 Neb. 212, 85 N. W. 2d 323; and State ex rel. Nebraska State Bar

Assn. v. Stanosheck, 167 Neb. 192, 92 N. W. 2d 194, wherein such rules may be found.

In the light of such rules, others heretofore set forth, and the final and conclusive findings of the referee, we conclude that the motion for final judgment should be and hereby is sustained, and that respondent's conduct requires disciplinary action as recommended by the referee.

We are confronted then with the extent of discipline which is reasonable and justly required. In that connection, the report of the referee discloses that respondent had 23 character witnesses present at the hearing, but, without objection, at suggestion of the referee that the record not be unduly encumbered, only 4 of such witnesses were examined. Each of them testified in substance that he had voluntarily appeared; and that respondent had an excellent reputation for truth and veracity and was generally held in high regard in the community. It was assumed by the referee that the other 19 witnesses would have given similar testimony.

In such respect, a comparable situation was presented in State ex rel. Nebraska State Bar Assn. v. Richards, *supra*. In that opinion, citing authorities, we concluded that such testimony "should be given consideration in determining the extent of discipline that should be imposed." Therein also, after quoting from State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474, wherein we concluded that evidence of good reputation should not mitigate the consequences of the enormity of the misdeeds pleaded and proved, we said: "Whether or not the reputation of an attorney is of material importance in any discipline case must necessarily depend largely upon the facts and circumstances thereof." We apply that rule here.

In doing so, we conclude that under the facts and circumstances appearing herein, a judgment suspending respondent from the right to practice law in any court in this state or in any other manner for a period of 6

months, should be and hereby is rendered. Such suspension shall go into effect 30 days after the aforesaid judgment becomes effective. If, after the end of 6 months from the effective date of respondent's suspension he makes an affirmative showing sufficient to satisfy this court that he has fully complied with our order of suspension, and that he will not in the future engage in any practices offensive to the legal profession, then respondent will be reinstated and allowed to engage in the practice of law. However, if he fails within a reasonable time to make such showing or fails to strictly comply with this order of suspension, then his suspension shall become permanent and an order of disbarment will necessarily follow. All costs are taxed to respondent.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA EX REL. DON C. GOODSELL ET AL., APPELLANTS, V. GEORGE T. TUNNICLIFF, COUNTY TREASURER OF GARFIELD COUNTY, NEBRASKA, APPELLEE.
98 N. W. 2d 710

Filed October 23, 1959. No. 34615.

1. **Mandamus.** The only proper pleadings in a mandamus action, where an alternative writ is issued, are the alternative writ and the return or answer thereto.
2. ———. No reply to the return or answer to an alternative writ of mandamus is permitted, but the allegations thereof are deemed to be denied.
3. **Officers.** A county attorney has no authority to confess judgment or to stipulate to facts requiring an adverse judgment against the county without an appropriate warrant of attorney on behalf of the county.
4. **Judgments.** Where the record in an action discloses that a judgment was entered against a county on a stipulation of facts amounting to a confession of judgment under the issues, without a warrant of authority to the county attorney to do so, the judgment is void and subject to collateral attack.
5. **Judgments: Mandamus.** A void judgment is not a defense to

the issuance of a peremptory writ of mandamus otherwise required.

APPEAL from the district court for Garfield County: ERNEST G. KROGER, JUDGE. *Reversed and remanded with directions.*

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

Keith J. Kovanda, for appellee.

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

CARTER, J.

This is an action to obtain a writ of mandamus to compel the county treasurer of Garfield County to accept the amounts tendered by relators in payment of the taxes due on certain described real estate owned by them, which amounts were shown to be due on the records in the office of the county treasurer. The trial court granted an alternative writ of mandamus and the respondent county treasurer filed an answer thereto. Upon a trial of the case the trial court denied the prayer of the relators for a writ of mandamus. The relators appealed.

The record discloses that on January 15, 1959, the relators tendered to the county treasurer the amounts shown to be due on the records of the county treasurer for taxes for the year 1958 on the lands described in the petition. Relators contend that the county treasurer is required to accept such amounts as full payment and to issue a tax receipt therefor. The respondent contends that the amounts shown on the records of the county treasurer are subject to increase because of a judgment of the district court for Garfield County in the case of Cassidy et al. v. County of Garfield et al., and that he would not accept less than the full amount due after the judgment in that case was given effect.

The only proper pleadings in a mandamus action, where an alternative writ is issued, are the writ and return or answer thereto. The return or answer will be deemed to be denied by the relator. State ex rel. Crawford v. Bisping, 89 Neb. 100, 130 N. W. 1034. In pleading a judgment it is sufficient to state that such judgment was duly given or made. If such allegation is controverted, as in the instant case, the party pleading it must establish, on the trial, the facts conferring jurisdiction. § 25-835, R. R. S. 1943. The burden of proof in the instant case is therefore upon the respondent to establish the jurisdiction of the court to render the judgment in the Cassidy case. Since the primary issue in the case is the validity of the judgment in the Cassidy case, we shall first dispose of that question.

The Cassidy case was an appeal from an order of the county board of equalization. The case being heard on appeal, the presumption of jurisdiction of the subject matter usually ascribed to courts of general jurisdiction does not apply. Sommerville v. Board of Commissioners of Douglas County, 116 Neb. 282, 216 N. W. 815. The Cassidy case was an appeal by a large number of taxpayers from an order reducing the valuation of certain lands in Garfield County. It was asserted that the order, bearing the date of June 27, 1958, was void for the reason that it was in fact made on July 1, 1958, a day beyond the period in which the county board of equalization was authorized to act.

The transcript filed in the appeal in this case shows that the resolution in question was adopted on June 27, 1958, a day when the county board was authorized to act. There is no evidence offered in the record of this case to the effect that the order of the county board of equalization was actually entered on July 1, 1958. Whether such evidence would be admissible on appeal to impeach the records of the county board of equalization, without first directly attacking it in the tribunal where made, we do not here decide.

The record shows that the county attorney appeared for the county of Garfield and the county board of equalization and entered into a stipulation, the effect of which required the entry of a judgment holding the resolution of June 27, 1958, to be void.

The evidence in the case shows that the judgment was entered on a stipulation between the county attorney and the attorneys for the plaintiffs in that case. The county attorney admitted that a part of the understanding at the time the stipulation was made was that a threatened contempt action against the members of the county board of equalization was to be abandoned. The record does not disclose that the county attorney was authorized by the county or its board of equalization to stipulate for the entry of an adverse judgment.

The records of the county board of equalization show that the order appealed from was entered within the time fixed by statute. No evidence to the contrary was offered, assuming that such evidence would be competent. The judgment stands solely on the stipulation of the county attorney that the order was rendered out of time. It is the rule in this state that a county attorney may not appear for or enter into stipulations against the interest of the county without express authority to do so. No such authority was given in the Cassidy case and the judgment based solely thereon is wholly void. The judgment being void, it is subject to collateral attack.

In County of Custer v. Chicago, B. & Q. R. R. Co., 62 Neb. 657, 87 N. W. 341, the court said: "Whether any officer or body of officers is authorized to execute a warrant of attorney on behalf of the county we are not required to determine, for the reason that the resolution under which the county attorney acted is not, and does not purport to be, such warrant. The judgments are absolutely void; the county court had no jurisdiction over the county, to say nothing of the subject matter." The county attorney was without au-

thority to confess judgment, or to stipulate to facts requiring an adverse judgment in the Cassidy case, and the judgment based thereon is void. Anstine v. State, 137 Neb. 148, 288 N. W. 525.

In Banking House of Castetter v. Dukes, 70 Neb. 648, 97 N. W. 805, the following pertinent language will be found: "It has often been somewhat loosely stated that, if a court had jurisdiction of the person and of the subject matter, its judgments were not subject to collateral attack. While in a general sense this is true, there is a qualifying principle that is often overlooked, which is, that the court must also have jurisdiction of the particular question which it assumes to decide. Mr. Black states the rule as follows: 'In order to the validity of a judgment, the court must have jurisdiction of the persons, of the subject matter, and of the particular question which it assumes to decide. * * * It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination.' 1 Black, Judgments (2d ed.), sec. 215. It is quite difficult to reconcile the cases bearing upon this subject. Some courts give a liberal construction to the rule and others are strict constructionists, and it is not seldom that the decisions of the same court are not reconcilable in principle with each other. But in this state the question seems to be foreclosed. In State v. Haverly, 62 Neb. 767, Judge Holcomb says (p. 781): 'It is fundamental that a judgment or final order made in the trial of a case must be founded upon and within the issues as made by the pleadings.'" The judgment shows on its face that it is based solely on a void stipulation. Such a judgment is void.

It is the declared policy of the law in this state that a county attorney may not confess judgment against a county without appropriate authority to do so. This

rule is for the protection of the public against results arising by improper or inept handling of litigation by a county attorney. In the instant case the county attorney confessed judgment for the county and the county board of equalization without any authority to prevent the filing of a contempt action against certain county officers. Certainly, the county attorney should not be permitted as a matter of public policy to trade away the rights of the public as a means of protecting individuals against personal action for their conduct. The county attorney operates counter to these provisions of law when he does so. Having no authority to confess judgment, any judgment based thereon is absolutely void and subject to collateral attack. If this were not so, and the judgment became final if no appeal were taken, the policy of the law could be easily thwarted, particularly as to those who were not parties to the action and yet bound by it because of its class nature. We conclude that the judgment in the Cassidy case is void, subject to collateral attack, and ineffective to defeat this issuance of a writ of mandamus.

The record shows that Cassidy alleged that the resolution appealed from was unjust and inequitable because it resulted in an arbitrary and nonuniform assessed valuation of farm lands in Garfield County outside the corporate limits of the city of Burwell. The record shows that the findings of the court were based on the void stipulation. Upon the placing of the stipulation in the record the court said: "The Court finds on the stipulation that the action of the County Board in reducing the assessment on certain of the lands in Garfield County, which was done on _____, was negative and void for the reason they do not comply with statutory procedures in arriving at the reductions which they actually made." The stipulation being void, the burden was on the respondent to show that the court had the jurisdiction and authority to enter the judgment it did. No such showing is made in

this record, in fact, the evidence is to the contrary.

There are other questions presented relating to the sufficiency of the notice of appeal, the service of process, the appropriateness of a petition in equity included in the petition on appeal, the sufficiency of the transcript, and other matters, alleged to void the jurisdiction of the court in the Cassidy case. In view of our holding that the judgment entered in that case was void and subject to collateral attack, it is not necessary that we determine these questions.

The trial court was in error in denying the prayer of the relators for a writ of mandamus commanding the respondent to accept the amounts tendered in payment of the taxes due for 1958 on the lands described in their petition and to issue a receipt in full therefor. The judgment of the district court is reversed and the cause remanded with directions to enter a peremptory writ of mandamus in accordance with the prayer of relators' petition.

REVERSED AND REMANDED WITH DIRECTIONS.

LESLIE C. ANDERSON, APPELLANT, V. PAUL MOSER, APPELLEE.
98 N. W. 2d 703

Filed October 23, 1959. No. 34638.

1. **Negligence.** The duty of the owner of the premises toward an invitee is to exercise ordinary care to maintain the premises within the scope of the invitation in a reasonably safe condition.
2. **Negligence: Master and Servant.** The law generally requires an employer to exercise ordinary care to provide reasonably safe tools and appliances for the use of his employee.
3. ———: ———. However, the foregoing rule has no application if the employee possesses ordinary intelligence and knowledge and the tools and appliances furnished are simple in character, in common use, easily understood, and in which defects can be readily observed by the employee.
4. ———: ———. In the instance of simple tools in common use an employer, as a matter of law, is relieved of the ordinary duty of furnishing safe tools and appliances to his employee, in-

structing the employee as to their use, and of inspecting the tools.

5. ———: ———. The knowledge of an employee of simple tools in common use is, as a matter of law, presumed to be equal to that of an employer.
6. **Trial: Appeal and Error.** It is within the discretion of the trial court to permit or refuse an amendment of a pleading during the trial of a case, and error cannot be predicated on the action of the court in reference thereto unless an abuse of discretion is established to the prejudice of the party who is adversely affected thereby.
7. **Trial: Judgments.** The prerequisites of granting a summary judgment are that the movant establish that there is no genuine issue of fact in the case and that he is entitled to judgment as a matter of law.

APPEAL from the district court for Antelope County: LYLE E. JACKSON, JUDGE. *Affirmed.*

Arthur O. Auserod and *E. L. Vogeltanz,* for appellant.

Frederick M. Deutsch and William I. Hagen, for appellee.

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

BOSLAUGH, J.

This is an appeal from a judgment sustaining a motion for summary judgment made by appellee in a personal injury action grounded on negligence.

Appellant was 36 years of age and lived with his wife and four sons 9 miles west and 2½ miles north of Elgin. He lived on a farm throughout his life except he was in the army 3 years and was engaged in office work in Scottsbluff during 1 year. He was a high school graduate and attended business college 2 years. He owns and has operated for several years a grain and livestock farm of 240 acres upon which he resides.

The wife of appellant is a sister of the wife of appellee. The latter is a farmer and lives 3 miles west and 1 mile north of Elgin. There are 6 or 7 miles between the farms of the parties. They generally did not exchange work

on their farms but appellant was assisting appellee on the farm of the latter at the time of the accident, the subject of this action, on the afternoon of February 10, 1956, because he desired to move some hay and he asked appellant to assist him in the operation. There was an icy condition then existing and appellant had a large tractor equipped with wheel chains and was part owner of a hay truck or lowboy. Appellee had secured a tractor which was equipped with a winch or hoist. The winch, hereafter called a hoist, was home-made about 1950, was in use since that time, and was partly owned by appellant. He had used it at various times for 5 or 6 years. Appellee had also used it previously. The hoist was used to pull hay in stack onto the lowboy and thereafter the tractor of appellant pulled the loaded lowboy to its destination where the hay was removed from the lowboy by use of the hoist. The parties to this case and Wilford Arehart, another brother-in-law of appellant who also had a tractor available for use, moved three stacks of hay the day of but before the accident. One stack was for Wilford Arehart and the other two for appellee.

A universal joint was a component part of the hoist. It was a part of the means by which power was transmitted to the hoist from the tractor on which the hoist was mounted. The parts of the universal joint fitted into each other and they were fastened together or integrated by a hole through each part in which a metal pin was inserted. The pin, from some unknown cause, was partly displaced and remained in only one side of the part of the joint into which it had been placed. This was discovered by appellee when he attempted to operate the hoist to remove a stack of hay from the lowboy. Appellant and appellee laid the universal joint in a position so that the pin which was partly displaced protruded upward. Appellant was on the north of the tractor and appellee was on the south of it. They were in close proximity. They were intending to drive or

force the pin back into its proper position as a part of the universal joint. Appellant held the pin with his left hand to guide it and he then tapped it several blows with a hammer. He was not successful in restoring it to its desired place. Appellee suggested that appellant guide the pin and that appellee would strike it with the hammer. He struck the pin numerous blows while appellant was guiding it and during this operation a particle of metal, probably steel, entered, pierced, and lodged in the eye of appellant. The injury was painful, serious, and expensive.

The record is silent as to the source of the metal which injured the eye of appellant. There is no information as to any investigation to learn its source. It may have been from the hammer, the pin, or some other part of the universal joint.

Appellee had hit the pin several substantial blows, described by appellant as "pretty good licks," as he had his hand on the pin to guide it like one would hold a nail or something like that. The description of the hammer is indefinite. It is said to have been what they call a "plow hammer" or a "blacksmiths' hammer of some kind." Its weight was conjectured to be about three-fourths of a pound. The hammer was held in one of the hands of appellee while he was using it. Appellant was watching the pin and did not know how forcible the blows of the hammer were. Appellee was attempting for about a minute to drive the pin in before the injury happened to appellant and during this effort the only comment of appellant was: "Don't hit it too hard because I can't guide it then." This statement was provoked only because it was difficult to guide the pin and not because of any anticipated fear of danger or belief of existing hazard. Appellant would not assert that he did not have as much information about any hazard of hitting the pin with the hammer, under the circumstances, as appellee had on that subject. Appellant said he had no reason to know that appellee realized from

what was being done that a piece of metal might be broken, propelled through space, and cause injury. The parties were doing the same thing at the time of the accident that was being done by appellant immediately before he surrendered the hammer to appellee except appellee was not guiding the pin when appellant was striking it with the same hammer in an effort to replace the pin to its normal position. The only thing appellant thought that appellee did wrong was possibly hitting the pin too hard.

Appellant argues that he was not an employee or servant of appellee but was an invitee on the premises of appellee at the time of the accident for the advantage of appellee; that the duty owed him as an invitee by the host to shield him from harm was greater than the duty of a master toward his employee while acting within the course of his employment; and that appellee defaulted in his duty to appellant by failing to warn him of the danger and hazard of injury attendant upon the attempt to repair the universal joint in the manner in which it was done, by requesting appellant to be present and to participate in that operation, and by inducing appellant to hold and guide the pin while force was being applied to it, which appellee knew or should have known was fraught with danger of injury to appellant.

It is not necessary to explore or decide whether the status of appellant was that of an employee or an invitee of appellee. The duty of appellee towards appellant was identical if he had either status at the time of the injury. That duty was to exercise reasonable care to prevent injury to appellant. An invitee may, for the purposes of this case, be defined as a person who goes upon the premises of another by the express or implied invitation of the owner or occupant thereof on the business of the owner or occupant or for their mutual advantage. The duty of the owner or occupant is to exercise reasonable care for the safety of the invitee while on the premises. See, Morse v. Gray, 166 Neb. 557, 89 N.

W. 2d 842; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610; 38 Am. Jur., Negligence, § 96, p. 754. Likewise, the measure of duty of an employer to an employee is generally that the former exercise reasonable care to protect the employee from injury while he is pursuing the course of his employment. Dougherty v. Pratt Institute, 244 N. Y. 111, 155 N. E. 67, states: "An owner of a building may owe as great a duty to the invited servant of another as he does to his own servant. He does not owe a greater one * * *." In this view the case of appellant does not differ whether he was at the time of the injury an invitee or an employee of appellant.

It is also claimed by appellant that the failure of appellee, under the circumstances of this case, to provide an appropriate tool which would not have exposed appellant to great danger of injury and the procedure appellee adopted and required in an attempt to restore the pin in the universal joint to its normal and functional condition, to which appellant was subjected, were negligence and the proximate cause of the injury inflicted upon him.

Liability is not created against a person when, in the prosecution of a lawful act, injury to another is caused by an accident. One may not be said to be negligent because he fails to make provision against an accident which he could not be reasonably expected to foresee. There was not in this case anything inherently dangerous in the work to be done or the attempt made to accomplish it. The repair of the universal joint was a simple task. It was a simple device. The act of restoring it was a very ordinary performance. It required only the replacing of a pin to its proper position. The pin was made for the function it performed and there is no claim that it was in any respect defective. It is not suggested that the manner in which the attempt was made by the parties to replace the pin in the joint was contrary to any standard of care practiced in

like situations or that the effort was inappropriate to accomplish what was desired. Appellant says appellee should have provided safeguards before permitting appellant to guide the pin as it was sought to be forced back into position. This suggestion is now made looking back at the unusual, unexpected, and unforeseeable mishap with the wisdom born of the event. Appellant complains of the tool which was used. It was quite an ordinary hammer with a steel head. The record yields no information that it was defective. It, as a tool, contributed not at all to the injury. A hammer has often been characterized as a simple, common tool and the most harmless of all tools. The first thing known about the hammer used in this instance is that it was in the hand of appellant and he was striking the pin with it. This was what appellee was doing, without objection from appellant, when he was injured.

The requirement that an employer must generally exercise ordinary care to furnish reasonably safe tools, appliances, and apparatus for his employee has no application to simple ones in common use, easily understood and comprehended. The facts considered in Vanderpool v. Partridge, 79 Neb. 165, 112 N. W. 318, 13 L. R. A. N. S. 668, were: Appellant, a mature man of average intelligence and knowledge, was cutting holes for joists in a brick wall. The tools furnished him by his employer were a 2-pound steel hammer and a chisel made by a blacksmith from an old rasp. The holes were 10 inches by 12 inches in size and 8 inches deep. Appellant stood on a ladder, held the chisel in front of him, and pounded it with the hammer. He was not instructed as to the manner in which the work was to be done. He had cut about 20 holes when the head of the chisel had become considerably battered; and, while pursuing the work, a chip or sliver from the end of the chisel broke off, struck the appellant in his left eye, and injured it so that it had to be removed. He claimed his employer was negligent in failing to properly in-

struct him in reference to the performance of the work, in not furnishing him proper tools, and especially because the chisel had no wooden handle or top to prevent it from chipping off. The trial court decided the case as a matter of law for the employer. This court affirmed that adjudication. Therein it is said: "The law requires masters to exercise ordinary care to provide reasonably safe tools and appliances for their servants. * * * But the foregoing rule has no application where the servant possesses ordinary intelligence and knowledge and the tools and appliances furnished are of a simple nature, easily understood, and in which defects can be readily observed by such servant."

Lynn v. Glucose Sugar Refining Co., 128 Iowa 501, 104 N. W. 577, a case cited as an authority in Vanderpool v. Partridge, *supra,* considered this situation: Plaintiff was a fireman and worked in the boiler room of the factory of defendant. Plaintiff was injured by the flying into one of his eyes of a particle of metal caused by a fellow workman breaking lump coal with a steel sledge or hammer. The sight of the eye was destroyed. The action was by the injured fireman for damages. The verdict for defendant was directed and sustained. The court said: "It is only machinery and appliances which are recognized as in their nature dangerous to employes using them, or working in proximity to them, as to which the employer owes a duty to the employe of looking out for his safety. * * * we are satisfied that the cause of the injury was not anything which it was the duty of the defendant to anticipate and prevent, if it might have been prevented in the exercise of reasonable care, but was one of those uncertain happenings as to which every one must take his chances."

In Brown v. Swift & Co., 91 Neb. 532, 136 N. W. 726, this court said: "Where a servant of ordinary intelligence and of mature years has operated a simple implement often enough to enable him to avoid being injured by it, when using it in the exercise of ordinary

care, or where the mode of operating it is so simple that such a servant can at once perceive the safe and proper way to do so, if exercising ordinary care, there is no duty resting upon the master to instruct him in that regard."

In Martin v. Highland Park Mfg. Co., 128 N. C. 264, 38 S. E. 876, 83 Am. S. R. 671, the circumstances were as follows: The employee of defendant, whose name was Webb, had the duty to keep the looms in the plant in proper operating condition. He had difficulty in inserting a new key in a shaft of one of the looms in place of a worn and defective key. A weaver who had been operating the loom was asked by Webb to hold a hammer upon the new key while he, Webb, struck upon that hammer with another in order to drive the key into the shaft, and while so doing a fragment of steel struck the weaver in the eye, injuring it. He sought to recover damages therefor. In sustaining a judgment for defendant the court said: "Tools of ordinary and everyday use, which are simple in structure, requiring no skill in handling—such as hammers and axes—not obviously defective, do not impose a liability upon employer for injuries resulting from such defects." In the opinion the court stated: "Injuries, resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause or is an unusual effect of a known cause and therefore not expected, must be borne by the unfortunate sufferer, which seems to us to be the condition of the plaintiff in this case. For an injury caused by an inevitable or unavoidable accident while engaged in lawful business, there is no legal liability."

In Wachsmuth v. Shaw Electric Crane Co., 118 Mich. 275, 76 N. W. 497, plaintiff lost one of his eyes because of a piece of steel being broken by a snap-hammer being used in a riveting operation. A verdict and judgment for plaintiff were disapproved by the reviewing court which said: "This tool was a simple one.

The men using it were competent to pass upon its fitness for use. All the witnesses who saw the hammer say it was a safe one to use. * * * The testimony discloses that no steel is so perfect as not to have defects which will not be disclosed by inspection. * * * The plaintiff failed to establish a cause of action. The court should have directed a verdict in favor of defendant."

Rule v. Giuglio, 304 Mich. 73, 7 N. W. 2d 227, 145 A. L. R. 537, states: "Under the simple-tool doctrine the employee is deemed as well qualified as the employer to examine the tool furnished by the latter, to detect defects therein and to judge the probable danger of using it, and the employer is not liable for defects in the tool or for failure to inspect it."

Danciger Oil & Refining Co. v. Free, 204 Miss. 870, 35 So. 2d 542, contains the following: "It is to be remembered that neither the running of the machinery nor its stoppage inflicted the injury on appellee * * *. It was caused proximately by the blow of a small peen hammer upon a bent pin in the link being repaired in a vise * * *. The blow of the hammer caused the unusual event of a sliver of steel flying from the pin in the link in the vice and into appellee's eye, blinding him. It was a simple operation with a simple tool, and appellants, in our judgment, were guilty of no justiciable negligence proximately injuring appellee, and hence the Chancery Court should not have awarded appellee any damages, but should have dismissed the bill."

It is said in Middleton v. National Box Co., 38 F. 2d 89: "They (cases cited) hold that in the case of simple tools the master, as a matter of law, is relieved of the ordinary duty of furnishing safe tools and appliances to the servant, and of inspecting and repairing the same when furnished. * * * In fact, as a matter of law, the employee's knowledge of simple tools is presumed to be equal to that of the master."

Halverson v. 562 West 149th St. Corp., 290 N. Y. 40, 47 N. E. 2d 685, was an action for damages by Halverson,

the respondent, whose brother was superintendent of an apartment house operated by appellant but who was not employed by appellant. Respondent was requested by his brother to hold a lighted flash lamp for a plumber who was endeavoring to dislodge a radiator bolt by the use of a chisel and a hammer, in the process of which a small piece of metal from an undisclosed source struck and seriously injured an eye of respondent. Respondent recovered a judgment which was reversed by the Court of Appeals. This language appears in the opinion: "The plaintiff's witnesses differ as to whether the plumber was 'banging' on the radiator or on the bolt. However, the evidence is clear that the 'banging' which occurred while the plumber was using the hammer and chisel had gone on uneventfully for a period of five or ten minutes when a minute piece of metal struck the plaintiff's eye causing serious injuries. The evidence does not disclose the source from which came the small piece of metal which struck the plaintiff—whether from the bolt, the radiator or from one of the tools which the plumber was using. * * * There is evidence from which the jury could have found that at the time of the accident the plaintiff was an invitee upon the defendant's premises. Considering him as such, the measure of the defendant's duty was the exercise of reasonable care toward the plaintiff who at the time of the accident was assisting the defendant's agent, the plumber, in the performance of a simple mechanical act—not one which was inherently dangerous. * * * But aside from evidence that the accident occurred, we find no proof of actionable negligence by the defendant or its agent."

Vulpis v. Bifulco, 284 App. Div. 1069, 136 N. Y. S. 2d 356, states as follows: "In an action to recover damages for personal injuries alleged to have been caused by negligence, plaintiff appeals from a judgment entered on the dismissal of the complaint at the close of his case. The evidence established that plaintiff had been requested by defendant to assist him in the prepa-

ration of certain pipes to be used by defendant in driving a well. While plaintiff was standing behind defendant, defendant, in attempting to release a chain wrench from a pipe, struck the wrench with a hammer, causing a chip to break off one of the teeth of the wrench and to fly into one of plaintiff's eyes. Judgment unanimously affirmed, with costs." See, also, Phillips v. Chicago, B. & Q. R. R. Co., 119 Neb. 182, 227 N. W. 931; Hoffman v. McKeen Motor Car Co., 95 Neb. 238, 145 N. W. 257; Frye v. Omaha & C. B. St. Ry. Co., 106 Neb. 333, 183 N. W. 567, 22 A. L. R. 607; Newbern v. Great Atlantic & Pacific Tea Co., 68 F. 2d 523, 91 A. L. R. 781; Olson v. Kem Temple, 77 N. D. 365, 43 N. W. 2d 385; Karras v. Chicago & N. W. Ry. Co., 165 Wis. 578, 162 N. W. 923, L. R. A. 1917E 677; Jones v. Lamm, 193 Va. 506, 69 S. E. 2d 430; Kilday v. Jahncke Dry Dock & Ship Repair Co., 281 F. 133; Royal Restaurant v. Ashcraft, 207 Ky. 364, 269 S. W. 305.

The denial of the request of appellant to amend his petition, made during the hearing on the motion of appellee for summary judgment, is assigned as error. This case was commenced February 7, 1958. An amended petition was filed by appellant May 19, 1958. It contained a new allegation that appellant hit the pin described in this case a few times with the hammer but the pin did not return to its normal position and appellee requested appellant to guide the pin and appellee hit it with the hammer with much more force than appellant had done. The motion for summary judgment was filed November 25, 1958, and it was heard by the court February 27, 1959. The showing of appellee in support of his motion for judgment was made. Appellant offered no showing in opposition to the motion. Arguments in reference thereto were had and counsel for appellant then in open court orally asked leave to amend the petition to set forth the evidence in the deposition of appellant "in that he requested the defendant (appellee) not to hit the pin with a

hammer with as much force as he was hitting it * * *."

The deposition of appellant, which was taken June 27, 1958, had been received in evidence in the hearing on the motion for summary judgment. The manner in which appellee hit the pin was raised by the amended answer by the allegation that he hit it with much more force than appellant had hit it. Appellant said in his deposition that he asked appellee not to hit the pin too hard because he, the appellant, could not guide it in that event and not because of any thought or anticipation of danger or hazard. If the requested amendment of the amended petition had been granted, it would have added no support to the alleged cause of action of appellant. It was within the discretion of the trial court to allow or to refuse the request of appellant to amend. The record does not show an abuse of discretion by the district court or any prejudice to appellant resulting from the refusal. Ericsson v. Streitz, 132 Neb. 692, 273 N. W. 17.

The summary judgment procedure had in this case pierced the allegations of the pleadings and established that there was no genuine issue of fact and that appellee was entitled to judgment as a matter of law. Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543; Clearwater Elevator Co. v. Hales, 167 Neb. 584, 94 N. W. 2d 7.

The judgment of the district court should be affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

ZULA E. WOODWARD ABBOTT, APPELLANT, V. THE CONTINENTAL NATIONAL BANK OF LINCOLN, TRUSTEE OF THE GEORGE L. WOODWARD TRUST, ET AL., APPELLEES.
98 N. W. 2d 804

Filed October 30, 1959. No. 34601.

1. Trusts. A trust involves the creation of two separate and distinct interests in the trust property, the legal estate which is held by the trustee and the beneficial interest which is held by the beneficiaries of the trust.
2. Wills. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
3. ———. It is a rule of construction generally recognized that a devise or bequest to heirs, without more, designates not only the persons who are to take but also the manner and proportions in which they will take, and if there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they take by the law of intestate succession.
4. ———. The words "I order and direct my trustees to pay the income of such trust fund to my wife during her natural life and upon her death to pay the principal thereof to my legal heirs" held to exclude the wife as a devisee of the remainder and to designate the heirs of the testator who are such as of the date of the failure of the trust as the intended devisees.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Frederick J. Patz and *Ralph H. Gillan*, for appellant.

Mason, Knudsen, Dickeson & Berkheimer, Gerald S. Vitamvas, Ralph W. Slocum, and *McCown, Wullschleger & Baumfalk*, for appellees.

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

CARTER, J.

The plaintiff, Zula E. Woodward Abbott, brought this

action to obtain a construction of the will of her husband, George L. Woodward, and to determine her interest in the corpus of a trust set up in the will. The named defendants are The Continental National Bank of Lincoln, trustee of the trust, Chester Walker, husband of plaintiff's deceased daughter, Benjamin L. Meisel, who claims an assignment from the deceased daughter, various collateral relatives of testator, the unknown heirs, devisees, and legatees of the testator, and all persons claiming an interest in the trust property. The trial court found that plaintiff had no interest in the corpus of the trust and plaintiff has appealed.

The evidence discloses that George L. Woodward died on September 9, 1925, leaving a will which was duly admitted to probate by the county court of Lancaster County. The deceased was survived by his widow, the plaintiff herein, and one child, Elizabeth Margaret Woodward, who married the defendant, Chester Walker. Elizabeth Margaret Woodward Walker died on June 9, 1951, intestate and without issue, and was survived by her mother and her husband. The parents of George L. Woodward predeceased him. He had two brothers and two sisters, three of whom predeceased him and one of whom died since his death. All of the brothers and sisters of George L. Woodward left a child or children surviving them. It is stipulated that the will of George L. Woodward was drafted by L. A. Ricketts, a lawyer who was admitted to the bar in 1899.

One-half of the estate of George L. Woodward was given to his wife, the plaintiff herein, by the terms of the will. The remaining one-half of his estate was placed in trust for the benefit of his wife and daughter. The issue before the court arises under Item 5(f) of the will which provides: "In the event my daughter Elizabeth Margaret Woodward shall predecease my wife without issue then living, then and in that event I order and direct my trustees to pay the income of such trust fund to my wife, Zula E. Woodward during her natural life,

and upon her death to pay the principal thereof to my legal heirs."

The question presented is the meaning to be given to the words "to my legal heirs" as used in the quoted paragraph of the will. The trial court found that the corpus of the trust vested at the time of testator's death in the brothers and sisters of the testator who were living at the time of testator's death and in the children of deceased brothers and sisters living at the time of his death by right of representation. It is the contention of the plaintiff that she, the surviving wife, and Chester Walker, the surviving husband of the deceased daughter, Elizabeth Margaret Woodward Walker, hold the remainder interest in the trust estate as the legal heirs of George L. Woodward.

It is fundamental that a trust involves the creation of two separate and distinct interests in the trust property, the legal estate, which is ordinarily held by the trustee, and the beneficial interest, which is held by the beneficiaries of the trust. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. It is a rule of construction generally recognized that a devise or bequest to heirs, without more, designates not only the persons who are to take but also the manner and proportions in which they will take, and if there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they take by the law of intestate succession. This is so even though a presumption exists that one who makes a testamentary disposition of his property does not intend it to be divided as though he died intestate. Kramer v. Larson, 158 Neb. 404, 63 N. W. 2d 349. The foregoing rules are generally the law of this state and have been applied in numerous decisions by this court.

There are many jurisdictions that have literally applied the foregoing rules to situations similar to the one we have presently before us. This court, however, has applied the rule that it will examine the will as a whole to determine the intent of the testator and has arrived at a different conclusion than such foreign jurisdictions. The plaintiff recognizes this fact and asks the court to depart from our previous holdings on the subject.

The case of In re Estate of Combs, 117 Neb. 257, 220 N. W. 269, was a case where the will provided that the remainder of the estate "remaining after the death of my wife, shall descend to my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska." While the court construed the latter portion of the quoted part of the provision as bearing upon the intention of the testator to exclude the wife, a portion of that opinion does have application to the present case. We there said: "It must be admitted that the term 'my legal heirs' construed, in the light of the surrounding circumstances, with reference to all of the language employed in the will, must be relied upon to designate the ultimate devisees, the ultimate remainderman. It would seem that the fact that the testator desired to dispose of the title to his property to the exclusion of his wife with her consent by will (she chose not to take under the statute) indicates that he did not desire to have it come back to her after his death for distribution to her heirs. It appears absurd to conclude that the testator intended to give her only a life estate living, and after her death cast a fee simple title on her, dead. Had he wanted his widow to share in his property as a remainderman to the partial exclusion of his heirs of the blood, it would have been easy to have evidenced such intention by use of appropriate words. This he failed to do."

In the case of In re Estate of Mooney, 131 Neb. 52, 267 N. W. 196, this court in a case similar in principle to

the case at bar said: "It does not appear reasonable, therefore, that Frank L. Mooney intended that his son should under no circumstances come into possession of the property during his life, but that upon his death the title should vest in him for the purpose of distribution to his heirs at law. The language of the will does not support any such fantastic construction. * * * 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." This rule was followed in Dennis v. Omaha Nat. Bank, 153 Neb. 865, 46 N. W. 2d 606, 27 A. L. R. 2d 674, and Applegate v. Brown, 168 Neb. 190, 95 N. W. 2d 341. Since 1936, the date of the decision in the Mooney case, this court has consistently adhered to the rule 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. Since this court has declared that the corpus of an express testamentary trust, undisposed of by the will, passes to the heirs of the testator living at the termination of the trust, it must be conclusively presumed that the testator intended the trust property to pass under the applicable statute as interpreted by this court. This simply means that the words "to my legal heirs" are construed to mean the heirs who would take if no disposition of the property had been made under the will. We necessarily construe the words "to my legal heirs" used in Item 5(f) of the will as designating the testator's heirs as of the date of the failure of the trust as the intended remaindermen under the language of the applicable portion of the will.

Plaintiff vigorously contends that the rule adopted by this court is against reason and logic and the weight of authority. It must be conceded that the contentions of the plaintiff in this respect are not tenuous ones and that they should again be given the consideration of this

court. This we have done. We think the former opinions of this court extending over more than 20 years should be adhered to. The rule is generally known and has no doubt been relied upon as stating the law of this state. Even if the rule announced is not the most reasonable one, a conclusion that we do not concede, it has become the fixed law of this state which ought to be maintained except for the most cogent reasons. It would create confusion in the field of trust law in this state by destroying rights which have been built up in reliance on it. It has, as stated in Dennis v. Omaha Nat. Bank, *supra,* become a rule of property in this state. We adhere to the announced rules in our previous holdings.

The trial court found that the plaintiff had no interest in the corpus of the trust. In this the trial court was correct. The trial court further found that the testator intended the remainder of the trust property to vest in the brothers and sisters of the testator who were living at the time of his death, and in the children, living at the time of testator's death, of deceased brothers and sisters by representation. In this the trial court was in error. The judgment of the district court is affirmed in part, and in part is reversed and remanded with directions to enter a decree finding that plaintiff has no right in the remainder interest in the trust property and that such remainder interest, upon the termination of the trust, is in the heirs of the testator as of the date of the termination of the trust.

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

MINNIE KINDLER, APPELLANT, V. CARROLL KINDLER, APPELLEE.
No. 34611.
MINNIE KINDLER, APPELLANT, V. MARGUERITE M. MOREHOUSE, APPELLEE.
No. 34612.
98 N. W. 2d 881

Filed October 30, 1959.

1. **Conflict of Laws.** Generally, if a judgment in an action provided by the law of the forum would impose on the defendant a more onerous duty than that imposed by the law of the state which created the right, or a substantially different duty, no action can be maintained.
2. ———. A mere difference between the laws of two states, whether in statutory provisions, or otherwise, will not necessarily render the enforcement of a cause of action arising in one state contrary to the public policy of another state.
3. ———. Comity is neither a matter of absolute obligation or mere courtesy or good will, but is the doctrine under which contracts made, rights acquired, and obligations incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition of such right or title.
4. **Contracts: Conflict of Laws.** The general rule is that a contract valid under its governing law is considered valid everywhere, and will be enforced everywhere, unless the enforcement of the contract would violate the positive law or would violate the settled public policy of the forum or would work an injury to the state or to its citizens.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

McGowan & Troia, for appellant.

Spear, Lamme & Simmons, for appellees.

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

CHAPPELL, J.

These two appeals have been consolidated by stipulation of counsel for the purpose of briefing, argument,

and disposition by this court in one opinion because the issues are substantially identical.

The question involved is whether or not defendants, Carroll Kindler and Marguerite M. Morehouse, who are now residents of Dodge County and the surviving joint tenants of Lloyd C. Kindler, who died a resident of Cheyenne, Wyoming, where his estate is being administered and where separate joint tenancies with right of survivorship were created and enforceable, are liable under section 30-624, R. R. S. 1943, to plaintiff, Minnie Kindler, as a creditor of the deceased joint tenant, Lloyd C. Kindler.

The cases were argued and submitted to the trial court on the pleadings and separate stipulations which appear in the bill of exceptions. Thereafter, the trial court rendered separate judgments in each case, which found and adjudged the issues generally in favor of defendants and dismissed plaintiff's petitions at costs of plaintiff. Plaintiff's motions for new trial filed in each case were overruled, and she appealed, assigning in effect that the judgments were not sustained by sufficient evidence or were contrary to law. We do not sustain the assignment.

In that connection, plaintiff's theory was that she was entitled to recover because section 30-624, R. R. S. 1943, enacted as L. B. 197 in 1955, did not purport to impose any lien or encumbrance on the jointly-owned property itself but simply imposed personal liability on defendants as surviving joint tenants for the debts of the deceased joint tenant, under conditions stated therein. Plaintiff so argues, notwithstanding the admitted fact that the joint tenancy contracts were created and enforceable in Wyoming where, under the law of that state, defendants held and would take the whole of the joint tenancy property clear and free of all claims of creditors of the deceased joint tenant.

The relevant and material facts, and the applicable laws of Wyoming as well, were admitted in the stipula-

tions of the parties. The agreed facts are in substance as follows: Plaintiff, Minnie Kindler, was the wife of Lloyd C. Kindler until March 23, 1934. At that time, a decree of divorce rendered in Douglas County, Nebraska, ordered and adjudged that Lloyd C. Kindler, hereinafter generally called Kindler, should pay $5 per week until further order of the court for the use, support, and maintenance of plaintiff and her minor child, then 20 months of age. Kindler died in Cheyenne, Wyoming, on June 11, 1957, where he had been a resident for several years and where his estate is being administered. During his lifetime, Kindler made certain payments pursuant to the terms of the divorce decree, but he was delinquent in certain payments, which, together with interest, exceeded $6,931 due and owing plaintiff on the date of the stipulations. The record is silent on whether or not, during the lifetime of Kindler, plaintiff ever attempted to collect her judgment or any part thereof from him by the use of remedies provided by law for such purpose.

On December 27, 1952, Kindler opened a checking account in the American National Bank at Cheyenne, Wyoming, naming himself and defendant, Carroll Kindler, as owners in joint tenancy thereof with right of survivorship. On June 11, 1957, the date of Kindler's death, there was $904.40 in said account, and Kindler and defendant, Carroll Kindler, were the owners in joint tenancy with the right of survivorship of said checking account during all the period between December 27, 1952, and June 11, 1957, inclusive, although none of said funds were deposited or contributed by said defendant. Also, on May 4, 1956, Kindler opened a savings account in the First Federal Savings and Loan Association at Cheyenne, Wyoming, naming himself and defendant, Marguerite M. Morehouse, as owners in joint tenancy with right of survivorship. On the date of Kindler's death, there was $6,004.57 in said account, and Kindler and defendant were the owners in joint tenancy with the

right of survivorship of said savings account during all of the period between May 4, 1956, and June 11, 1957, inclusive, although none of said funds were deposited or contributed by said defendant.

Except for the checking account and the savings account aforesaid, there was not sufficient other property standing in the name of Kindler at the time of his death to pay the debt owing by him to plaintiff, and no payments or property have been given to plaintiff in Kindler's behalf since his death.

It was agreed that at the time of Kindler's death section 35-148, Compiled Statutes of Wyoming, 1945, dealing with banks and banking, was in full force and effect, and provided in part that: "When a deposit has been made or shall hereafter be made in the name of two (2) persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or interest or dividends thereon, may be paid to either of the said persons, whether the other be living or not, and the receipt or acquittance of the person so paid shall be valid and sufficient release and discharge to the bank for any payment so made. This section shall apply to all banking institutions, including national banks, within this state." It was also agreed that: "Under the common law in effect in Wyoming at the time of" Kindler's death, "the surviving joint tenant of a checking account in a bank would take the account clear and free of all claims of creditors."

It was further agreed that at the time of Kindler's death, section 36-108, Compiled Statutes of Wyoming, 1945, dealing with building and loan associations, was in full force and effect, and provided in part that: "Any association may issue shares to or in the name of two (2) or more persons, whether husband or wife or otherwise, withdrawable by any one of such persons, and the receipt or acquittance of any one of such persons shall be valid and sufficient release and discharge to the association for such withdrawals, regardless of the

death or disability of any other such joint shareholder." It was also agreed that: "Under the common law in effect in Wyoming at the time of" Kindler's death, "the surviving joint tenant of a savings account in a savings and loan association would take the account clear and free of all claims of creditors."

Whether the funds involved are still in Wyoming or have been expended or removed to Nebraska or elsewhere is not shown by the record, but we deem that immaterial here. See, Restatement, Conflict of Laws, § 260, p. 343; 11 Am. Jur., Conflict of Laws, § 71, p. 356.

Section 30-624, R. R. S. 1943, provides: "Upon the death of either or any of the joint owners of real or personal property in joint tenancy, with right of survivorship, the surviving joint owner or owners shall be liable for the debts and obligations of the deceased joint owner or owners under the following conditions:

"(1) Unless a settlement is made with the surviving joint owner or owners, a creditor or personal representative of the deceased joint owner shall institute an action in a court of competent jurisdiction, within three months after the death of the deceased joint owner, against the surviving joint owner or owners setting forth such claim;

"(2) The surviving joint owner shall be liable to the creditors or personal representatives of the deceased joint owner only to an amount equal to the value of the amount contributed to the jointly owned property by the deceased joint owner, to pay lawful debts and obligations, but subject to all homestead and legal exemptions in such decedent's jointly owned property; and

"(3) In any action instituted by a creditor or personal representative of such deceased joint owner, as specified in subdivision (1) of this section, the person instituting such action shall allege and prove that there is not sufficient other property standing in the name of the deceased joint owner at the time of his death subject to the payment of said debts and obligations;

Provided, that if no petition is filed in court to probate the deceased owner's estate, within thirty days from the date of his death, there shall be a presumption of evidence as proof of the allegation that is necessary and required, by subdivision (1) of this section in plaintiff's petition, which presumption shall not be evidence in any other cause."

The title of said act, same being Chapter 110, Laws of Nebraska, 1955, reads: "AN ACT relating to decedents' estates; to make the surviving joint owner or owners of jointly held real or personal property liable for the debts and obligations of the deceased joint owner or owners within the limitations and under the conditions prescribed; to provide for the institution of an action as prescribed in regard thereto; to provide for allegations and proof; and to provide presumptions, as to such action only, as prescribed."

The act is peculiar to Nebraska. Counsel for the parties have cited no similar statutes existing in any other state, and we have found none. In DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733, which involved joint tenancies with right of survivorship to real property and a checking account in this state and claimed liability for the debts and obligations of a deceased joint tenant, we mentioned the act. However, we refused to apply it as sought by plaintiff therein, for the reason in substance that the conveyances were contractual and it was not a case involving debts existing at the time of the conveyance nor of contingent liabilities then in being, and there was no competent evidence that the conveyances were made with intent to hinder, delay, or defraud expected creditors.

Here, the Wyoming joint bank account was created in 1952, when a part of plaintiff's judgment may have been unpaid, but before section 30-624, R. R. S. 1943, was enacted by the Legislature of Nebraska in 1955. Here, the Wyoming joint savings account was created in 1956 when a part of plaintiff's judgment was unpaid,

but soon after section 30-624, R. R. S. 1943, became effective in Nebraska. However, there was no such statute existing in Wyoming which could, upon any theory, become a part of or control the joint tenancy contracts here involved, and there is no competent evidence from which it could be reasonably concluded that such joint tenancy contracts were made with any intent to hinder, delay, or defraud either expected or existing creditors.

In DeForge v. Patrick, *supra,* we concluded that section 30-624, R. R. S. 1943, did not abolish joint tenancies with right of survivorship in this state. Rather, citing and quoting authorities, we pointed out the universal elementary rules that joint tenancies are created by contract; that the relation of and estate of joint tenancies may be created in any kind of property that is subject to be held in severalty; and, after quoting section 8-167, R. R. S. 1943, dealing with banks, we said: "This statute fixes the property rights of the persons named in the deposit where compliance with the statute has been had. * * * Upon the death of one payee the survivor takes the whole legal title free of any debts of the deceased unless a contrary intent affirmatively appears from the terms of the deposit." See, also, Slocum v. Bohuslov, 164 Neb. 156, 82 N. W. 2d 39. We point out also that section 8-317, R. R. S. 1943, dealing with building and loan associations likewise governs joint tenancy survivorship accounts therein. See, Tobas v. Mutual Building & Loan Assn., 147 Neb. 676, 24 N. W. 2d 870. In that connection, the statutes of Wyoming applicable here are in effect identical with our own except they contain no act having any similarity with section 30-624, R. R. S. 1943.

It will be noted that the language in the title of section 30-624, R. R. S. 1943, as originally enacted, and the act itself as well, relates to "decedents' estates" and attempts to provide a conditional liability of the surviving joint tenant for debts and obligations of a de-

ceased joint tenant as a lawfully existing asset of his estate with which to pay his creditors. In that connection, where a joint tenancy is created and enforceable under the laws of Wyoming, the rights of both tenants are vested in the whole of the property when the joint tenancy is created, and on the death of a joint tenant the surviving tenant takes his entire joint tenancy property clear and free of any personal or property liability for the claims of creditors. Thus no liability of the surviving joint tenant for the debts and obligations of the deceased joint tenant ever lawfully existed or became any part of the joint tenancy contracts here involved or any part of Kindler's estate with which to pay his creditors. The general rule is that: "The survivor takes under the agreement creating the joint tenancy, and not as the successor to the deceased joint tenant." 48 C. J. S., Joint Tenancy, § 1, p. 912. In other words, defendants' contractual property rights and duties were created and enforceable by and under the laws of Wyoming, which imposed no duty whatever upon them to pay any debts and obligations of the deceased joint tenant.

In that connection, the applicable and controlling general rule appears in Restatement, Conflict of Laws, § 609, p. 726, where it is said that: "If a judgment in an action provided by the law of the forum would impose on the defendant a more onerous duty than that imposed by the law of the state which created the right, or a substantially different duty, no action can be maintained."

Citing State ex rel. National Surety Corp. v. Price, 129 Neb. 433, 261 N. W. 894, and quoting from Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240, plaintiff relies upon the rule that: " 'It is thoroughly established as a broad general rule that foreign law or rights based thereon will not be given effect or enforced if opposed to the settled public policy of the

forum.'" However, such cases are distinguishable from that at bar.

In that connection, we held in Whitney v. Penrod, 149 Neb. 636, 32 N. W. 2d 131, that: "A mere difference between the laws of two states, whether in statutory provisions, or otherwise, will not necessarily render the enforcement of a cause of action arising in one state contrary to the public policy of another state."

Also, as held in Green Finance Co. v. Becker, 151 Neb. 479, 37 N. W. 2d 794: "Comity is neither a matter of absolute obligation or mere courtesy or good will, but is the doctrine under which contracts made, rights acquired, and obligations incurred in one state are enforced by the courts of another state unless there is some definite public policy preventing recognition of such right or title."

Further, as stated in 15 C. J. S., Conflict of Laws, § 4, p. 858: "In accord with the general rule as to the enforceability of foreign law * * * it is usually held that a contract valid under its governing law * * * is considered valid everywhere, and will be enforced everywhere, unless the enforcement of the contract would violate the positive law or unless the enforcement of the contract would violate the settled public policy of the forum, or unless it would work an injury to the state or to its citizens." See, also, § 11, p. 880.

No authority is cited or found which would support a conclusion that recognition of defendants' rights and title established by the Wyoming contracts here involved, as a defense to plaintiff's actions, would violate the positive law or settled public policy of this state or work an injury to this state or to its citizens. We conclude that plaintiff's contention has no merit.

Some constitutional questions were presented and argued by the parties, but, in view of our prior conclusions, they require no consideration, discussion, or decision here.

We conclude that the judgment of the trial court

should be and hereby is affirmed. All costs in both cases are taxed to plaintiff.

AFFIRMED.

EVERETT M. SCHROLL ET AL., APPELLANTS, V. CITY OF BEATRICE, NEBRASKA, ET AL., APPELLEES.
98 N. W. 2d 790

Filed October 30, 1959. No. 34624.

1. **Public Utilities: Electricity.** Section 70-626.01, R. R. S. 1943, relating to powers of public power districts is subject to the limitations of the petition for the creation of public power districts and amendments thereto.
2. **Statutes.** A legislative act is limited in its scope and operation by its title, and a like rule is applicable to a law adopted by the initiative method.
3. **Public Utilities: Electricity.** Section 70-628, R. R. S. 1943, relates to means by which a district may exercise the powers recited in the petition for the creation of a public power district.
4. **Statutes.** An express proviso that a corporation shall not do certain acts is no stronger than the failure to give authority, express or implied, to do them, for powers not granted either expressly or impliedly, are impliedly prohibited.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Reversed and remanded with directions.*

Sackett & Sackett and *Healey, Davies, Wilson & Barlow*, for appellants.

Crosby, Pansing & Guenzel, Vasey & Rist, Anne P. Carstens, and *Cline, Williams, Wright & Johnson*, for appellees.

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

SIMMONS, C. J.

The plaintiffs in this action are three resident taxpayers and patrons of the municipal electric distribu-

tion system of the city of Beatrice. Also a party plaintiff is Consumers Public Power District, a public corporation organized and existing under the provisions of Chapter 70, article 6, R. R. S. 1943. It purchases electricity at retail from the city of Beatrice and makes payments in lieu of taxes for the benefit of the city.

The defendants are the city of Beatrice, a city of the first class with a population of over 11,000, the mayor, and members of the city council. Also a defendant is the Norris Rural Public Power District, a public corporation organized under Chapter 70, article 6, R. R. S. 1943. It has its principal place of business in Beatrice, Nebraska. Also as parties defendant are the directors of the Norris Rural Public Power District.

Consumers Public Power District will be referred to herein as Consumers. The city of Beatrice will be referred to herein as Beatrice. Norris Rural Public Power District will be referred to herein as Norris.

Plaintiffs bring this as a representative action. They seek a judgment declaring their rights and the rights, status, and legal relations of Beatrice and Norris arising under a purported contract that is the subject matter of this litigation wherein Norris agrees to sell electrical energy to Beatrice.

It is that contract which the individual plaintiffs and Consumers sought to have declared void and its performance enjoined. The plaintiffs sought in the alternative a decree that the contract was subject to rescission.

Issues were made and trial was had. The trial court found generally against the plaintiffs and dismissed their petition. Plaintiffs appeal.

We reverse the judgment of the trial court and remand the cause with directions to enter a judgment declaring the purported contract void and granting the plaintiffs injunctive relief.

The ultimate question to be decided here is whether

or not the contract between Norris and Beatrice is valid.

At the outset we are met with a debate in the briefs as to whether or not the plaintiffs have legal capacity to maintain this action and present that issue. It does not appear that the question was presented to the trial court. If so presented it was determined against Beatrice and Norris. There is no cross-appeal. We accordingly go to the question of whether or not the contract is ultra vires as to Norris and void.

Beatrice owns and operates the only electric distribution system in the city and sells electricity to its residents. It purchases electricity so sold. It has a contract to purchase part of its needs from the United States Bureau of Reclamation. It has been purchasing the remainder of its needs from Consumers under a contract which expired during the course of this litigation.

Beatrice entered into a contract with Norris for the purchase at wholesale of all electric current needed over and above that received from the United States Bureau of Reclamation. The electricity to be so purchased from Norris comprises about 60 percent of Norris' sale of power. Beatrice spent substantial sums of money in preparation of lines and facilities to receive the electricity.

Norris was organized under the provisions of Chapter 86, Laws 1933, page 337, which as amended is now Chapter 70, article 6, R. R. S. 1943. The title of the act recited, among other things, that it was an act "to define the powers, functions, duties and responsibilities" of the districts whose creation it authorized. The initial step toward the organization was the filing of a petition. Laws 1933, c. 86, § 3(2), p. 341, now § 70-603, R. R. S. 1943.

Norris petitioned for the formation of a district in 1935. At that time the act provided that the petition must contain: "The name of the proposed district, which name shall contain if the district is to engage in

the electric light and power business the words 'Public Power District'. * * * A general description of the nature, location and method of operation of the proposed power plants and systems * * *." Laws 1933, c. 36, § 3(2) (a), (c), p. 342. As amended see § 70-604, R. R. S. 1943.

Norris' petition proposed the name of "Norris *Rural* Public Power District." The petition recited in part: "That a general description of the nature, location, and method of operation of the proposed *rural* public electric light and power system is as follows:

"The general purpose and object of the creation of said district is to establish and operate a *rural* electric light and power system to furnish electric light and power at low rates to the *rural* inhabitants of said district and adjoining territory. In connection therewith the district is authorized and shall have power:

"First, to construct or purchase, and operate, transmission lines, substations, and service connections, to supply where economically feasible, electric light and power to the *rural* inhabitants within said district and adjoining territory desiring such service." (Emphasis of "rural" supplied.)

As authorized by Laws 1933, § 3(2), p. 343 (now § 70-607, R. R. S. 1943), the petition was approved on July 15, 1935. This petition, when approved, became the charter of the district. Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N. W. 2d 619.

The repeated use of the word rural throughout the petition as above quoted indicates a clear intent of the petitioners to limit the powers of Norris to the establishing and operation of a rural system and to supply electricity to rural inhabitants. It cannot be successfully contended that a sale of 60 percent of its electricity to a municipality is a rural operation and sale to a rural inhabitant.

As originally enacted, Laws 1933, c. 86, § 6, p. 346,

provided: "A public power district or a public power and irrigation district, organized under the provisions of this act shall have the following powers and shall be entitled to own, have, or exercise the following rights, privileges and franchises: * * *."

By amendment in 1937 the Legislature added the language "subject to the limitations, if any, of the petition for its creation and all amendments thereto: * * *." Laws 1937, c. 152, § 5, p. 583.

This clearly appears as a legislative intent to recognize and affirmatively declare that districts organized under the act were subject to the limitations, if any, of their petition which becomes their charter. The legislative intent to subject districts organized under the act to the language of their petitions is further evidenced by the fact that the limiting clause refers to "all amendments." The 1937 Legislature in the same act authorized amendments to the petition in certain particulars, subject to the approval of the Department of Roads and Irrigation. Laws 1937, c. 152, § 4, p. 581, § 9, p. 589. As amended, see §§ 70-612 and 70-662, R. R. S. 1943.

The 1933 act became Chapter 70, article 7, C. S. Supp., 1933. As above amended in 1937, section 6 thereof became § 70-706, C. S. Supp., 1941. In 1943 the Legislature amended section 70-706, C. S. Supp., 1941, by inserting therein, following the above limitations clause, this language in subdivision (2) thereof: "Any district organized under this act which is engaged in the generation and transmission of electrical energy shall be required to sell electrical energy at wholesale directly to any municipality or political subdivision in the state which is engaged in the distribution and sale of electrical energy when such municipality or political subdivision makes application for the purchase of electrical energy, provided such district has the requested amount of electrical energy available for sale and the municipality or political subdivision agrees to make or pay for the necessary physical connection with the electrical

facilities of such district." Laws 1943, c. 146, § 3, p. 522.

The defendants assert here that this language required Norris to enter into the contract with Beatrice. To reach the answer for that contention we must recite further legislative history.

The Legislature in 1941 created a statute revision commission and prescribed its duties. The commission made its report to the 1943 Legislature. It subdivided section 70-706, C. S. Supp., 1941, into several sections.

Subdivision (1) became section 70-625, R. S. 1943, subdivision (2) became section 70-626, R. S. 1943, and subdivision (3) became section 70-627, R. S. 1943. In the revision commission report all three sections carried the clause "subject to the limitations of the petition for its creation and all amendments thereto." The report of the revision commission to the Legislature showed those provisions. That report was approved and adopted by the 1943 Legislature. Laws 1943, c. 115, § 1, p. 401; § 49-601, R. R. S. 1943.

At the same time and in the same act the Legislature provided that "Except as modified by legislative acts" enacted by the 1943 Legislature, the report of the commission was to take effect when published and when deposited in the office of the Secretary of State. See § 49-603, R. R. S. 1943. Thereafter the Legislature amended section 70-706, C. S. Supp., 1941, as above set out prior to the time the statute commission report was published as a part of the Revised Statutes of Nebraska, 1943.

The 1943 Legislature further directed: "In incorporating the acts of this session of the Legislature, the commission shall compile the same in the proper chapter and thereunder into new or presently designated articles as, in the judgment of the commission, will best facilitate reference thereto *but does not change, modify or alter the law.* In incorporating acts or sections of the present Legislature which are amendatory of past enactments that were divided by the commission in the revision of previous laws, the commission is empowered

and directed to divide the new acts or sections in the same manner and to insert the parts of the new or amendatory acts where a change is made in the law." (Emphasis supplied.) Laws 1943, c. 115, § 10, p. 403. See, also, § 49-610, R. R. S. 1943.

Pursuant to that direction the revision commission inserted the 1943 amendment upon which defendants rely in the statute and it became section 70-626.01, R. S. 1943, and is now section 70-626.01, R. R. S. 1943.

It necessarily follows that section 70-626.01, R. R. S. 1943, does not rest for its validity on the adoption of the report of the revision commission. It rests for its validity on the enactment of Laws 1943, c. 146, § 3(2), p. 522. It is patent also that the requirements of section 70-626.01, R. R. S. 1943, are subject to the limitation of the petition for the creation of Norris. To hold otherwise would be contrary to the act of the 1943 Legislature placing the amendment in a section clearly subject to the limitation; and likewise contrary to the approval of the extension of that limitation by the statute revision commission to all three sections—70-625, 70-626, and 70-627, R. R. S. 1943.

We find no merit in defendants' contention in that regard.

Defendants contend that section 70-628, R. R. S. 1943, and sections 70-501 and 70-502, R. R. S. 1943, authorize the contract between Norris and Beatrice.

What is now section 70-628, R. R. S. 1943, was originally Chapter 86, section 6(4), page 348, of the 1933 act. It remained in the statutes as section 70-706(4), C. S. Supp., 1937; Laws 1937, c. 152, § 5, p. 583. It was section 70-706(4), C. S. Supp., 1941, when the revision commission separated that section into sections 70-625 to 70-628, R. S. 1943. The revision commission did not include the limiting clause in the report as to section 70-628, R. S. 1943. It is now section 70-628, R. R. S. 1943, and provides: "In addition to the rights and powers enumerated in sections 70-601 to 70-679, and in no man-

ner limiting or restricting the same, such district shall be deemed to be and shall have and exercise each and all of the rights and powers of a 'public electric light and power district' or 'public power district' within the meaning of sections 70-501 to 70-503." Clearly the reference to "rights and powers" in the act must refer to "rights and powers" acquired by a district when organized under the act.

Defendants here quote several provisions from sections 70-501 and 70-502, R. R. S. 1943, which they contend authorize the contract between Norris and Beatrice, regardless of the language of its petition for creation. The above sections are the first two sections of Initiated Law No. 324, Laws 1931, c. 116, p. 336.

We had a like contention advanced as to these provisions in Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649. What was said there is peculiarly appropriate here: "There are expressions and language used in the body of the act which would seem to sustain the contention of defendants, but the scope of the act must be determined from its title. It is a familiar rule that a legislative act is limited in its scope and operation by its title, and a like rule is applicable to a law adopted by the initiative method. A careful examination of the title to the act, which is quite lengthy, clearly discloses that it applies only to such cities or villages as are engaged in the generation, transmission or distribution of electrical energy, and provides that such cities may extend, improve and add to their plants and pay the cost of such extensions, additions or improvements by pledging the future earnings of such plants." The decision has been accepted as the settled construction of the act.

We amplify somewhat the analysis of the title of the act. It relates to cities, villages, and public electric light and power districts "engaged" in enumerated activities. It then recites that it is an act to provide for the "extension" of facilities and service outside the

boundaries of the district; to provide for the "interconnection" of facilities; to authorize the pledging of earnings; to make requirements and restrictions on the sale of plants to private persons; to define certain crimes; and to make applicable to the cities, villages, and public power districts affected provisions of law as to eminent domain, etc.

It becomes patent from an analysis of the title that the "rights and powers" granted by section 70-628, R. R. S. 1943, through reference to sections 70-501 and 70-502, R. R. S. 1943, relate to means by which a district may exercise the powers defined in its charter. They do not relate to an increase or extension of those basic defined powers. The Legislature was not revising and amending petition and charter powers.

We find that the above contention of defendants is without merit.

Finally, it is contended that the petition for its creation does not limit Norris from selling electricity to Beatrice at wholesale, and that accordingly it has the power. This in effect is an appeal to the doctrine of implied powers.

Norris quotes and relies on the following rule taken from Drainage Dist. No. 2 v. Dawson County Irr. Co., 140 Neb. 866, 2 N. W. 2d 321: Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care, and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers.

We need point out only that there appears no basis for holding that the contract here involved is fairly incidental or auxiliary to the main business of Norris.

In State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N. W. 2d 784, 152 A. L. R. 480, we held: " 'It seems clear that an express proviso that a corporation shall not do certain acts is no stronger than the failure to give authority, express or implied,

to do them, for powers not granted either expressly or impliedly, are impliedly prohibited.' "

We see no merit to the above contention.

We hold the purported contract to be ultra vires as to Norris and is null and void.

The judgment of the trial court is reversed and the cause remanded with directions to enter a judgment declaring the purported contract to be null and void and granting the plaintiffs appropriate injunctive relief.

REVERSED AND REMANDED WITH DIRECTIONS.

ARTHUR RIMPLEY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

98 N. W. 2d 868

Filed October 30, 1959. No. 34630.

1. **Homicide: Automobiles.** In an action charging motor vehicle homicide the burden is on the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle, that he operated it in violation of one or more of the statutory provisions relating to the operation of motor vehicles, and that such unlawful operation was the proximate cause of the death.
2. **Criminal Law.** To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.
3. ———. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
4. ———. Error may not be claimed because of the nature of cross-examination if it was not on the trial challenged by timely and proper objection thereto.

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

Johnston & Grossman, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for defendant in error.

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

WENKE, J.

This is an error proceeding from the district court for Jefferson County by Arthur Rimpley, defendant below. Rimpley thereby seeks to have his conviction of motor vehicle homicide, together with his sentence based thereon to the State Reformatory for men, set aside. We shall herein refer to Rimpley as the defendant.

The statute, under and pursuant to which defendant was prosecuted, provides, insofar as here material, that: "Whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be deemed guilty of a crime to be known as motor vehicle homicide * * *." § 28-403.01, R. R. S. 1943.

In an action charging motor vehicle homicide the burden is on the State to prove beyond a reasonable doubt that the person charged operated the motor vehicle, that he operated it in violation of one or more of the statutory provisions relating to the operation of motor vehicles, and that such unlawful operation was the proximate cause of the death. Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201.

The information filed against defendant, insofar as here material, charged: "* * * that Arthur Rimpley on the ninth day of October in the year of our Lord Nineteen hundred fifty-eight in the County of Jefferson and State aforesaid, then and there being did then and there at about 5 o'clock P.M., without malice, while under the influence of intoxicating liquor, did operate and drive

an automobile, at an excessive rate of speed, through the stop sign on Nebraska highway 3S at the junction of said highway with Nebraska highway 15, at the southeast limits of Fairbury, Jefferson County, Nebraska, without stopping thereat; and unlawfully and feloniously did operate and drive his automobile, at said time and place, into and against an automobile operated and driven by Cashious M. Flower with such force and violence that said Cashious M. Flower died on said date as a result thereof." We shall hereinafter refer to Cashious M. Flower as the decedent.

Defendant contends the trial court erred in refusing to sustain his motion for dismissal made at the end of the State's case. This raises a question of whether or not the evidence adduced by the State is legally sufficient to sustain the charge of motor vehicle homicide.

As stated in Fielder v. State, 150 Neb. 80, 33 N. W. 2d 451: "Where the evidence is so lacking in its probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt, the defendant is entitled to be discharged and the case dismissed." However, as stated in Haffke v. State, 149 Neb. 83, 30 N. W. 2d 462: "This court will not interfere with a verdict of guilty in a criminal case which is based upon conflicting evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a finding of guilt beyond a reasonable doubt."

Defendant contends that in several particulars the evidence adduced by the State is not sufficient. We shall hereinafter discuss each of the contentions that he makes in this respect. In considering some of the questions raised by the defendant the following principles have application:

"The test by which a jury shall determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such

conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt." Hoffman v. State, 162 Neb. 806, 77 N. W. 2d 592.

"To justify a conviction on circumstantial evidence, it is necessary that the facts and circumstances essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and, when taken together must be of such a character as to be consistent with each other and with the hypothesis sought to be established thereby and inconsistent with any reasonable hypothesis of innocence." Jeppesen v. State, 154 Neb. 765, 49 N. W. 2d 611.

"When circumstantial evidence is relied upon, the facts and circumstances must form a complete chain and point directly to the guilt of the accused in such a conclusive way as to exclude any other reasonable conclusion, every element essential to the conclusion must be proved by competent evidence beyond a reasonable doubt, and the existence of a reasonable doubt as to any one of them requires an acquittal." Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539. See, also, Jeppesen v. State, *supra*.

"It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed." Morgan v. State, 51 Neb. 672, 71 N. W. 788. See, also, Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158; Hoffman v. State, *supra*.

The accident, out of which the charges filed against defendant arose, happened about 5 p.m. on Thursday, October 9, 1958, on state highway No. 15 at a point near the southeast limits of the city of Fairbury, which is in Jefferson County, Nebraska. At that point state highway No. 3S intersects state highway No. 15 from the east. The accident happened in the west lane of

highway No. 15 or the right-hand lane for southbound traffic. It occurred when a car owned by defendant was driven head-on into the front end of a car being driven south on highway No. 15 by decedent. Defendant's car had approached and entered onto highway No. 15 from the east-southeast on highway No. 3S. There was a stop sign on highway No. 3S as it intersects highway No. 15. Decedent was driving his son's car, which was a 1953 Dodge sedan.

There were four eyewitnesses to the accident who testified at the trial. They were Billy G. Adamson, Royce Horsky, Harvey Witt, and Sam Seachord. Adamson, at the time, was driving his car on highway No. 3S toward highway No. 15. The defendant's car passed his car about a mile from the point of the accident. However, Adamson drove along behind defendant's car and both he and Royce Horsky, a guest in his car, were in a position to and did see the accident when it happened. Harvey Witt was driving his car south on highway No. 15 at the time and was only about 50 feet behind the car decedent was driving when the accident occurred. Sam Seachord, a truck driver, was driving north on highway No. 15 when he saw the accident happen in the west lane of highway No. 15.

Defendant contends there was no competent evidence introduced by the State from which a jury could properly find that he was driving his car at the time of the accident.

Royce Horsky testified he was sure there was one person in defendant's car when it passed the car in which he was riding on highway No. 3S and that he was driving. He further testified that at the scene of the accident he saw defendant lying on the ground just outside of the driver's door of defendant's car, which was in the ditch on the west side of highway No. 15. Billy G. Adamson testified he saw a man (defendant) in the ditch near defendant's car. Sam Seachord testified he never saw anyone get out of either car, saw only

two people there who had been involved in the accident, and that defendant was lying in the ditch. Harvey Witt testified he saw a man fly out of defendant's car, that he saw the man who flew out of the car lying in the ditch, and that the man lying in the ditch was the defendant. Witt went on to testify that the defendant was lying in the ditch beside his car, which ended up in the ditch west of highway No. 15, and that he saw only the two men at the accident, the other being decedent who was still in the car he had been driving. We think this evidence sufficient, under the rules hereinbefore set forth, to present a question for a jury as to whether or not defendant was driving his car at the time the accident occurred.

But defendant contends that while there is no question as to his ownership of the car in which he was riding, that there is a big question as to whether or not there was a third person involved in the accident who might have been driving the car.

It is true that one of the police officers testified he made a search to see if anybody else might have been involved in the accident because, as he stated, the authorities are never sure as to just how many people may have been involved in any accident. However, he goes on to state that he didn't think there was anyone else involved and didn't find anyone else. That only two people were involved in the accident, one in each car, is fully supported by the eyewitnesses to the accident. We make the further observation that the jury was not bound to believe the story of defendant in this regard.

As hereinbefore quoted from the information, the State charged defendant with driving his automobile at an excessive rate of speed through the stop sign on highway No. 3S at the junction thereof with highway No. 15. If he did so then it was done unlawfully for section 39-754, R. R. S. 1943, provides, insofar as here material, that: "The Department of Roads and Irriga-

tion with reference to state highways and local authorities with reference to highways under their jurisdiction are hereby authorized to designate main traveled or through highways by erecting at the entrances thereto from intersecting highways signs notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto."

Defendant contends the State failed to introduce any competent evidence to support this charge. Billy G. Adamson testified the defendant's car weaved as it went into the one-way lane for cars on highway No. 3S to enter highway No. 15 and that it didn't stop at the stop sign located on highway No. 3S. Harvey Witt testified he saw defendant's car approach highway No. 15 from the east on highway No. 3S at a fast rate of speed and out of control and that it didn't stop. Sam Seachord testified he saw defendant's car coming from the east at a fast rate, which he estimated at 40 miles an hour, and that it didn't stop at the stop sign. Donald E. Mayhew, a trooper of the Nebraska Safety Patrol, testified the tire marks left by defendant's car as it approached highway No. 15 on highway No. 3S, and as it entered thereon, showed its speed had been accelerated rather than decreased. From the evidence adduced by the State we think the jury could properly find the defendant operated his car in an unlawful manner as charged in the information.

The information, as hereinbefore set forth, also charged the defendant with operating his automobile while under the influence of intoxicating liquor. Section 39-727, R. S. Supp., 1957, provides, insofar as here material, that: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug. Any person who shall operate or be in the actual physical control of any motor vehicle while under

the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime * * *." If the defendant was guilty of operating his car as charged in the information he was guilty of doing so in an unlawful manner.

Defendant contends the State failed to adduce any competent evidence to support this charge. Dr. R. L. Cassel, who observed and examined the defendant at the Fairbury Clinic in Fairbury shortly after the accident, testified he believed that the defendant was under the influence of intoxicating liquor at that time. Donald E. Mayhew, trooper of the Nebraska Safety Patrol, testified he observed the defendant shortly after the accident and that he then had a strong odor of alcohol on his breath and, from observing the defendant, it was his opinion that he was under the influence of alcoholic liquor. Dr. R. L. Cassel, the county physician of Jefferson County, did, at the request of a police officer, take a sample of defendant's blood shortly after the accident happened. This sample was analyzed by Marjorie Dewey, a qualified chemist for Harris Laboratories of Lincoln, Nebraska, as to alcoholic content by the "Muehlberger Method," which she was authorized to make. She testified that by using this method, a recognized test, it showed the alcoholic content of the sample of blood taken from defendant shortly after the accident to be .018 percent by weight. The legal effect of this test is covered by section 39-727.01, R. S. Supp., 1957, and the jury was instructed in regard thereto by instruction No. 11. We think the evidence adduced by the State presented a jury question.

Defendant contends, however, that the admission of the chemist's report as to the alcoholic content of defendant's blood was in error because a substance in the vial, wherein defendant's blood was placed by Dr. Cassel, was not explained. There is evidence that the sealed vial in which the defendant's blood was placed after the seal had been broken by trooper Donald E. Mayhew was obtained by the Nebraska Safety Patrol

from the Harris Laboratories and that the substance therein, consisting of a powder, had been placed therein by the Harris Laboratories prior to the vial being sealed. Marjorie Dewey, a qualified chemist employed by Harris Laboratories, testified she knew what had been placed in the vial; that it is a chemical called sodium chloride; that it is placed therein to prevent coagulation and as a preservative for the blood; that it is necessary to use it in order to obtain a proper analysis of the blood taken; that it prevents bacterial action of the blood that might alter the alcoholic content thereof; and that it does not destroy the original blood nor affect the alcoholic test thereof. We think this, together with the testimony as to the taking of the blood sample and the handling thereof up to the time of its being tested, laid a full and complete foundation for the admission of the test made thereof and the trial court was not in error in admitting it.

Defendant also questions the sufficiency of the evidence adduced by the State to show that decedent's death resulted from the accident. He asks, is there any competent evidence that decedent's death was the proximate result of defendant's unlawful acts in the operation of his motor vehicle?

Herschel Flower, decedent's son, testified that at the time of the accident his father was 78 years of age but had average health, both physically and mentally; that decedent was driving his, the son's, car at the time, which was a 1953 Dodge sedan; and that the car was in excellent condition. Harvey Witt, who was following the Flower car at the time of the accident, testified it was going about 25 miles an hour. He also testified that immediately after the accident decedent was lying on the front seat of his car, still alive, and that he helped remove him from the front seat to a stretcher. Royce Horsky testified the person in the Dodge car was lying across the seat. Billy G. Adamson testified that immediately after the accident the elderly man in the

Dodge car was lying across the seat seriously injured and that the steering wheel of the Dodge car was bent. Sam Seachord testified the man in the Dodge was lying on the front seat. The pictures of the cars taken shortly after the accident and before they were moved show the accident was approximately a head-on collision. Frank Knocke, the deputy sheriff, testified the motor of the Flower car was pushed back into the body thereof and that the lower part of the steering wheel was bent up. Donald Cerveny, a policeman from Fairbury, testified Flower was bleeding from both the nose and mouth and that he was in bad shape. Roy Traum testified decedent was placed on an ambulance cot and was taken by ambulance to the Fairbury hospital. Dr. Roscoe Luce saw decedent at the Fairbury hospital about 5:30 p.m. and examined him at that time. He testified that because of the nature of his condition it was impossible to examine decedent by means of X-ray and that by the time they had taken off his clothes and started to stimulate him, which took about 10 minutes, he died. Dr. Luce gave as the cause of his death a fractured skull, crushed chest, and probable internal injuries, although he did not make any post mortem examination. We think this evidence was sufficient to present a jury question under the principles applicable thereto, as hereinbefore set forth.

Defendant also complains of the State offering and re-offering exhibit 9, a bottle of beer, claiming prejudice resulted from the State so doing. Donald Cerveny, captain of police of the city of Fairbury, testified he found the bottle of beer, which was cold, lying in the ditch beside defendant's feet; that he placed it on the seat in the defendant's car; and that he did so to preserve it to use as evidence. Defendant's objections were sustained and the bottle of beer was never received in evidence. In this situation we can not see where error occurred on the part of the trial court. If defendant wished to have the trial court caution the jury

in this regard he should have made a request to that effect. In the absence of such request defendant is not now in position to complain because the trial court failed to do so.

Defendant took the stand and on cross-examination was asked about a former arrest and conviction in Perkins County, Nebraska, on a charge of drunk driving. No objection was made thereto by defendant or his counsel and defendant admitted that he had been so convicted. Defendant now complains this was improper and prejudicial. Under the situation here disclosed we think the following is controlling: "Error may not be claimed because of the nature of cross-examination if it was not on the trial challenged by timely and proper objection thereto." Latham v. State, 152 Neb. 113, 40 N. W. 2d 522.

We have examined the record and think it presents a question for a jury on all issues raised by defendant as to the sufficiency of the evidence adduced by the State and that defendant had a fair and impartial trial. In view thereof we affirm the action of the trial court.

AFFIRMED.

STATE OF NEBRASKA ET AL., APPELLEES, V. MILTON C. KIDDER, APPELLANT.
98 N. W. 2d 800

Filed October 30, 1959. No. 34643.

1. **Officers.** Where a person is appointed by the proper authority as acting county judge and thereafter performs duties of the office and holds himself out to the public as such officer, but has failed to give the required statutory bond or take the required statutory oath of office, such person is a county judge de facto.
2. ———. The acts of a de facto officer are as valid and binding as though performed by an officer whose title to the office is beyond dispute.
3. **Appeal and Error: Bonds.** A defective appeal bond which has been approved by the court rendering the judgment confers

jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit an amendment of the bond or to order the filing of a new bond in the furtherance of justice.

4. ———: ———. When a statute requires two sureties upon a bond for an appeal, and a bond containing but one surety is duly approved by the judge who rendered the judgment appealed from, the bond is not void and may be amended.

5. ———: ———. When an application is made to amend the appeal bond on file or to provide a new one, the proper practice is to order the amendment of the bond or the filing of a new one within a reasonable time designated by the court, and in default thereof to direct the dismissal of the appeal.

APPEAL from the district court for Cherry County: ROBERT D. FLORY and LYLE E. JACKSON, JUDGES. *Reversed and remanded.*

Milton C. Kidder, pro se.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellees.

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

CARTER, J.

This is an action by the appellees to recover the possession of certain described school lands from the appellant. The action was commenced in the county court of Cherry County and from an adverse judgment the appellant appealed to the district court. From an order of the district court quashing the appeal the appellant has appealed to this court.

On May 26, 1958, the county court of Cherry County entered its judgment in favor of the appellees and against the appellant. On June 2, 1958, the appellant gave notice of appeal to the district court, filed an appeal bond, and ordered a transcript of the proceedings in the county court. The transcript was duly filed in the office of the clerk of the district court on July 17, 1958. On July 28, 1958, appellees filed a motion to quash the appeal. On October 20, 1958, the motion to

quash was sustained on the grounds that the appeal bond was defective in that it was signed by one surety only and that it was not approved by a regularly appointed acting county judge. A motion for a new trial was filed on October 28, 1958. On March 12, 1959, the appellant filed a motion for leave to file an amended appeal bond meeting statutory requirements. On March 13, 1959, appellant filed an amended appeal bond signed by two sureties, with justifications attached. On April 7, 1959, the trial court overruled the motion for a new trial and appellant has appealed therefrom to this court.

A bill of exceptions has been filed in this court which appellees concede has met the requirements set forth in State ex rel. Bankers Reserve Life Assn. v. Scott, 59 Neb. 499, 81 N. W. 305. We accept the bill of exceptions as correctly stating the evidence taken and the proceedings had in the district court.

The record shows that the appeal bond alleged to be defective was approved by "Ben F. Wilkinson County Judge." Wilkinson was not the elected county judge of Cherry County. The evidence shows that he held himself out as the county judge while the regular occupant of the office was absent from the county. The fact that he purported to file and approve the appeal bond as county judge is evidence that he held himself out as such. The evidence shows also that the county commissioners of Cherry County took the following action in May 1957: "By action of the County Board Ben F. Wilkinson, Clerk of the District Court was appointed to act as County Judge in the absence of County Judge C. H. Elliott." The evidence shows that Wilkinson did not qualify by taking an oath of office or giving a bond.

The evidence is clearly sufficient to show that Ben F. Wilkinson was county judge de facto of Cherry County. Where a person is appointed by the proper authority as acting county judge and thereafter performs duties of the office and holds himself out to the

public as such officer, but has failed to give the required statutory bond or take the required statutory oath of office, such person is a county judge de facto. Gragg v. State, 112 Neb. 732, 201 N. W. 338; Baker v. State, 112 Neb. 654, 200 N. W. 876. See, also, 43 Am. Jur., Public Officers, § 471, p. 225. The acts and judgment of a de facto officer are as valid and binding as though performed and rendered by an officer whose title was beyond dispute. Dredla v. Baache, 60 Neb. 655, 83 N. W. 916.

At the hearing on the motion to quash the appeal bond, the appellant advised the court: "If I am wrong in my interpretation of this I can forthwith produce another surety; if that is required by the Court. In fact I had a surety come in town for the purpose of signing that bond." This was clearly an application to the court by appellant to furnish a proper bond if the bond on file was insufficient. It was an abuse of discretion for the trial court not to permit the filing of an amended bond.

In Rube v. Cedar County, 35 Neb. 896, 53 N. W. 1009, this court held: "This undertaking, although informal, is not void. The proceedings, while irregular, were sufficient to give the district court jurisdiction. The plaintiff in error appears to have acted in good faith and should have been given an opportunity to file a new and sufficient bond. The district court erred in dismissing the appeal and the judgment is reversed."

In State Savings & Loan Assn. v. Johnson, 70 Neb. 753, 98 N. W. 32, this court said: "It would seem, however, that the reasoning of the Texas case, namely, that the approval of the bond by the justice determines its sufficiency until some further action is taken, is sound, and in this instance the presentation of the bond with the justice's approval indorsed, seem sufficient to give jurisdiction to the district court until some further action with regard to that bond was taken."

As early as Casey v. Peebles, 13 Neb. 7, 12 N. W.

840, this court said: "Where the statute requires two sureties upon a bond for an appeal, and a bond containing but one is duly approved, it is not void, but may be amended. And it will be sufficient, unless objected to on the ground that it is signed by but one surety."

The rule is aptly stated in Northup v. Bathrick, 78 Neb. 62, 110 N. W. 685, as follows: "As the bond was in compliance with the statute governing appeals in form and condition, and as it was duly approved by the county judge, it gave the district court jurisdiction of the case on appeal. And, even if it had been defective and insufficient in security, the defendant should have been allowed to provide a new and sufficient bond, without having his appeal summarily dismissed."

Section 25-852, R. R. S. 1943, provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleadings, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." In the case of In re Estate of Hoagland, 128 Neb. 219, 258 N. W. 538, we held that the filing of an appeal bond to obtain a review of the judgment of a county court is a proceeding within the purview of this section. It was further stated in the last case cited: "The action of the trial court in permitting and approving the amendments to the appeal bond is approved as being not only within the spirit, but as required by the express wording, of the statute quoted."

We conclude that a defective appeal bond which has been approved by the court rendering the judgment

confers jurisdiction on the appellate court to have the defect corrected, and the appellate court is required to permit amendments of the bond or order the filing of a new bond in the furtherance of justice. Where a failure to so do results in prejudice to the complaining party it constitutes prejudicial error. The discretion granted a court in permitting or denying amendments is a legal discretion which is subject to review to determine if its exercise resulted in prejudice to a litigant.

It is contended that appellant delayed unreasonably in applying for leave to file an amended or new bond. The evidence shows that appellant offered a new bond when the trial court indicated at the hearing on the motion to quash the appeal that the appeal bond was insufficient. When an application is made to amend the bond on file, or to provide a new one, the proper practice is to order the amendment of the bond or the filing of a new one within a reasonable time designated by the court, and in default thereof to direct a dismissal of the appeal. In re Estate of Kothe, 131 Neb. 780, 270 N. W. 117; In re Estate of McLean, 138 Neb. 752, 295 N. W. 270.

The trial court was in error in dismissing the appeal. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IN RE ESTATE OF ROBERT BERG, DECEASED. CHARLES BOSLE, APPELLANT, V. A. J. LUEBS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ROBERT BERG, DECEASED, APPELLEE.

98 N. W. 2d 795

Filed October 30, 1959. No. 34650.

1. **Work and Labor.** An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof.

2. **Work and Labor: Pleading.** It is the rule in pleading a cause of action based on quantum meruit for the reasonable value of labor and materials furnished that an allegation of a promise to pay impliedly exists in the pleading.
3. **Work and Labor: Evidence.** There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.
4. ———: ———. In a proceeding to recover for personal services rendered decedent, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense to be established by the executor.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded.*

E. Merle McDermott and *Flansburg & Mattson,* for appellant.

Luebs, Elson & Tracy, for appellee.

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

MESSMORE, J.

This action involves a claim filed against the estate of Robert Berg, deceased, by Charles Bosle, hereafter referred to as claimant, for personal services performed by him for the deceased during his lifetime, the claim being on quantum meruit. This action was tried in the district court for Hall County upon an appeal from an order of the county court of said county disallowing the claim of the claimant against the estate of Robert Berg, deceased. Trial was had. At the close of the claimant's case the defendant, A. J. Luebs, executor of the estate of Robert Berg, deceased, moved for a directed verdict. The trial court sustained the motion for directed verdict, basing the same upon the premise that the burden was upon the claimant to prove by a preponderance of the evidence that he had not been paid for his claimed services, there being no evidence to establish that fact. Claimant filed a motion for new trial which was overruled. Claimant perfected appeal to this court.

The claimant's petition on appeal admitted that A. J. Luebs was the executor of the estate of Robert Berg, deceased; alleged that Robert Berg died on July 25, 1957; and alleged that from November 1953, through and until the time of the death of Robert Berg, the claimant, at the special instance and request of Robert Berg, performed personal services and labor for Robert Berg consisting of hauling hay, threshing, furnishing a team and rack, shelling corn, breaking up concrete, fixing fences, surveying land, and other farm work. It was further alleged that said services performed by claimant were of the fair and reasonable value of $935; that Robert Berg promised to pay the claimant for said services but died before making payment; and that claimant filed a claim against the estate of Robert Berg, deceased, within the time provided by law. Claimant prayed judgment in the sum of $935, and costs.

The executor's answer was a general denial of the facts set forth in the claimant's petition relating to the services alleged to have been rendered by the claimant for Robert Berg, deceased, and prayed for a dismissal of the claimant's action.

It appears from the evidence that there was a Robert Berg and a Lawrence Berg, and reference is made to the Berg farm. We will use Robert Berg's name for the reason that the claim is against his estate.

Oscar Searson, the manager of the Alda Grain Company of Alda, Nebraska, testified to an exhibit which constituted a record of grain sold and delivered by Robert Berg from 1954 through 1956. He further testified that he was sure that the claimant hauled some of this grain to the elevator; that very often when shelling corn the claimant's truck was used; that he believed the last time he saw the claimant hauling Robert Berg's corn was in 1956; and that the claimant helped haul corn most of the years this witness purchased corn from the Bergs.

Maynard D. Bosle, a son of the claimant, testified that

his father's farm is half a mile south of the Robert Berg farm; that he farmed with his father who is the claimant in this case; that Robert Berg would come to the claimant's place and ask the claimant to haul hay for him; that this witness helped his father haul hay for Robert Berg in October 1953, and this work took 40 or 50 hours during the months the hay was hauled until the end of the year; that in 1953, his father threshed for Robert Berg, and this work took a day or a day and a half, or 8 or 9 hours; that the reason his father did this work was because Robert Berg's physical condition was poor, and Robert Berg requested the claimant to do it; and that in doing the work, the claimant used his team and rack. He further testified that his father shelled corn on the Robert Berg farm in August 1953, and it took 2 or 3 days because the corn sheller worked slowly; that Robert Berg came to his father's farm when this witness was present and asked his father to help truck the corn, and also asked if it was possible for this witness to help; that his father trucked the corn, using his own truck and furnishing the gas and oil; that the corn was taken to the Alda Grain Company; that in 1954, his father hauled hay for Robert Berg from the first of the year until April, working 12 or 13 days, or 40 to 50 hours; that his father's truck was used in this work and his father furnished the gas and oil for the truck; that his father also hauled hay for Robert Berg for 40 to 50 hours from October to December 1954; that the reason his father hauled hay and shelled corn for Robert Berg was because the latter asked him to; that this corn shelling took place in August or September, and took from 2 to 2½ days; and that the amount of corn shelled was from 3,000 to 4,000 bushels. This witness was in military service from December 16, 1954, to December 14, 1956, and consequently was unable to testify to the work performed by his father for Robert Berg during this period. He further testified that in 1957, his father helped Robert Berg by

doing chores, surveying land, and helping make a cement box; and that he burned stalks, fixed fences, harrowed the land, and also did some disking for him. This work was performed by the father of this witness at the request of Robert Berg around March and April of 1957, and the work took from 20 to 30 days. He further testified that Robert Berg came to his father's place almost every day from the first of January 1957, until he died, to ask his father to help with the work. During this time Robert Berg was in failing health, and the claimant was at Robert Berg's farm every day. He further testified that he was present and recalled a conversation which took place at his father's farm in October 1954, when Clarence Wiese, a veterinarian, and Robert Berg were present. In this conversation Robert Berg asked this witness and his father to help vaccinate some cattle, and they went to Robert Berg's farm in the afternoon to help in this work. The veterinarian told Robert Berg what he charged for his work, and was paid. The veterinarian asked Robert Berg what he was going to pay claimant for the work he did, and Robert Berg said he would "make it good." This witness further testified that he had hauled grain in that area for Robert Berg; and that the going rate for hauling corn in 1953 was from 2 to 4 cents a bushel. This witness testified on cross-examination that in 1953, Robert Berg ran his threshing machine on the claimant's farm, shelled corn thereon, and ran his cement mixer seven or eight times on different jobs on the claimant's farm.

Marvin Gerdes, a farmer, testified that he sold hay to Robert Berg in 1955 and 1956, which amounted to about 30 tons, and the claimant and another person loaded and hauled this hay for Robert Berg.

Otto Albertson, a farmer, testified that he sold hay to the Bergs in 1955, and a stack of hay to them in 1956; that there was approximately 7 or 8 tons of hay in each stack; that the claimant hauled hay with one

truck, and Clarence Luth with another; and that the claimant was using his own truck.

Robert Denman, a farmer, testified that he shelled corn on the Berg farm for the first time in 1956; that the claimant was around the Berg farm at that time, and drove a truck and hauled corn; and that it took about half a day or a little better to do this work.

Wilmer Scheel testified that in the fall of 1956, he was present on the Berg farm where some corn was to be shelled and the claimant was helping with the work; that he had observed the claimant hauling hay and shelling corn; that the claimant used his own truck; and that this witness hauled hay with the claimant in 1955, 1956, and 1957, from many different places. He further testified that the rate of pay for common labor was $1 an hour, and the same amount for threshing; and that the rate including a team and rack was $2.50 an hour.

Robert Beberniss testified that he sold hay to Lawrence Berg (who is now deceased), and saw the claimant hauling hay to the Berg farm in 1955, and in February or March 1956, or some time later; that there were 14, 15, or 16 tons of hay hauled; that the claimant hauled the hay in both years; that Robert Berg was there, as well as the claimant; that they hauled 2 tons of hay to a load; and that it took about half a day to haul one load.

Clarence Wiese testified that he was employed by Robert Berg and Lawrence Berg from 1953 to 1957. He worked on the Berg farm from March until some time in June 1957. His work consisted of doing chores, fixing fences, putting in a well, fixing corrals, vaccinating cattle, and putting in cement forms for wells. He bought materials that the Bergs ordered, and ran errands to Grand Island. For vaccinating and cement work he charged $2 an hour. For common labor he charged $1 an hour. He further testified that he saw the claimant do some work for the Bergs in 1957; that when he was asked to put in a cement form he asked Robert

Berg for help and, as a result, the claimant and his son came to help this witness pour cement and take the form out; that Robert Berg sent the claimant and his son to deliver the form north of Grand Island; that it took about three-quarters of a day to run the form; that he saw the claimant doing chores around the Berg farm; that from 1953 to 1957, this witness saw the claimant thresh and fix fences on the Berg farm; and that in October 1954, he asked Robert Berg who was going to pay the claimant for the work the claimant did for him and Berg said he would pay him. This witness never saw Robert Berg pay the claimant any amount of money. This witness further testified that he was paid $1 to $1.25 an hour for common labor.

There is evidence of one witness on cross-examination that it was the common practice for neighbors to get together and thresh and shell corn in that general area.

The claimant assigns as error that the trial court erred in directing a verdict for the defendant, and in overruling the claimant's motion for new trial.

In determining whether or not the evidence adduced by the claimant is sufficient to make a case for the consideration of the jury, there are certain well-established rules of law to be kept in mind, as follows.

The evidence is reviewed here subject to the rule that: "Where a motion for a directed verdict is made the party against whom it is made is entitled to have his evidence accepted as true by the court and he is further entitled to have all favorable inferences reasonably to be drawn therefrom resolved in his favor." Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678. See, also, Comstock v. Evans, 159 Neb. 739, 68 N. W. 2d 351.

In Umberger v. Sankey, 154 Neb. 881, 50 N. W. 2d 346, it was held: "An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof." The court further said: "It is the rule in pleading a

cause of action based on quantum meruit for the reasonable value of labor and materials furnished that an allegation of a promise to pay impliedly exists in the pleading."

In Sorensen Constr. Co. v. Broyhill, 165 Neb. 397, 85 N. W. 2d 898, it is said: "There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced." The evidence in this case conforms to this requirement.

As heretofore stated, the trial court, in directing a verdict for the defendant, based the same upon the premise that the burden was upon the claimant to prove by a preponderance of the evidence that he had not been paid for his claimed services, there being no evidence to establish that fact.

In many cases this court has held that the question of payment is a matter of defense, which, to be available, the defendant is required to set up in the answer and establish on the trial. See, Ashland Land & Livestock Co. v. May, 51 Neb. 474, 71 N. W. 67; Burke v. Munger, 138 Neb. 74, 292 N. W. 53; Washington v. Beselin, 141 Neb. 638, 4 N. W. 2d 753.

As said in In re Munro's Estate, 296 Mich. 80, 295 N. W. 567; "In proceeding to recover for personal services rendered decedent, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense to be established by the executor." The burden was not on the plaintiff to prove nonpayment of the obligation, and the burden of proving payment was an issue to be proved by the defendant in the trial of this case.

The evidence in this case contains testimony concerning the services performed by the claimant for the decedent during the latter's lifetime. There is also competent evidence relating to the reasonable value of such services rendered to the decedent by the claimant. In addition,

there is some evidence of a promise by the decedent to pay the claimant.

We conclude that in the light of the evidence and the authorities heretofore set forth, the judgment rendered by the district court in directing a verdict against the claimant should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL MATHEW, RESPONDENT.
98 N. W. 2d 865

Filed October 30, 1959. No. 34689.

1. **Attorney and Client: Pleading.** A motion for judgment on the pleadings will lie only when, from the face of the pleadings, the moving party is entitled to judgment as a matter of law.
2. ———: ———. It is the duty of the court to render judgment in favor of a party, where, from the pleadings, such party is entitled thereto.
3. **Criminal Law: Evidence.** A plea of nolo contendere in a criminal action may not be used in evidence in a civil action against the party making the plea, but where a judgment has been entered on the plea, the record is competent evidence of the fact of conviction.

Original action. On motion for judgment on the pleadings. *Judgment of suspension.*

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

Joseph T. Votava, for respondent.

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

YEAGER, J.

This is a disciplinary action originally instituted in this court by the State of Nebraska on relation of the Nebraska State Bar Association, relator, designated com-

plainant, against Paul Mathew, an attorney at law, duly licensed and admitted to practice in this state, respondent. The complaint was filed by the members of the Committee on Inquiry for the Twelfth Judicial District of the State of Nebraska.

By the complaint, the important part of which is summarized here, it is charged that the respondent was guilty of unprofessional conduct which was evidenced by a criminal action in the United States District Court for the District of Nebraska wherein the respondent was charged with the criminal offense of knowingly, along with another whose name is not set out here, transporting a certain girl from Omaha, Nebraska, to Denver, Colorado, for the purpose of prostitution and debauchery. To this charge the respondent entered a plea of nolo contendere, on which plea the respondent was convicted.

To the complaint the respondent filed an answer and a motion for leave to amend the answer. Thereafter the parties entered into a stipulation which by its effect amended the answer in accordance with the terms of the motion to amend.

By the portions of the answer as amended which are of concern here, the respondent denied all allegations of the complaint not specifically admitted to be true. He admitted that he was charged with an offense in the United States District Court as alleged in the complaint. He also admitted that he entered a plea of nolo contendere to the charge and that on January 22, 1959, he stood convicted for the purpose of sentence. There is nothing in either the complaint or the answer thereto from which it may be ascertained whether or not sentence or any other adjudication was made upon the conviction.

Thereafter the relator filed a motion for judgment against the respondent on the pleadings and admitted facts.

In response to this motion the respondent filed an

answer. In this answer he, by reference, made proceedings conducted by the Inquiry and Advisory Committees a part of his answer to be considered in determining whether or not the motion for judgment on the pleadings should be sustained. These proceedings disclose that the respondent was sentenced to pay a fine of $250 and the costs of the action.

Before this court is the question of whether or not on the pleadings an adjudication that the respondent has been guilty of unprofessional conduct is required, and, if so, what, if any, disciplinary action shall be imposed.

The general power of the court in case of a motion for judgment on the pleadings is well defined in 71 C. J. S., Pleading, § 425, p. 864, as follows: "A motion for judgment on the pleadings will lie only when, from the face of the pleadings, the moving party is entitled to judgment as a matter of law." See, also, Hunter v. Delta Realty Co., 350 Mo. 1123, 169 S. W. 2d 936; Baker v. Lamar (Mo.), 140 S. W. 2d 31.

This court has said: "It is a rule of universal application that it is the duty of the court to render judgment in favor of a party, where, from the pleadings, such party is entitled thereto." Woods v. Brown County, on rehearing, 125 Neb. 692, 251 N. W. 839.

The respondent at no point contends either that if he was guilty of the acts charged against him he was not guilty of unprofessional conduct or that the facts alleged in the complaint were insufficient as a charge of unprofessional conduct. He admits in his original answer that "he stood convicted for purposes of sentence." In his answer to the motion for judgment on the pleadings, by reference, he adduced the judgment of the United States District Court disclosing that he received a sentence on the conviction.

The only theory on which he seeks to be relieved from an adjudication on the motion at the hands of this court that he was guilty of unprofessional conduct is that, since the sentence of the United States District

Court was made pursuant to his plea of nolo contendere, the record of his sentence, which, as pointed out, was pleaded by him, may not receive evidentiary consideration in this action.

It is true that a plea of nolo contendere in a criminal action may not be used in evidence in a civil action against the party making the plea. If however a judgment has been entered on the plea, the record is competent evidence of the fact of conviction. See 22 C. J. S., Criminal Law, § 425, p. 658.

In the light of what appears in the pleadings on which, as has been pointed out, the judgment herein shall rest, it becomes the duty of this court to, and it accordingly does, find and adjudge the respondent guilty of the charge of unprofessional conduct contained in the complaint.

There is no designated standard for the fixation of discipline in a case where unprofessional conduct of a member of the bar has been found to exist. Obviously the fixation must reside in the sound discretion of the court. It would appear that this discretion should be exercised in the light of the facts and circumstances which under legal rules and restrictions a court is entitled to examine.

The respondent by his answer to the motion for judgment on the pleadings has invited an examination of proceedings before a committee of the State Bar Association bearing on the character and qualities of the acts constituting the crime of which the respondent was convicted. These have not been identified in any such manner as to cause them to be admissible as evidence in a trial at law or in equity. In no true and legal sense are they in evidence. Even had they been offered and received in evidence this court could not properly consider them for the reason, as has been indicated earlier herein, that the right to have a motion for judgment sustained depends solely and alone on the pleadings themselves.

In propriety therefore this court in determining what

discipline should be imposed has for consideration the crime charged, the statute defining the crime charged, the conviction and sentence, the designated penalty for such crime, the penalty imposed by the court, and the inferences to be drawn therefrom.

Two of these incidents and inferences to be drawn from them merit specific consideration in this determination. The two are the penalty provided and the penalty imposed. Title 18, U. S. C. A., section 2421, page 369, prescribes as a penalty for this crime a maximum penalty of a fine of not more than $5,000 or imprisonment for not more than 5 years, or both. No minimum is prescribed. As pointed out, the penalty actually imposed was $250 and costs.

In the very nature of things it appears reasonable to assume that the court inquired into the surrounding facts and circumstances before pronouncing sentence and in probability acted with reference to what was disclosed. If this assumption is valid then it becomes inferable that the crime committed was relatively not highly serious.

Accepting this assumption with its attendant inferences the conclusion reached is that extreme severity is not justified herein in the assessment of discipline. The judgment therefore is that the respondent be suspended from the right to practice law in any court in this state or in any other manner for a period of 6 months. The suspension shall go into effect after the judgment becomes effective. If, within a reasonable time after 6 months from the effective date of the suspension, he makes a sufficient showing to this court that he has fully complied with the order of suspension the respondent will be reinstated and allowed to engage again in the practice of law, otherwise the suspension will become permanent and have the effect of disbarment.

JUDGMENT OF SUSPENSION.

GEORGE SMITH, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

99 N. W. 2d 8

Filed November 6, 1959. Nos. 34517, 34604.

1. **Indictments and Informations.** An information in a felony case which lacks an allegation that the crime charged was committed within the jurisdiction is vulnerable to a general demurrer.
2. ———. It is a general rule that defects or omissions in an indictment or information which are of such fundamental character as to render the indictment or information wholly invalid are not subject to waiver by the accused.
3. ———. A defendant by failure to move to quash or to demur does not waive the right to raise the question in this court of whether or not the indictment or information is wholly invalid.
4. ———. The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law.
5. ———. An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which accused was convicted.
6. **Criminal Law.** The fact that an accomplice has been guilty of willful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration.
7. **Criminal Law: Trial.** In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury is instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has willfully sworn falsely in regard to a material matter it should be hesitant to convict upon his testimony, without corroboration, and that in no case should it convict unless it is satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.
8. **Criminal Law: Evidence.** Where there is a direct conflict in the evidence relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant

evidence and admissible for consideration of the jury as corroborative evidence.

9. ———: ———. The evidence of other acts is admissible in a criminal prosecution if they evidence a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which of itself is evidence bearing upon the particular act charged.
10. **Criminal Law: Witnesses.** A jury has the right to disregard the entire testimony of a witness if it believes that the witness has willfully testified falsely on any material matter.
11. **New Trial.** A motion for new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and ordinarily, unless an abuse of discretion is shown, its determination will not be disturbed.
12. **Continuances: Criminal Law.** The refusal of the trial court to grant a continuance in a criminal action will not constitute reversible error unless an abuse of discretion is shown which is prejudicial to the rights of the defendant.
13. **Criminal Law: Trial.** Where the trial court has instructed generally as to the issues of a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining.

ERROR to the district court for Keith County: JOHN H. KUNS, JUDGE. *Affirmed in part, and in part reversed.*

Beatty, Clarke, Murphy & Morgan, Donald W. Pedersen, Frank E. Piccolo, Jr., and *James E. Schneider,* for plaintiff in error.

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

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

YEAGER, J.

In this opinion two proceedings in error from the district court will be considered and a determination made in each of them. As to the first of these, No. 34517, in the district court for Keith County, Nebraska, George Smith, plaintiff in error herein, who will be referred to hereinafter as defendant, was charged by the State of Nebraska by information with five criminal offenses of

burglary. The State of Nebraska is defendant in error and it will be referred to as the State. Each offense was charged in a separate count in the information. The date of all of the alleged offenses was February 23, 1958. A trial was had to a jury. The jury by its verdict found the defendant guilty on each of the five counts. A motion for new trial was duly filed. This motion was overruled and the defendant was sentenced to serve an indeterminate sentence in the State Reformatory at Lincoln, Nebraska, on each count of not less than 2 and no more than 5 years, which sentences should run consecutively and not concurrently. By proceedings in error the defendant seeks a reversal in this court.

The second proceeding involves contentions contained in a second motion for new trial based on alleged newly discovered evidence and that an accomplice who was a witness against the defendant testified falsely on the trial. This motion was also overruled. This case is No. 34604.

The alleged errors which the defendant contends entitle him to a reversal are numerous but all of them do not require separate consideration herein. By assignments of error requiring first attention it is asserted (1) generally that each of the counts fails sufficiently to charge an offense punishable by the laws of the state, and (2) specifically that the allegations are insufficient to confer jurisdiction on the court.

Examination of the information discloses that these two attacks do not apply equally to all of the five counts. As will be made clear later herein the question as to sufficiency of allegations to confer jurisdiction applies to the second, third, fourth, and fifth counts, but does not apply to the first.

By the first count of the information it was sufficiently alleged that the defendant committed the crime charged in that count in the County of Keith and State of Nebraska. The same is not true of the allegations of any

of the other four counts. There is nothing in any one of these four counts, either directly or inferentially, describing the jurisdictional situs of the commission of the alleged offense. It is true that by the allegations in each of these counts the county attorney and his authority are by reference to the first count sufficiently defined and declared, but there is a total failure of reference to the jurisdiction defined and declared therein. The total description of the location of the offense charged in the second count is "into the Chrysler & Plymouth Automobile building occupied by George Buer." In descriptive character and quality the other three of the four counts are the same.

The rule applicable in situations such as this is the following: "An information in a case of felony which lacks any allegation that the crime charged was committed within the jurisdiction of the court is vulnerable to a general demurrer." Poulsom v. State, 113 Neb. 767, 205 N. W. 252. This statement was approved in State v. Furstenau, 167 Neb. 439, 93 N. W. 2d 384.

In McCoy v. State, 22 Neb. 418, 35 N. W. 202, it was said: "* * * it is elementary that to confer jurisdiction upon the court for the trial of an offender the information or indictment must allege specifically that the crime was committed within the jurisdiction of the court." This statement was quoted with approval in State v. Furstenau, *supra*. See, also, Dickens v. State, 139 Neb. 163, 296 N. W. 869; Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111; Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

The question of the jurisdictional insufficiency of the allegations of the four counts was not raised before or at the trial. However under the decisions of this court that failure constituted no bar to the right of the defendant to present it on appeal to this court. The question of the effect of failure to demur was considered and earlier holdings of this court were reviewed in Nelson v. State, 167 Neb. 575, 94 N. W. 2d 1. In that case, in holding

that failure to demur did not waive the right to raise the question, it was said: "It is the general rule that defects or omissions in the indictment or in the mode of finding the indictment, which are of such a fundamental character as to make the indictment wholly invalid, are not subject to waiver by the accused." See, also, State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497; Hunt v. State, 143 Neb. 871, 11 N. W. 2d 533.

With specific reference to the right to raise for the first time in error proceedings in this court the question of whether or not the information contained sufficient jurisdictional allegations, it was said in Nelson v. State, *supra:* "We accordingly hold that the defendant by failing to move to quash or demur did not waive the right to raise that issue and that it may be raised in this court for the first time on appeal." In this view the conviction on the second, third, fourth, and fifth counts of the information may not be allowed to stand.

It follows from the conclusion reached with regard to the four counts that the general assertion that the several counts fail sufficiently to charge an offense requires consideration only in relation to the first count since this count is not subject to jurisdictional attack as are the other four counts. The main point of the contention is that the building which it is alleged was broken and entered was not sufficiently described.

It is true that the description contained in the information is lacking in clarity as is also the evidence of identification. It is further true that neither before nor during the trial was the attention of the court called to these deficiencies. Attention was not even called to them directly by motion for new trial. Also here it is not pointed out that this occasioned any surprise to the defendant or that on account thereof he suffered any particular disadvantage.

The determination on this question does not turn however on the question of surprise or disadvantage but upon the question of waiver.

As to waiver, in State ex rel. Gossett v. O'Grady, *supra,* it was said: "The general rule is that, where an objection is not made at the time prescribed by law, the objection is waived. * * * This jurisdiction is fully committed to this rule." Numerous cases are cited in the opinion which support the rule. This statement has been approved in Nelson v. State, *supra.*

In Hunt v. State, *supra,* it was said: "The general rule is that a defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads to the general issue, provided the information contains no jurisdictional defect and is sufficient to charge an offense under the law.

"The governing principle is that an information is fatally defective only if its allegations can be true and still not charge a crime.

"An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which accused was convicted." These pronouncements were approved in Nelson v. State, *supra.*

From an examination of the first count of the information in the light of these pronouncements it may not well be said that it was so defective as to permit an attack for the first time in this court in an action for review of the conviction of the defendant.

The next question which will be considered is that of whether or not the court erred in its refusal to grant a new trial and in failure to dismiss for want of proper proof. There are several assignments of error presenting different phases of the subject. The important phases however inhere in the following questions: (1) Did either or both of two motions for new trial on the ground of newly discovered evidence require the granting of a new trial? (2) Should the verdict have been set aside in view of the fact that an accomplice was a witness against the defendant? (3) Was it prejudicial error to admit evidence of other criminal acts of the

defendant, namely that in support of the four counts which have by this opinion been declared invalid, on the trial of the charge contained in the first count? (4) Taken as a whole did the evidence amount to proper proof of the charge?

An examination of the entire evidence adduced and admitted, if proper to be considered in determining guilt or innocence, discloses without question that the court did not err in refusing to dismiss on account of failure of proof. There was proof that the crime was committed. There was testimony of disinterested witnesses that the defendant was at the time in the jurisdiction and in the immediate vicinity. Articles which were taken in the series of crimes committed on the date in question were found on the premises of the defendant. An admitted accomplice gave testimony in detail describing participation in the crime by defendant. This testimony was in proof of all of the elements of the crime.

The defendant contends however that this evidence was insufficient to sustain the conviction. The theory is that the conviction was invalid for the reason that it depended upon the testimony of an accomplice, which he contends was uncorroborated, and which he further contends could not be considered since it has been made apparent by the hearing on motion for new trial that the testimony given by the accomplice on the trial was false.

It is true that after the trial the accomplice repudiated by affidavit his testimony wherein he stated that the defendant participated in the commission of the crime. It is also true that later, also by affidavit, he retracted the repudiation. In this light the defendant relies at least in part on the following from Jahnke v. State, on rehearing, 68 Neb. 181, 104 N. W. 154: "The evidence of an accomplice should be closely scrutinized. If it appears that such witness has willfully sworn falsely in regard to a material matter upon the trial, his evidence

can not be sufficient, if uncorroborated, to support a verdict of guilty."

This statement was specifically modified as follows in Millslagle v. State, 137 Neb. 664, 290 N. W. 725: "The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration.

"In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused."

It is therefore not now the law of this state that one charged with a criminal offense may not be convicted on the testimony of an accomplice.

Another fallacy of the contention of the defendant is that, contrary to his insistence, there was corroboration of testimony of the accomplice. It is true that the testimony as to the actual commission of the act is not corroborated, but it does not follow that within the meaning of law there was no corroboration.

The defense was that of alibi. The defendant and other witnesses testified that he was not within the jurisdiction at the time the crime was committed. The accomplice testified that he was present and other witnesses whose testimony it cannot well be said was incapable of belief testified that he was seen by them in

the jurisdiction in the immediate vicinity of the crime and in the company of the defendant. The testimony was within the meaning of law evidence corroborative of the testimony of the accomplice.

Definitive of what is meant by corroboration, it was said in Heusser v. McAtee, 151 Neb. 828, 39 N. W. 2d 802: "Where there is a direct conflict in the evidence relating to a material issue, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and admissible for consideration of the jury."

This statement does not employ the terms "corroboration" or "corroborative" but the opinion points out that the statement was a characterization of these terms. It follows from this that the answer to the fourth question posed above is that the evidence on which the case was tried was sufficient to sustain a verdict of guilty. This also requires a negative answer to the second question.

The theory involved in the third question is that evidence of other crimes was admitted. The evidence to which reference is made is that given in support of the four counts wherein it has been said herein that no sufficient charge of crime is contained.

The evidence of which complaint is made was of acts committed by defendant and his accomplice, in a series of the same kind and character within a few short hours at most, in a small town with both acting at all times in the furtherance of a common design and purpose.

This being true it must be said that the evidence was admissible under the following rule: "To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged." Clark v. State, 102

Neb. 728, 169 N. W. 271. See, also, Rice v. State, 120 Neb. 641, 234 N. W. 566; Foreman v. State, 126 Neb. 619, 253 N. W. 898; Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824; Sall v. State, 157 Neb. 688, 61 N. W. 2d 256.

It is urged, as we interpret, that there was no competent evidence of the commission of the crime by the defendant since the only evidence in this respect was that of the accomplice, which evidence the jury was required to reject for the reason that it was demonstrated that he had testified falsely. The evidence of falsity was raised by the second motion for new trial and supported by an affidavit of the accomplice.

It is true that if this evidence of the accomplice is rejected the conviction may not be allowed to stand. There is no other evidence of probative value of acts involved in the commission of the crime.

If it may be said that this evidence is now known to be false it is so known because of the repudiation by affidavit which affidavit was in turn repudiated by a later affidavit.

On the record it is clear that if the testimony of the accomplice was false it was willfully so. The true applicable rule under such circumstances is that the jury may disregard the testimony of any witness who it believes from the evidence has willfully testified falsely.

It is obvious therefore that the jury in this case had the power and duty to determine whether or not to believe the testimony of the accomplice. In the face of an abundance of testimony that the defendant was not in the jurisdiction of the court but was many miles away the jury believed the testimony of the accomplice.

In the light of all of this and after trial, should this court assume to say that the defendant is entitled to have the verdict and sentence vacated? If present appearances are to control then the record made on another trial would be the same as the former one, except that there would be the opportunity to show that

the accomplice had made a statement contrary to his testimony out of court on another occasion. In the light of decisions in cases already cited the ascertainment of what was to be believed would still be for the jury.

As an observation, witnesses, as is well known, may be called and examined at a hearing on a motion for new trial. The accomplice was not called as a witness on the hearing on the motion and no explanation was offered. It should be added that if there was a lack of zeal in this respect the lack should be equally chargeable to the defendant and the State.

It appears proper to say that a verdict of a jury and a judgment of a court based on testimony of a witness surrounded by an oath with its potential in the case of violation in which witnesses are subjected to a customary and rigorous examination and to a searching cross-examination should not be rendered for naught by a mere affidavit of falsity obtained by the losing party from a witness in a suit at law.

In support of that part of his first motion for new trial relating to newly discovered evidence three affidavits were filed the purpose of which was to show that the defendant was not at the scene of the alleged crime but was in another county many miles away. Only one of these has a competent bearing upon this question. It is the affidavit of Clifford Higgins the sum total of its pertinent content being that the defendant was at his home on February 23, 1958, from about 5:30 or 6 p.m. to about 7:30 to 8 p.m. During this period Higgins was present but not thereafter. This was but cumulative of other evidence adduced at the trial.

A rule applicable to motions for new trial on the ground of newly discovered evidence is the following: "A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and ordinarily, unless an abuse of discretion is shown, its determination will not be dis-

turbed." Phegley v. State, 113 Neb. 138, 202 N. W. 419. The conclusion reached in this case is that the trial court did not abuse its discretion in refusing to grant a new trial on the ground of newly discovered evidence.

By an assignment of error the defendant contends that it was reversible error for the court to refuse to grant a continuance requested before the trial. There are a number of reasons why this assignment is without merit, but there is one which is peculiarly applicable. That rule is as follows: "It is within the sound discretion of the trial court to determine under all the circumstances of a particular case whether a continuance is required in the interest of justice. The ruling of the trial court thereon is not reversible error unless an abuse of discretion is shown which is prejudicial to the defendant." Smith v. State, 127 Neb. 776, 257 N. W. 59. See, also, Maher v. State, 144 Neb. 463, 13 N. W. 2d 641; Dolen v. State, 148 Neb. 317, 27 N. W. 2d 264.

By one assignment of error the defendant challenges the sufficiency of instruction No. 2 and by another the giving of instruction No. 11. As to instruction No. 2 no basis for the challenge becomes apparent. The instruction in pertinent part stated, insofar as the remaining count of the information is concerned, that the State charged that George Smith in Keith County, Nebraska, feloniously broke and entered John Deere Implement Company. The statement was purely informative and true. It was not definitive and did not purport so to be. No valid objection to it becomes apparent.

As to instruction No. 11 there is no contention that it contained any erroneous statement. The attack upon it is: "The instruction is too weak—too favorable to the state and not sufficiently definite and positive as to the rights of the defendant in connection with the jury's consideration of accomplice testimony; and it is therefore prejudicially erroneous." The attack is with-

out merit under the following rule: "Where the trial court has instructed generally as to the issues in a criminal prosecution, error can not be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining." Martin v. State, 67 Neb. 36, 93 N. W. 161. See, also, Frades v. State, 131 Neb. 811, 270 N. W. 314. It is true that an instruction was requested and refused, but the refusal was not assigned as error. The situation therefore, insofar as this case is concerned, is the same as if no instruction had been requested.

In the light of all of the foregoing, the conclusion reached is that as to counts two, three, four, and five the verdict and judgment of the district court be and they are reversed. The further conclusion is that as to count one the verdict and judgment of the district court be and they are affirmed. The conclusion and the observations in the opinion effectually dispose of both proceedings in error.

AFFIRMED IN PART, AND IN PART REVERSED.

KENNETH J. PULLEN, THROUGH AND BY JAMES K. VOBORIL, HIS NEXT FRIEND, APPELLANT, V. ADRIAN NOVAK ET AL., APPELLEES.

99 N. W. 2d 16

Filed November 6, 1959. No. 34572.

1. **Infants: Torts.** Infants have a right to sue by a guardian or next friend to recover damages done to their person or property by the tortious acts of another.
2. **Constitutional Law: Courts.** Article I, section 13, of the Constitution of the State of Nebraska does not create any new rights but is merely a declaration of a general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but, where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none.

3. **Automobiles: Infants.** The driver of an automobile is not an insurer against injuries to children from the operation of a car. He is bound to exercise ordinary or reasonable care towards children as well as towards adults. The age, maturity, and intelligence of the child is a circumstance to be considered in determining whether or not the driver has exercised such care. Actually, in certain instances, the driver may be required to exercise greater care towards children than towards adults, but this greater care is, in one sense, but "ordinary" care, namely, that degree of care which a man of ordinary prudence would exercise under the circumstances.
4. ———: ———. If a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion, but, if he has no reason to anticipate the presence of children near his vehicle, negligence cannot be predicated on the mere fact that he started his vehicle, injuring the child.
5. ———: ———. Ordinarily a driver is not required to search for children on the far side of an automobile he is about to start, or for any that may be hidden underneath or in front of it, whom, by exercising reasonable care, he cannot see before starting.
6. **Parent and Child: Torts.** As a general rule an unemancipated minor child can not maintain an action against a parent, or one standing in loco parentis, for a personal tort committed by the latter against the former. However, there may be recovery if, by reason of such tort, the child is subjected to brutal, cruel, inhuman, or unreasonable treatment. Whether or not the latter is true is ordinarily a question of fact for a jury if the evidence adduced is sufficient to support a verdict to that effect.
7. **Master and Servant: Negligence.** For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of his servant committed while the servant is acting within the general scope of his employment and engaged in his master's business.
8. **Parent and Child: Negligence.** When there is no right of action in the son for personal injuries inflicted upon him by the negligent acts of the father, there can be no liability therefor on the part of the father and, since there is no liability of the father therefor, his employer can not be made to respond in damages to the son for the father's negligent acts.

9. ———: ———. An unemancipated child cannot sue his father to recover damages for injuries to his person resulting from ordinary negligence on the part of the father and consequently he cannot sue his father's employer to recover such damages as he has suffered therefrom for, to permit doing so, would countenance an encircling movement against the father when a direct suit against him is inhibited, the primary liability to answer for such an act resting upon the employee.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Bryant & Sullivan, for appellant.

Sidner, Lee, Gunderson & Svoboda, Crossman, Barton & Quinlan, and *Spear, Lamme & Simmons,* for appellees.

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

WENKE, J.

This is an appeal from the district court for Dodge County. It involves an action brought by Kenneth J. Pullen, a minor, by and through James K. Voboril, his next friend, against Adrian Novak, Erwin Boysen, and Robert L. Pullen for the purpose of recovering damages which he allegedly suffered as a result of being struck by an automobile owned by the defendant Robert L. Pullen but operated by the defendant Adrian Novak. The basis for plaintiff's claim is negligence on the part of the defendants Robert L. Pullen and Adrian Novak in relation to Novak's operation of Pullen's car, which negligence he alleged caused the accident which resulted in his injuries.

The defendant Robert L. Pullen is plaintiff's father, the defendant Erwin Boysen was the father's employer at the time of the accident, and the defendant Adrian Novak was at that time a friend of the Pullen family.

The accident, as a result of which the plaintiff was injured, happened around 7 p.m. on June 9, 1957, on the private driveway of the then Pullen home located at 1217 North Nye Street in Fremont, Nebraska. It oc-

curred while defendant Adrian Novak was backing the Pullen car, an Oldsmobile, which was parked on the Pullen driveway. The car, while being backed, in some manner struck plaintiff and seriously injured him.

Plaintiff's amended petition alleged that Robert L. Pullen, his father, was guilty of negligence in certain respects, setting out four specifications to that effect. Pullen demurred thereto, setting out as one of the grounds therefor that: "* * * the petition does not state facts sufficient to constitute a cause of action against the defendant, Robert L. Pullen. Said Kenneth J. Pullen being an unemancipated minor child as shown in the petition, has no right of action against the parent for the negligent tort of such parent."

On July 22, 1958, the trial court sustained Pullen's demurrer and gave plaintiff 10 days to amend his pleadings, stating that upon failure to do so plaintiff's action would be dismissed as to Pullen. Plaintiff failed to amend his pleadings and consequently, on August 20, 1958, the plaintiff's action was dismissed as to Robert L. Pullen. Thereafter, as to this order, no further action was taken by the plaintiff in the form of a motion for new trial or notice of appeal within the time provided by statute for doing so.

Defendant Erwin Boysen filed a motion for summary judgment on September 17, 1958. This motion the trial court sustained on October 16, 1958, and thereupon dismissed the action as to defendant Boysen.

The action went to trial as to defendant Adrian Novak on October 20, 1958. At the end of plaintiff's evidence the trial court sustained Novak's motion to dismiss.

Plaintiff thereafter, on October 24, 1958, filed a motion for new trial directed at both the trial court's order sustaining defendant Erwin Boysen's motion for summary judgment and dismissing his action against said defendant and also at the trial court's order sustaining defendant Adrian Novak's motion to dismiss, claiming the trial court erred in entering both of these orders.

The trial court overruled this motion for new trial and plaintiff, on December 3, 1958, perfected this appeal from that order.

This court, on February 13, 1959, on motion of appellee Robert L. Pullen, dismissed the appeal as to him. The reason for doing so is apparent from the history of this case hereinbefore set forth as it relates to appellee Pullen.

We shall hereinafter refer to Robert L. Pullen as Pullen and to his car as the Olds; we shall refer to appellee Adrian Novak as Novak and to his car as the Chevrolet; we shall refer to appellee Erwin Boysen as Boysen and to his customer's car as the Lincoln.

The principal contention made by appellant is that the evidence he adduced was sufficient to present a jury question as to Novak and that the trial court erred in sustaining Novak's motion to dismiss. As stated in Christ v. Nelson, 167 Neb. 799, 95 N. W. 2d 128: "In an appeal from an order directing a verdict and dismissing an action, the party against whom the verdict was directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." See, also, Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678; Comstock v. Evans, 159 Neb. 739, 68 N. W. 2d 351.

That appellant can maintain the action is beyond question. As stated in Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640: "It seems to be well established that infants have a right to sue by guardian or next friend, to recover damages done to their person or property by the tortious acts of another." However, in this respect, Article I, section 13, of the Constitution of the State of Nebraska does not create any new rights. See Muller v. Nebraska Methodist Hospital, 160 Neb. 279, 70 N. W. 2d 86. As therein stated: "Article I, section 13, of the Constitution of the State of Nebraska does not create any new rights but is merely a declaration of a

general fundamental principle. It is a primary duty of the courts to safeguard this declaration of right and remedy but, where no right of action is given or remedy exists under either the common law or some statute, this constitutional provision creates none."

"In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

" 'In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.' Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899." Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603.

"Where the evidence bearing upon the vital issue presented by the pleadings in a case is of such a nature that reasonable minds can not disagree as to its effect, it is proper for the court to require the jury to return a directed verdict." Nelson v. Nelson, 95 Neb. 523, 145 N. W. 1004.

The record discloses the following: On June 9, 1957, Pullen lived with his family at 1217 North Nye Street in Fremont, Nebraska. His family at that time included appellant, a son then 21 months of age who had just learned to walk fairly well. Pullen at that time worked for Boysen at the latter's service station located at Twenty-third and Nye Avenue in Fremont, Nebraska.

On June 9, 1957, a customer left his Lincoln at the Boysen service station to be serviced with an understanding with Pullen, who was then in charge of the station, that it would be taken to the customer's home

when the servicing had been accomplished. About 7 p.m., on the evening of June 9, 1957, Mrs. Robert L. Pullen, having the appellant with her, was at the service station in the Olds waiting to take Pullen home, that apparently being the end of his working day. Agreeable to Boysen, Pullen was to take the Lincoln and drive it to the customer's home with the understanding that Pullen's wife would follow in the Olds so Pullen would have a ride to his home as he did not intend to return to the service station that evening. Pullen proceeded down Nye Avenue in the Lincoln but, as he did so, the engine of the Lincoln started to overheat. Pullen thereupon drove the Lincoln off of Nye Avenue onto Linden Street and then onto the private driveway leading to his home in order to get some water to put in the Lincoln to cool the overheated engine. It appears that the Pullen home was just off the direct route from the service station along Nye Avenue to the customer's home.

Pullen's home had a private driveway off of Linden Street. The driveway ran along the south side of the house. When Pullen drove onto his driveway he observed a Chevrolet parked on the driveway just south of the house at the southwest corner thereof. Pullen drove the Lincoln to within about 15 feet of the back end of the Chevrolet and, at that point, parked it on the private driveway. Mrs. Pullen, who had followed Pullen onto the private driveway, parked the Olds on the driveway close to and just behind the Lincoln. The three cars were all parked in a line on the driveway. The Chevrolet parked on the driveway belonged to Novak. Mr. and Mrs. Adrian Novak were friends of the Pullens and they had come to visit. At the time Pullen drove onto his driveway the Novaks were sitting on some lawn chairs which the Pullens had placed on their lawn just to the south of where Pullen had parked the Lincoln.

When Mrs. Pullen got out of the Olds she took appellant with her and walked to where the Novaks were

seated. She handed appellant to Novak, who took him. Novak was well acquainted with appellant, liked to play with him, and proceeded to do so. After Mrs. Pullen had handed appellant to Novak she, together with Mrs. Novak, went into the house where they stayed until after the accident happened. They apparently entered the house at the southwest corner thereof from a porch located there in a triangular recess of the house. This porch had a railing on the south side thereof, three steps leading down to a sidewalk on the west side thereof, and walls of the house on the north and east sides thereof. The sidewalk ran north and south and crossed the driveway located just south of the house. The Chevrolet was parked so it straddled this walk, the front wheels being to the west and the rear wheels being to the east. The distance between the driveway, which had a single lane for cars, and the house was not very wide especially where the steps which were located on the south side of the house, led down to the basement.

Pullen parked the Lincoln so the front end was just south of a faucet located in the south wall of the house. This faucet had a hose attached which Pullen used to put water in the Lincoln. While he was putting water in the Lincoln Pullen asked Novak if, when Pullen returned the Lincoln to its owner's home, he would follow him (Pullen) in the Olds so Pullen would have transportation from the customer's home back to his home. Novak agreed to do this. Novak then took appellant over to the porch already referred to and put him down on the steps. Novak says the last he saw of appellant, until after he was injured, was when he was on the porch, having climbed there from the step where he had placed him. Pullen testified the last time he saw appellant before he was injured was when he was on the steps of the porch where Novak had taken him.

After putting appellant on these steps Novak proceeded to go to and get into the Olds while Pullen went to the Lincoln for the purpose of driving it. However,

before Pullen got in the Lincoln, Novak called and said he couldn't get the Olds started. Thereupon Pullen went back to the Olds and either told or demonstrated to Novak how to start it. Pullen then started back toward the Lincoln. Pullen, while walking back and forth between the Lincoln and Olds, was at all times to the south thereof. Novak got the Olds started and, after doing so, looked back through the rear window to see if it was all right to back and, seeing nothing, proceeded to do so. It was necessary to back the Olds to get it onto Linden Street and then Nye Avenue as the other cars were blocking the driveway ahead. Pullen heard the Olds start to back just as he was about to get in the Lincoln. He then heard a thud. He hurriedly went between the Lincoln and Olds to the north side of the Olds and there found appellant completely under it. Appellant was lying just under the right door and between the wheels, the Olds being a two-door car. Appellant was seriously injured. There is no evidence as to how appellant got from the porch to where he was injured, a distance of between 45 and 55 feet, as neither Pullen nor Novak ever saw him when Novak placed him on the steps of the porch. Because of appellant's height, which was about 30 inches, it would not have been possible for Novak to have seen him by looking through the rear window of the Olds as that was at least 4 feet above the ground.

We think the duty of a driver of a motor vehicle as it relates to children, whether it be on a public thoroughfare or private driveway, is well stated in 5 Am. Jur., Automobiles, § 185, pp. 607-8 as follows: "The driver of an automobile is not an insurer against injuries to children from the operation of the car. He is bound to exercise ordinary, reasonable, or due care towards children as well as towards adults. The age, maturity, and intelligence of the child is a circumstance to be considered in determining whether or not the driver has exercised such care. Actually, in certain instances,

the driver may be required to exercise greater care towards children than towards adults, but this greater care is, in one sense, but 'ordinary' care, namely, that degree of care which a man of ordinary prudence would exercise under the circumstances."

As stated in 2A Blashfield, Cyclopedia of Automobile Law and Practice, under the heading Children, Negligence of Motorists: "* * * he is not justified in assuming that a young child will manifest the judgment and prudence of an experienced man, and must govern his own conduct with some reasonable degree of respect of that fact; the standard of care to be exercised by motorists being that of an ordinarily prudent man under the same circumstances." § 1492, p. 383. "If a driver has reason to anticipate that a child might be near his automobile, it is his duty to see that the way is clear before starting the vehicle into motion, but, if he has no reason to anticipate the presence of children near his car, negligence cannot be predicated on the mere fact that he started his machine, injuring the child." § 1509, p. 440. "Ordinarily a driver is not required to search for children on the running board on the far side of the vehicle, or hidden underneath or in front of it, whom he cannot see before starting." § 1509, p. 443.

These same principles are stated in 60 C. J. S., Motor Vehicles, § 396(d), p. 972, as follows: "The operator of a motor vehicle is required to exercise ordinary or reasonable care under the circumstances, before and while starting or backing his vehicle, with respect to any children who may be in the vicinity; and, where he has reason to anticipate that a child may be near his vehicle, it is his duty to see that the way is clear before starting it in motion. He is not ordinarily required to search for children hidden underneath or in front of his vehicle, whom he cannot see before starting, and, if he has no reason to anticipate the presence of children near the vehicle, or if the child is with an adult who is in a position easily to take care of it, negligence cannot

be predicated on the mere fact that he started his car and injured the child." See, also, Comer v. Travelers Ins. Co., 213 La. 176, 34 So. 2d 511; Trowell v. Diamond Supply Co., 46 Del. 318, 83 A. 2d 691; White v. Edwards Chevrolet Co., 186 Va. 669, 43 S. E. 2d 870; O'Neil v. Cochrane, 184 Minn. 354, 238 N. W. 632; Williams v. Cohn, 201 Iowa 1121, 206 N. W. 823.

As we said in De Griselles v. Gans, 116 Neb. 835, 219 N. W. 235: "Until a driver of an automobile has notice of the presence or likelihood of children near his line of travel, he is bound only to the exercise of reasonable care, and has the right to assume that others will do likewise; and until he has such notice the rule is the same as respects children and adults."

The evidence shows Novak placed appellant, who was then 21 months of age and who had just learned to walk fairly well, on or near the porch, which has been hereinbefore referred to and which was a distance some 45 to 55 feet from the point where appellant was hit; that thereafter Novak saw appellant on this porch; that Novak then went back to where the Olds had been parked; that he got into the Olds and, with Pullen's assistance, got it started; that after he got the Olds started he proceeded to back away from where he had last seen appellant on the porch, looking back through the rear window of the Olds as he did so to see if he could safely back; and that after backing up about 8 feet the Olds hit appellant in some manner and inflicted serious injuries upon him.

It is true that Novak knew appellant was on the porch some 45 to 55 feet away but that can hardly be said to be near or in the immediate vicinity of the Olds. Novak had no reason to anticipate that appellant had left the porch and had come into a place of danger around or under the Olds as he started to back it along the private driveway away from where he had placed appellant. It clearly appears that neither he nor Pullen anticipated such a move on the part of appellant. Under

these circumstances we do not think the facts adduced by the evidence present a jury question on the issue of whether or nor Novak can be said to have been guilty of negligence which was a proximate cause of the appellant's being hit and injured. We think Novak did all an ordinarily prudent man would have done or could be expected to do under the circumstances.

While appellant, on account of his tender age, can not be charged with either negligence or contributory negligence, however, if his acts, whether negligent or not, were the proximate cause of his injuries, there can be no recovery from Novak in this action. De Griselles v. Gans, *supra.*

Since, as a matter of law, we have come to the conclusion that Novak was not guilty of any conduct toward appellant that could be the basis for any recovery herein, Boysen likewise could not be held liable for any conduct of Novak, even assuming Novak was a servant or subagent of Boysen under the circumstances herein established, a question we do not decide, for such liability is purely derivative as will be more fully discussed hereinafter.

Pullen was an employee of Boysen at the time of the accident and, under the evidence herein adduced, applying thereto the principles hereinbefore set forth, the question of whether or not he was acting within the scope of that employment when he stopped at his home while returning the Lincoln to its owner's residence would be for a jury. See Dafoe v. Grantski, 143 Neb. 344, 9 N. W. 2d 488. As stated therein: " 'Whether the act was or was not such as to be within the scope of his employment is, ordinarily, one of fact for the determination of the jury.' "

As we said in Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451: "The law imputes to the principal or master reponsibility for the negligent acts of his agent or servant done in obedience to the express orders or directions of the master or within

the scope of the employee's authority or employment in his master's business, and if those acts cause injury to third persons the law holds the principal or master liable in damages therefor."

Here appellant alleged Pullen was negligent in four different respects which, by Pullen's demurrer, he admitted to be true. Even so, can Pullen, the father, be held liable therefor?

The cases from other jurisdictions run strongly to the effect that an unemancipated minor, such as appellant was and is, cannot maintain an action against his parent, or any other person standing in that relation to the minor, to recover damages for negligence. See, annotation of the subject, "Liability of parent or person in loco parentis for personal tort against minor child," as found in 19 A. L. R. 2d, Annotation, 423. See, also, Annotations, 122 A. L. R. 1352; 71 A. L. R. 1071; 31 A. L. R. 1157. The reason for the rule is stated in Meece v. Holland Furnace Co., 269 Ill. App. 164, as follows: "It is a rule of common law based upon public policy that a minor child cannot sue his father in tort unless a right of action is authorized by statute."

However, Nebraska has adopted a modified version of this rule. See, Nelson v. Johansen, 18 Neb. 180, 24 N. W. 730, 53 Am. R. 806; Clasen v. Pruhs, *supra;* Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349. In 122 A. L. R., at page 1356, the first two of these cases are cited under the statement, and we think correctly, that where torts have been committed by parents or persons standing in the place of parents: "* * * the court recognizing that there might be recovery by a minor for such torts where the child is subjected to * * * brutal, cruel, or inhuman treatment * * *." As we said in Clasen v. Pruhs, *supra:* "It is a question of fact to be determined by the jury whether or not the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive."

While this latter issue would ordinarily be a ques-

tion of fact for a jury to determine, if the evidence adduced in relation thereto presented a question of fact in that regard, however, we do not think the evidence here adduced presents such an issue as a question of fact. We find that generally an unemancipated minor cannot maintain an action against his parents, or any other person standing in that relation to the minor, to recover damages for ordinary negligence. The foregoing has application here.

We come then to the question, if the father cannot be held liable for his negligence can his employer be so held? We think not, under the situation here presented, for the following reasons.

It should be remembered that Boysen's liability, if any, is not that of a joint tort feasor but derivative solely from the liability of Pullen, if any. As we said in Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N. W. 297, 56 A. L. R. 327, by quoting from Doremus v. Root, 23 Wash. 710, 63 P. 572, 54 L. R. A. 649: " 'For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master's business.' "

As was said in Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N. W. 20, 37 A. L. R. 161: "The liability of the employer for the negligent acts of his servant is based upon the familiar doctrine of respondeat superior. Unless the servant is liable, there can be no liability on the part of the master." The court went on to say: "Where there is no right of action in the wife for a wrongful or negligent personal injury inflicted upon her by her husband, there can be no liability

therefor on his part; and, since there is no liability on his part, we see no escape from the conclusion that his employer can not be made to respond in damages to her for his negligent act." See, also, Meece v. Holland Furnace Co., *supra;* Ownby v. Kleyhammer, 194 Tenn. 109, 250 S. W. 2d 37; American District Telegraph Co. v. Kittleson, 179 F. 2d 946.

In Emerson v. Western Seed & Irr. Co., *supra,* we held a married woman could not sue her husband to recover damages for injuries to her person and consequently she could not sue her husband's employer for damages caused by the husband's negligence, stating as the reason for so holding that: "It would seem that to permit a recovery against the employer results simply in countenancing an encircling movement where a frontal attack upon the husband is inhibited." The basis for that holding is the following quoted in that opinion from Doremus v. Root, *supra:* " 'The primary liability to answer for such an act, therefore, rests, upon the employee, and when the employer is compelled to answer in damages therefor he can recover over against the employee.' " See, also, Maine v. James Maine & Sons Co., *supra;* Myers v. Tranquility Irr. Dist., 26 Cal. App. 2d 385, 79 P. 2d 419; Ownby v. Kleyhammer, *supra;* Graham v. Miller, 182 Tenn. 434, 187 S. W. 2d 622, 162 A. L. R. 571. As stated in Ownby v. Kleyhammer, *supra:* " '* * * it follows automatically that the ultimate effect of the judgment in this case is to fasten upon this parent ultimate liability for this recovery in favor of his child, in contravention of the rule that grants immunity to a parent from such liability.' "

Having come to the conclusion that the evidence adduced would not support a verdict that Novak was guilty of negligence the dimissal of the action as to him is affirmed.

Having come to the conclusion that even if Pullen could be said to be guilty of the specific charges of negligence made against him, a question which we assumed in

favor of appellant but factually did not decide, such guilt would not support a verdict in favor of appellant against Boysen because, as we said, appellant could not maintain an action therefor against Pullen. Consequently the trial court's judgment dismissing appellant's action against Boysen was correct and is affirmed.

AFFIRMED.

ANN LOCKARD, APPELLANT, V. HUBERT LOCKARD, APPELLEE.
97 N. W. 2d 1

Filed November 6, 1959. No. 34609.

1. **New Trial.** A motion for new trial must be made within 10 days after the verdict, report, or decision is rendered except where a party is unavoidably prevented from so doing, or for the cause of newly discovered evidence.
2. **New Trial: Appeal and Error.** A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken.
3. **Appeal and Error.** In proceedings to obtain a reversal, vacation, or modification of a judgment, decree, or final order made by the district court, except in criminal actions, a notice of intention to prosecute an appeal shall be filed with the clerk of the district court within 1 month from the date of the rendition of such judgment, decree, or order, or an order overruling a motion for new trial.
4. ———. It is necessary that the notice of appeal shall be filed in accordance with the terms of the statute in order to confer jurisdiction upon the Supreme Court to entertain the appeal.
5. **Judgments.** A formal entry on the record is not essential to the rendition of a judgment. A judgment is rendered when the court announces its decision upon the law and facts in controversy.
6. ———. The proper function of a nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded.
7. ———. A nunc pro tunc order is one the design and purpose of which is to make the record speak the truth.
8. ———. The purpose of a nunc pro tunc order is not to correct, change, or modify affirmative action previously taken by the court.

9. ———. Courts may consider and rely upon any satisfactory evidence to ascertain whether or not an order is properly a nunc pro tunc order.

10. **Appeal and Error.** In the absence of a bill of exceptions, this court will presume that the trial court had before it competent evidence on which to base its findings sustaining the order of which complaint is made.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Appeal dismissed.*

Victoria & Sloma, for appellant.

Richling & Shrout, for appellee.

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

YEAGER, J.

This was originally an action for separate maintenance instituted by Ann Lockard, plaintiff and appellant, against Hubert Lockard, defendant and appellee. In her petition, which was filed March 11, 1957, the plaintiff alleged generally as grounds for the action that the defendant was guilty of cruelty. In the petition the plaintiff asked that she be awarded the custody of a minor child of the parties.

To the petition the defendant, on April 15, 1957, filed an answer which contained a general denial of the allegations of cruelty contained in the petition. He also filed a cross-petition in which he charged that plaintiff had been guilty of cruelty. His prayer was for absolute divorce and for custody of the minor child.

A trial was had on the issues made by these pleadings on July 1 and 2, 1958, as is shown by a photostatic copy of entries made on the trial docket, which appears in the transcript. Nothing of importance appears beyond an entry of July 1, showing that evidence of the plaintiff was taken and another showing that further evidence of plaintiff was taken on July 2. There is no statement the effect of which was to indicate that the

trial had been concluded or that a decision had been made or announced.

Appended as a separate part of the transcript was a document separately certified by the clerk of the district court as a true photostatic copy of the judge's notes "entered as an Exhibit in said cause." There is nothing in the record as to how it became an exhibit. It does not appear in the bill of exceptions and it is not by reference made a part of any pleading or order or the decree of the court. The significance of this will appear later herein.

On the trial the plaintiff and two witnesses gave testimony with regard to conduct of the defendant. This testimony on its face was sufficient as proof to sustain a decree of divorce in her favor on the ground of cruelty. Neither party questions this on this appeal.

On the second day of the trial, as disclosed by the bill of exceptions, a recess was taken. Following the recess the attorney for the plaintiff made an announcement which is in part a follows: "With permission of the Court and approval of the Court and by the agreement of the parties and counsel representing the parties, we have been able to come (to) an agreement concerning this matter and settlement whereby:

"1. With the Court's approval an absolute divorce will be granted to the plaintiff."

The remaining portion of the announcement contains the details of the agreement as to division of property, alimony, custody of the minor child, costs, expenses, and attorneys' fees. These details are not important at this point in the opinion.

Following the pronouncement there were interchanges relative to incidents involved in the proposed settlement among the attorneys and the court which do not require review here. Throughout this there was no announced approval by the court.

Following this the defendant gave testimony relating only to his economic status and his physical condition.

The plaintiff was then recalled to the stand and with reference to the proposed agreement the bill of exceptions contains in pertinent part the following: "Q. And all of these agreements are made with your knowledge and consent, is that correct? A. I will agree to that statement. * * * Q. You understand each and every one of those agreements and arrangements and concessions we have made and the concessions they have made? A. I do. Q. They have all been submitted to you and approved by you and are okay? A. Yes." These were questions propounded to the plaintiff and her answers thereto.

Then on the matter of amendment to the petition to ask for divorce rather than separate maintenance the following questions by the court appear as do answers by the plaintiff as well as an answer to a question to the court contained in an answer made by her: "BY THE COURT: I think the legitimate ends of matrimony are destroyed here. Would you rather have a divorce? A. Yes. BY THE COURT: Then you withdraw your petition. You have asked for separate maintenance but we have come to the point where I am satisfied a divorce must be granted here. I am giving you the privilege to ask now for an absolute divorce by interlineation. A. That isn't the way it was drawn up and that isn't the way I want it, but we still have six months, haven't we? BY THE COURT: Yes." This was the end of the hearing on July 2, 1958. There was no announcement by the court of approval of the agreement and no announcement of any other kind or type of adjudication.

Thereafter, on July 23, 1958, the plaintiff filed an application, to the extent that it is important here, to have the agreement of July 2, 1958, set aside and held for naught, and for permission to adduce further testimony as to the issues in the case. Whether or not there was ever a hearing prior to September 2, 1958, on this application does not appear. From the bill of ex-

ceptions it appears that there was a hearing thereon on September 2, 1958. There however does not appear to have been a ruling upon it. It is added here that, as was true at the hearing in July, no approval of the agreement and no adjudication on the merits of the case was pronounced.

On October 1, 1958, a decree was filed by which the plaintiff was granted a decree of absolute divorce. This decree disposed of the rights and property of the parties in accordance with the terms of the purported agreement of July 2, 1958. It also made provision for the custody, support, and maintenance of the minor child of the parties. The decree contains the following: "The Court further finds that after the plaintiff had rested (on July 2, 1958), the parties presented to the Court a compromise agreement which was represented to the Court has (sic) having been agreed upon by the parties through counsel. In this connection the Court approved said agreement which will be hereinafter more specifically detailed."

It is to be observed that while the decree states that the agreement was approved by the court, without stating any date of approval, it does not contain any declaration that an adjudication had previously been made or announced.

The decree concludes as follows: "Signed Nunc Pro Tunc as of July 2nd, 1958. Dated October 1st, 1958."

A motion for new trial was filed by plaintiff on October 7, 1958. This motion was overruled on February 2, 1959. The plaintiff appealed from the order overruling the motion.

The grounds of the appeal as disclosed by the assignments of error are, in substance: That the decision is contrary to the evidence and to law; that the court erred in refusing to receive further evidence; that the award of alimony and the division of property were inequitable; and that there was irregularity in the proceedings of the court.

By reason of what becomes apparent from the briefs of the parties and the transcript, although the point suggested is not made explicit in either brief, the question for first consideration is that of whether or not this court has any jurisdictional right to entertain the appeal on the merits of the cause of action which was before the district court.

The question is that of whether or not the decree must be treated as having been entered on October 1, 1958, the date it bears, or actually nunc pro tunc as of July 2, 1958. The importance of this is that if it was entered nunc pro tunc as the concluding words indicate no proper jurisdictional steps were taken to bring the case here for review.

A motion for new trial must be made within 10 days after the verdict, report, or decision is rendered except where a party is unavoidably prevented from so doing, or for the cause of newly discovered evidence. See, § 25-1143, R. R. S. 1943; Rumbel v. Ress, 166 Neb. 839, 91 N. W. 2d 36. The question of whether plaintiff was unavoidably prevented from filing a motion for new trial is not here, hence the 10-day provision applies.

A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken. See Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558.

It is required by statute that in proceedings to obtain a reversal, vacation, or modification of a judgment, decree, or final order made by the district court, except in criminal actions, a notice of intention to prosecute an appeal shall be filed with the clerk of the district court within 1 month from the date of the rendition of such judgment, decree, or order, or an order overruling a motion for new trial. See, § 25-1912, R. R. S. 1943; Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894.

It is necessary that the notice of appeal shall be filed in accordance with the terms of section 25-1912, R. R.

S. 1943, in order to confer jurisdiction upon this court to entertain the appeal. Akins v. Chamberlain, 164 Neb. 428, 82 N. W. 2d 632.

If within the true meaning of the term the decree in this case was entered nunc pro tunc as of July 2, 1958, in the light of what has been pointed out, there is nothing here which this court has jurisdiction to review. There is no motion for new trial which is referable to a final decision on that date, and the notice of appeal was not filed until February 18, 1959.

It should be said here that a formal entry on the records is not essential to the rendition of a judgment. Under the law of this state a judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings. See Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167.

With regard to the true office of a nunc pro tunc order this court said in O'Grady v. Volcheck, 148 Neb. 431, 27 N. W. 2d 689:

"The proper function of a nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded.

"A nunc pro tunc order is one the design and purpose of which is to make the record speak the truth.

"The purpose of a nunc pro tunc order is not to correct, change, or modify affirmative action previously taken by the court." See, also, Fisher v. Minor, 159 Neb. 247, 66 N. W. 2d 557; Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475; Akins v. Chamberlain, *supra*.

Before it may be said therefore that the decree in question here was truly nunc pro tunc as of July 2, 1958, it must be ascertained that there was in fact a rendition of an adjudication on July 2, 1958; that it was the purpose of the court in the decree here to express that which it was the intention to express at that time; and that it does express that intention.

Courts may consider and rely upon any satisfactory evidence to ascertain whether or not an order is properly a nunc pro tunc order. See, Ackerman v. Ackerman, 61 Neb. 72, 84 N. W. 598; Amos v. Eichenberger, 107 Neb. 416, 186 N. W. 330; Fisher v. Minor, *supra;* Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.*

Another rule is the following: "In the absence of a bill of exceptions, this court will presume that the judge had before him competent evidence on which to base his findings sustaining the order complained of." Amos v. Eichenberger, *supra.*

In the case here there is no bill of exceptions relating to the question of whether or not there was a rendition on July 2, 1958, of the adjudication contained in the decree dated and filed on October 1, 1958. It must therefore be presumed that the decree was and is properly entered nunc pro tunc as of July 2, 1958. It follows that this court is without jurisdiction to entertain the appeal.

The appeal is accordingly dismissed.

APPEAL DISMISSED.

THEODORE C. TURPIN ET AL., APPELLEES, V. STANDARD RELIANCE INSURANCE COMPANY (MUTUAL), A CORPORATION, ET AL., APPELLANTS.
99 N. W. 2d 26

Filed November 6, 1959. No. 34634.

1. **Automobiles: Insurance.** The "omnibus clause" of motor vehicle liability policies is for the purpose of giving additional insureds other than person named in liability policy as insured, with certain limitations, the benefit of the policy, and it extends protection to one permitted to use motor vehicle, although named insured may not be liable for accident.
2. **Automobiles.** The legislative act relating to title and transfer of motor vehicles constitutes an authorized exercise of police power on the part of the Legislature and does not violate any of the provisions of our state and federal Constitutions.

3. ———. A purchaser who receives possession of a motor vehicle without obtaining the certificate of title thereto, as required by our statutes, acquires no title or ownership therein.
4. ———. The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owners thereof, to prevent theft of motor vehicles, and to prevent fraud.
5. ———. A certificate of title to a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle.
6. ———. The word "owner" means one who has the legal title or rightful title, whether the possessor or not.
7. **Statutes.** Statutes in pari materia should be construed together, and, if possible, effect be given to all of their provisions.
8. **Contracts.** Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part of the same.
9. **Automobiles: Insurance.** Where two motor vehicle liability policies contained identical omnibus clauses relating to prorating of loss occurring under the provisions of such policies and a driver, not the owner of the motor vehicle, was driving it with the owner's permission and became involved in an accident resulting in injury and property damage for which a judgment was obtained against him, the insurance carried by such driver would be excess over all other insurance, and the insurance carrier of the owner of the motor vehicle would be liable for the entire judgment sustained against the driver to the extent of the limit of such policy.

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

Stubbs & Metz, for appellants.

Healey, Davies, Wilson & Barlow, for appellees.

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

MESSMORE, J.

The plaintiffs, Theodore C. Turpin and Union Insurance Company, a corporation, brought this action for a declaratory judgment in the district court for Dawes County against the Standard Reliance Insurance Company (Mutual), a corporation; Midwest Furniture Company, a corporation; James W. Blanford, individually,

and as assignee of Midwest Furniture Company, a corporation; Saint Paul-Mercury & Indemnity Company, a corporation; and Wilbur Ross Jones, Jr., defendants. The trial court ordered that the defendants James W. Blanford, the Midwest Furniture Company, and the Saint Paul-Mercury & Indemnity Company be dismissed from the action. The purpose of the action was to obtain a declaratory judgment determining and declaring that the coverage and terms of the contract issued by the Standard Reliance Insurance Company (Mutual) to Wilbur Ross Jones, Jr., extends to all claims against Theodore C. Turpin for injuries or damages which arose out of an accident while Theodore C. Turpin was driving a 1949 Buick automobile described in the insurance policy of the Standard Reliance Insurance Company (Mutual), a corporation. The trial court found generally for the plaintiffs and against the defendants. A declaratory judgment was rendered declaring that the insurance policy issued by the Standard Reliance Insurance Company (Mutual), a corporation, extended coverage to Theodore C. Turpin with respect to the accident in question. The defendants each filed a separate motion for new trial. These motions were overruled, and defendants perfected appeal to this court.

For convenience we will refer to Theodore C. Turpin as Turpin; to the Union Insurance Company, a corporation, as Union; to the Standard Reliance Insurance Company (Mutual), a corporation, as Standard; to Wilbur Ross Jones, Jr., as Jones; to the Midwest Furniture Company, a corporation, as Midwest Furniture; to General Motors Acceptance Corporation as G.M.A.C.; and to James W. Blanford, as Blanford.

We summarize the pleadings necessary to a determination of this appeal as follows.

The plaintiffs' petition alleged that Turpin was at all times mentioned therein a resident of Chadron, and Jones was also a resident of Chadron; that on January 20, 1954, there was in effect an insurance contract be-

tween Jones and Standard by the terms of which Standard insured Jones against any loss or damage arising from the operation of a 1949 Buick automobile owned by Jones and used by him; and that on January 20, 1954, there was in effect an insurance contract between Turpin and Union by the terms of which Union insured Turpin against any loss or damage arising from the operation of a 1938 Chevrolet sedan owned by Turpin.

It was further alleged that on January 20, 1954, at approximately 5:30 p.m., the 1949 Buick automobile owned by Jones and covered by Standard was involved in an accident on U. S. Highway No. 20 approximately 2 miles east of Chadron, with a 1952 Studebaker pickup truck owned by Midwest Furniture and driven by Blanford; that said 1949 Buick automobile was being operated by Turpin with the permission of Jones; that as a result of said accident, Midwest Furniture's 1952 Studebaker pickup truck was damaged and Blanford was injured; that timely notice of said accident and the damages and injuries sustained by Blanford was given to Standard, but Standard denied any and all liability to Turpin, denied any obligation to indemnify and protect Turpin in the premises, and refused to do so; that thereafter suit was commenced by Blanford individually and as assignee of Midwest Furniture in the district court for Dawes County, alleging that the negligence of Turpin was the proximate cause of the accident, and seeking to recover damages for injuries sustained by him and, as assignee of the Midwest Furniture, for damages to the 1952 Studebaker pickup truck, and also seeking to recover, as assignee of Midwest Furniture, the medical, hospital, and disability payments allegedly paid to him, or on his behalf, by Saint Paul-Mercury & Indemnity Company, the workmen's compensation insurance carrier of Midwest Furniture; and that timely notice of said suit was given Standard, but Standard denied any and all liability to Turpin, denied any obligation to indemnify and protect him from the claims for injuries and

damages thus sustained by virtue of the accident, and refused to defend such suit. Plaintiffs contended that Standard had an obligation to defend Turpin in the suit against him by Blanford individually and as assignee of Midwest Furniture; that said obligation arose from the contract of insurance issued by Standard to Jones; and that said obligation also included the payment of any judgment or judgments that might be rendered against Turpin as the result of the law suits growing out of said accident. The petition contained a prayer for a declaratory judgment determining that the coverage and terms of the insurance policy issued by Standard to Jones extended to all claims against Turpin which arose out of the accident while Turpin was driving the 1949 Buick automobile described in Standard's insurance policy.

The answer of Jones and Standard denied any liability under Standard's insurance policy issued to Jones by the terms of which Standard insured Jones against any loss or damage arising from the operation of a 1949 Buick automobile used by Jones or with his permission. The answer alleged that within 10 days prior to January 20, 1954, Jones sold and delivered to Turpin the 1949 Buick automobile; that on January 20, 1954, the Buick automobile was being operated by Turpin as the owner thereof, and not with the permission of Jones within the meaning of Standard's insurance policy and the Union's insurance policy; that on January 20, 1954, the 1949 Buick automobile was newly acquired by Turpin less than 30 days previously; and that on said date the 1938 Chevrolet automobile owned by Turpin was broken down and could not be operated or repaired. The prayer was that defendants might go hence without day and recover their costs expended in this action.

The plaintiffs' reply denied every allegation contained in defendants' answer not admitted in the petition, and renewed plaintiffs' prayer for a declaratory judgment.

The record discloses that Union issued a motor ve-

hicle liability policy insuring Turpin against any loss or damage arising out of the operation of a 1938 Chevrolet owned by Turpin. The term of this policy was from September 28, 1953, to September 28, 1954. On Christmas day 1953, while Turpin was driving his Chevrolet automobile, it became disabled and was sold for junk.

Standard issued a motor vehicle liability policy insuring Jones against loss or damage arising out of the operation of a 1949 Buick automobile owned by Jones. The term of this policy was from January 5, 1954, to July 5, 1954.

Jones purchased the 1949 Buick automobile in August 1953, from Prey Chevrolet Company of Chadron. The sale was financed by G.M.A.C., and insofar as this action is concerned its office was in Denver, Colorado, where the certificate of title issued to Jones for the 1949 Buick automobile was held. Jones was leaving for the Marine Corps in January 1954. He was trying to make a sale of his 1949 Buick automobile and obtain something for his equity in the automobile, but was unable to find a buyer on such terms. Turpin displayed some interest in buying the 1949 Buick, but he had no money to make a down payment on it. Jones told Turpin he was going into the Marine Corps and could not keep up the payments on his automobile but he hated to turn it back to the Prey Chevrolet Company; that his father did not especially want to take it over; and that he could not take it with him. The upshot of it was that Jones suggested that Turpin could use the Buick if Turpin could make the payments.

Turpin went to the Prey Chevrolet Company with Jones where they talked to a salesman. Jones wanted to know if it would be all right with the Prey Chevrolet Company if Turpin would make the payments, and Prey Chevrolet Company seemed willing to let him do so. A contract was drawn in writing by a salesman named Ken C. Graves at the Prey Chevrolet Company.

After a diligent search made by Graves and counsel for the parties, the original contract, or a copy of it, could not be found in the Prey Chevrolet Company office. Turpin testified that he did not remember signing any such contract, and that he would have remembered signing such a contract if he had done so. Graves testified that the written contract provided that Jones agreed to sell the 1949 Buick automobile to Turpin, and in consideration thereof Turpin agreed to make the payments on the automobile which Jones was obligated to pay G.M.A.C. Jones testified to the written contract, and that it was signed by both Jones and Turpin.

On January 17, 1954, some friends of Jones drove him to Scottsbluff in the 1949 Buick automobile. From Scottsbluff Jones went to Denver where he was inducted into the Marine Corps. The friends returned to Chadron, parked the 1949 Buick automobile in front of a newspaper office where Turpin was employed, and left the keys in the automobile. Three days later, on January 20, 1954, Turpin was driving the 1949 Buick when it was involved in an accident with a 1952 Studebaker pickup truck owned by Midwest Furniture and driven by Blanford, on U. S. Highway No. 20 approximately 2 miles east of Chadron. As a result of the accident the Studebaker pickup truck was damaged and Blanford was injured.

On January 21, 1954, Standard received notice of the accident. Thereafter suit was commenced by Blanford individually and as assignee of Midwest Furniture against Turpin. Standard received notice of this action. The action was tried, and on March 27, 1958, a verdict was rendered on two separate causes of action in favor of Blanford for the total amount of $6,473.35. Thereafter a motion for judgment notwithstanding the verdict, or in the alternative for a new trial, was overruled. No appeal was taken from this order, and the judgment against Turpin remains unpaid.

On March 18, 1954, G.M.A.C. secured a certificate

of title to the 1949 Buick in its name by repossession. It was covered by collision insurance, but Jones testified he did not receive any part of the collision settlement because the amount due and the value of the 1949 Buick, which was a total loss, were equal, and the collision loss was therefore paid to G.M.A.C.

The defendants assign as error that the trial court erred in declaring that the insurance contract between Standard and Jones extended to cover Turpin with respect to an accident involving only Turpin which occurred on January 20, 1954, after delivery of the automobile to Turpin under a contract of sale; the trial court erred in failing to declare that the contract of insurance between Standard and Jones was voided by the sale of the automobile involved to Turpin prior to the accident for the reason that thereafter Jones was not the sole owner of said automobile as required by the contract; that the judgment is not sustained by the evidence and is contrary to the evidence; and that the trial court erred in failing to prorate the loss between the Standard and Union contracts of insurance as required by clause 18 of both contracts.

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

Section 60-104, R. R. S. 1943, provides in part: "No person, * * * shall sell or otherwise dispose of a motor vehicle, * * * without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as may be necessary to show title in the purchaser, * * *."

Section 60-105, R. S. Supp., 1953, provides in part: "No person, except as provided in section 60-110, acquiring a motor vehicle, * * * from the owner thereof, * * * shall acquire any right, title, claim, or interest in or to such motor vehicle, * * * until he shall have had issued to him a certificate of title to such motor vehicle * * *. No court in any case at law or in equity shall recognize the right, title, claim, or interest of

any person in or to any motor vehicle, * * * unless evidenced by a certificate of title * * *."

Section 60-106, R. S. Supp., 1953, provides in part: "(1) Application for a certificate of title shall be made upon a form prescribed by section 60-114, * * *. (2) Such application shall be filed with the county clerk of the county in which the applicant resides, if the applicant is a resident of this state or, if a nonresident, in the county in which the transaction is consummated, and shall be accompanied by the fee prescribed in this act. (3) If a certificate of title has previously been issued for such motor vehicle in this state, the application for a new certificate of title shall be accompanied by such certificate of title duly assigned, unless otherwise provided for in this act. * * * The county clerk shall retain the evidence of title presented by the applicant and on which the certificate of title is issued. (4) The county clerk shall use reasonable diligence in ascertaining whether or not the statements in the application for a certificate of title are true by checking the application and documents accompanying the same with the records of motor vehicles in his office. If he is satisfied that the applicant is the owner of such motor vehicle and that the application is in the proper form, the county clerk shall issue a certificate of title over his signature and sealed with his seal, but not otherwise."

It is apparent that section 60-105, R. S. Supp., 1953, applies to individuals such as Turpin.

Standard's contract of insurance entered into with Jones, provides under "Declarations," item 1, that Jones is the insured. The contract further states that Standard agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay for bodily injuries and property damage. The Union insurance contract contains the same provisions.

In section III of Standard's contract the definition of "insured" is as follows: "With respect to the insurance for bodily injury liability and for property dam-

age liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person * * * legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

With reference to the Union insurance contract with Turpin, under section IV, "Automobile Defined," under subparagraph (3) "Temporary Substitute Automobile" is defined as follows: "under coverages A, B and C, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, * * *." Union's contract defines "Newly Acquired Automobile" as "an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; * * *."

Section V of Union's contract provides: "Use of Other Automobiles: If the named insured is an individual who owns the automobile classified as 'pleasure and business' * * * such insurance as is afforded by this policy for bodily injury liability, for property damage liability * * * with respect to said automobile applies with respect to any other automobile * * *."

Standard's insurance contract provides: "18. Other Insurance—Coverages A, B, D, E, F, G, H, I and J: If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary sub-

stitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobile or otherwise."

The provisions of the Standard and Union insurance contracts relating to "temporary substitute automobiles," "newly acquired automobiles," the definition of "insured," and "other insurance coverages," above set out, are identical.

The defendants Standard and Jones contend that Turpin's use of the Buick automobile was not with the "permission" of Jones as used in Standard's insurance contract.

The "omnibus clause" appearing in the insurance contracts of Standard and Union is previously set forth.

In Nyman v. Monteleone-Iberville Garage, Inc., 211 La. 375, 30 So. 2d 123, it was held: "The 'omnibus clause' of automobile liability policy is for purpose of giving additional assureds other than person named in liability policy as assured, with certain limitations, the benefit of the policy, and it extends protection to one permitted to use automobile, although named assured may not be liable for accident under the doctrine respondeat superior."

The above-named defendants cite many cases relating to the above contention.

In the case of Farm Bureau Mut. Ins. Co. v. Emmons, 122 Ind. App. 440, 104 N. E. 2d 413, the action was brought by Robert Emmons and others to recover benefits under an automobile insurance policy issued by the Farm Bureau Mutual Insurance Company of Indiana to Louis Johnson. The facts, in substance, were as follows: On or prior to February 9, 1949, Johnson owned a 1947 Mercury automobile upon which he carried the insurance policy in question, which contained the following provision: "Coverage C-Medical Payments. To

pay to or for each person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the automobile described in declarations, if the injury arises out of the use thereof by or *with the permission of the named insured.*" (Emphasis supplied.) On February 9, 1949, Johnson sold said automobile to Emmons on a conditional sales contract, by which Emmons agreed to make specified monthly payments and to pay for full coverage insurance. Johnson delivered possession and control of the car to Emmons on said date pursuant to the contract. Emmons had made monthly payments to Johnson, but on two occasions had failed to pay the full amount due. However, Emmons remained in control of the automobile up to May 8, 1949. The persons riding with Emmons at the time of the collision were his guests. After the collision occurred, Emmons notified Johnson. The automobile was repaired by the Farm Bureau Mutual Insurance Company, at its expense, and in October 1949, it was delivered to Johnson by the repairman. The questions were whether, when Johnson sold the automobile to Emmons under a conditional sales contract and Emmons took possession thereof under said contract, Johnson's possession and right to control the use of said automobile ceased and passed to Emmons; and whether thereafter Emmons' possession and use of the said automobile was by virtue of his ownership rather than by virtue of any consent or permission of Johnson.

Cited with approval upon this issue in the foregoing case was the case of Virginia Auto Mutual Ins. Co. v. Brillhart, 187 Va. 336, 46 S. E. 2d 377. This was an action against an insurance company on an automobile liability policy where the insured sold the automobile covered by the policy and gave the policy to the purchaser, but without any endorsement being made thereon changing the name of the insured. The plaintiff was injured in a collision after the sale of the automobile, and contended that, under the omnibus coverage provision

of the policy, protection was afforded to anyone who was using or driving the automobile with the permission of the named insured; that when the named insured sold the automobile and the purchaser took possession of it, this constituted a permission by the insured to the purchaser to use the automobile, within the meaning of the provision of the policy; and that hence its coverage was extended to the purchaser. It was held that there was no merit in this contention.

It was also held: " 'Permission' or 'consent' to use or drive a car within the meaning of an 'omnibus coverage' provision of an automobile liability policy must come from someone who was in a position to give or grant it, and his relation to or control over the car must be such that he has a right to give or withhold the permission or consent to use it."

We have read and analyzed all the cases cited on this proposition of law by said defendants, and it would serve no useful purpose to set forth the factual situations contained therein or the law applicable thereto. Suffice it is to say that all of such cases adopt the rule which appears in the annotation to 36 A. L. R. 2d 675, wherein it is said: "There are relatively few cases in which an action was brought under the omnibus clause against the insurer on the ground that the plaintiff was injured by an automobile driven by a conditional vendee of the insured. However, despite the dearth of authority the rule appears to be well settled that a conditional vendee does not use the insured automobile with the consent or permission of the conditional vendor and therefore is not within the coverage of the omnibus clause of an automobile liability insurance policy."

We conclude that the authorities above set forth are not applicable to the facts in the instant case or the law applicable to such facts. We deem the following to be applicable.

In the case of Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913, this court held that the

legislative act relating to title and transfer of motor vehicles constitutes an authorized exercise of police power on the part of the Legislature and does not violate any of the provisions of our state and federal Constitutions; that a purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein; and that a subsequent purchaser for value of the automobile, who obtains the certificate of title by complying with the statutory requirements relating thereto, obtains the title and ownership thereof, and his title and ownership are superior to any rights which the first purchaser may have. The opinion in this case quoted from Crawford Finance Co. v. Derby, 63 Ohio App. 50, 25 N. E. 2d 306. Ohio has an act like ours relating to transfers and titles to automobiles. As stated in Crawford Finance Co. v. Derby, *supra*: "On the other hand, from the whole scheme of the Certificate of Title Act, especially the sections quoted above (such as the sections previously quoted in this opinion), it is apparent that the Legislature intended to set up one and only one method by which liens on or titles to a motor vehicle could be acquired. To a purchaser, it makes a certificate of title issued by a clerk of courts (in this state county clerks) on a proper application, accompanied by the preceding certificate, either manufacturer's or owner's, the sine qua non to any right or title therein."

In the case of State Farm Mutual Auto. Ins. Co. v. Drawbaugh, 159 Neb. 149, 65 N. W. 2d 542, this court held: "The purpose of the act relating to transfers and titles to motor vehicles is to provide a means of identifying motor vehicles, to ascertain the owners thereof, to prevent theft of motor vehicles, and to prevent fraud. * * * A certificate of title of a motor vehicle is generally conclusive evidence in this state of the ownership of the vehicle. * * * The word 'owner' means one who has the legal title or rightful title, whether the possessor or

not. * * * Statutes in pari materia should be construed together, and, if possible, effect be given to all of their provisions." This was a replevin action brought by the State Farm Mutual Auto. Ins. Co. against Loran Drawbaugh to obtain possession of a 1950 Chevrolet automobile. The Chevrolet automobile was purchased by Clarence Anderson from the Central Chevrolet Company at Grand Island. He received a manufacturer's certificate. A certificate of title was issued to him by the county clerk upon a proper application which conformed to section 60-114, R. R. S. 1943. Anderson had the automobile from June 27, 1950, to January 12, 1951. He parked it in front of his apartment in Lincoln on the evening of January 12, 1951, and the next morning it was missing. Anderson made claim against the State Farm Mutual Auto. Ins. Co., for the loss sustained either on January 13 or 14, 1951. State Farm Mutual Auto. Ins. Co. paid the loss and took a release and an assignment of the certificate of title as appeared on the reverse side thereof. The automobile was found in the possession of Drawbaugh at his farm home. Drawbaugh claimed to own the automobile and had obtained a certificate of title on May 16, 1951, from the county clerk of Butler County. The certificate of title was from one Deppe. The car was taken under a writ of replevin on February 27, 1952. After it was replevied it was sold to a dealer in Fremont. When the action was brought, State Farm Mutual Auto. Ins. Co. had only the assigned certificate of title from Anderson. This court, relying upon the case of Loyal's Auto Exchange, Inc. v. Munch, *supra,* held as above set forth.

We have read and analyzed the Ohio cases relative to transfers and titles to motor vehicles for the reason that the Nebraska and Ohio laws relating to such subject matter are identical, that is, insofar as the sections of the statutes of Nebraska heretofore set forth are concerned.

In the case of Mielke v. Leeberson, 150 Ohio St. 528,

83 N. E. 2d 209, 7 A. L. R. 2d 1342, the court held: "Under the plain and unambiguous language of Section 6290-4, General Code, a court cannot recognize the right, title, claim or interest of any person in or to any motor vehicle, without the production of a certificate of title or manufacturer's or importer's certificate duly issued in accordance with the Certificate of Title Law, and any other evidence of ownership is not of sufficient weight to sustain a verdict or judgment where title must be proved as a condition precedent for the validity of such verdict or judgment."

In Brewer v. DeCant, 167 Ohio St. 411, 149 N. E. 2d 166, it is said: "Under the Ohio Certificate of Title Act, a change in ownership of an automobile is not consummated until a certificate of title is issued in the name of the purchaser. * * * Where a purchaser contracts to buy an automobile and takes possession thereof from an automobile dealer and uses the automobile, such use is a use with the permission of the dealer until such time as a certificate of title thereto is issued to the purchaser."

In Garlick v. McFarland, 159 Ohio St. 539, 113 N. E. 2d 92, it was held that title to a Plymouth automobile in controversy did not pass to McFarland because the certificate of title had not been assigned, whereas this court, in State Farm Mutual Auto. Ins. Co. v. Drawbaugh, *supra,* held that not only must the seller's certificate of title be assigned, but the purchaser must have a new title issued in his own name before title and legal ownership is in the purchaser. Thus it would appear that there was a conflict in the Ohio and Nebraska decisions on this point, which was noted in the dissent in the case of State Farm Mutual Auto. Ins. Co. v. Drawbaugh, *supra.* However, from the later decisions cited from the Ohio courts heretofore set forth, it is obvious that the law of Ohio relating to transfers and titles to motor vehicles now follows Loyal's Auto Exchange, Inc. v. Munch, *supra,* and State Farm Mutual Auto. Ins. Co. v. Drawbaugh, *supra.*

While there is a contention on the part of the defendants Standard and Jones that the problem in the instant case turns on the construction of an insurance contract, that is, the Standard's contract of insurance, and not who was the legal title owner of the Buick automobile, and that section 60-105, R. S. Supp., 1953, does not purport to affect or to apply to any policy of insurance, in the case of Reinsch v. Pacific Mutual Life Ins. Co., 140 Neb. 225, 299 N. W. 632, it is said, quoting from McWilliams v. Griffin, 132 Neb. 753, 273 N. W. 209, 110 A. L. R. 1039: " 'It is settled that the laws which subsist at the time of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated therein.' " See, also, Garlick v. McFarland, *supra*.

In the instant case there was not even an assignment of the Jones certificate of title to Turpin. In other words, although the defendants Standard and Jones contended a sale took place, no assignment of the certificate of title was accomplished, intended, or possible. The certificate of title was held by G.M.A.C. in its Denver office until the Buick automobile was repossessed by G.M.A.C. Jones was in fact the owner of the Buick automobile at the time the accident occurred. There was no conditional sale of the Buick automobile from Jones to Turpin. There is evidence that a contract was drawn wherein Turpin was to finish the payments on the Buick, and to the effect that he was the purchaser thereof. This contract was testified to from memory by a salesman of the Prey Chevrolet Company who testified that he drew the contract. It could not be found in the files of the Prey Chevrolet Company after diligent search made by counsel and the witness who testified to it.

Even assuming that there was such a contract, under the law of the State of Nebraska Turpin was not the owner of the Buick automobile and could not be until such time as he produced a certificate of title thereto as

set forth in the cases heretofore cited.

Referring to the facts, but not repeating them, we conclude that Turpin was driving the Buick automobile with the permission of Jones, the owner thereof, at the time of the accident, and that the Standard insurance contract extended to Turpin as provided for in such contract.

The defendants Standard and Jones contend that in any event the Union insurance policy must be prorated with the Standard insurance policy. We have carefully read and analyzed the cases cited by the defendants on this proposition of law. We conclude, however, that none of such cases contain "other insurance" clauses like the "other insurance" clauses in the Standard insurance policy and the Union insurance policy involved in the instant case. In the instant case the "other insurance" clauses appearing in the policies here involved, as previously stated, are identical. We make reference to clause 18 under "Conditions," "Other Insurance - Coverages" in both policies.

The case of American Automobile Ins. Co. v. Republic Indemnity Co., — Cal. App. 2d —, 341 P. 2d 675, deals with "other insurance" clauses such as are involved in the instant case. In this cited case reference is made to the case of Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 195 F. 2d 958. This case is discussed by defendants Standard and Jones in their brief, as well as other cases of like import. The court in American Automobile Ins. Co. v. Republic Indemnity Co., *supra,* pointed out that in the Oregon Auto. Ins. Co. case, *supra,* the "other insurance" clause in the owner's policy differed in that it wholly excluded coverage of a driver other than the named insured when the driver had other insurance. The discussion pertinent to this situation appears on page 678 of 341 P. 2d, as follows: "The 'other insurance' clause in American's policy is identical with that contained in the 'National Standard Automobile Policy,' used by the great majority of casu-

alty insurers in the United States. See Faude, The 1955 Revision of the Standard Automobile Policy, Coverage: Insuring Agreements and Exclusions, 1955 Proceedings of the Section of Insurance Law of the American Bar Association, p. 48. Although Republic did not use the standard form, its 'other insurance' clause is substantially the same as that appearing in the standard policy. That policy as well as the policies involved here extends coverage to the named insured when he drives a car other than his own and also to any other person when driving the car of the named insured. For that reason there will be dual insurance when an accident is caused by a person not driving his own car and both the driver and the owner are insured under a standard policy. Clearly the excess provision of the 'other insurance' clause is intended to show how the loss should be borne in this frequently recurring situation. It is impossible, and could not have been intended, that the excess provision would govern with respect to the insurance of the driver and that at the same time the prorate provision would control with respect to the insurance of the owner because proration of the loss and treating the driver's insurance as excess over the insurance of the owner obviously lead to inconsistent results. The only construction of the 'other insurance' clause under which both its parts will be meaningful is that the *excess* provision alone controls in every situation which falls within its terms, such as when a person is driving the car of another and both the driver and the owner have insurance, and that the *prorate* provision alone governs in all other situations, for example, when more than one policy has been issued to the same person. When the driver's insurance is excess, it necessarily follows that the insurance of the owner is primary, and therefore the owner's insurer must bear the entire loss to the extent of the limits of the policy." See, also, Firemen's Ins. Co. v. Continental Cas. Co., — Cal. App. 2d —, 339 P. 2d 602.

We have reviewed and analyzed the provisions of the Union insurance policy and the Standard insurance policy, especially clause 18, with reference to other insurance coverages. We conclude that the contention of Standard and Jones that the Union contract must be prorated with the Standard contract is without merit. Under the authorities heretofore cited it is apparent that Standard is required, under the facts in the instant case, to pay the loss as heretofore set forth.

We deem other contentions raised by the defendants Standard and Jones to be without merit.

For the reasons given herein, we conclude that the declaratory judgment rendered by the trial court should be affirmed.

AFFIRMED.

WILLARD STODDARD, APPELLEE, V. ISABEL MONTGOMERY ET AL., APPELLEES, JOHN A. BOTTORF, APPELLANT.

98 N. W. 2d 875

Filed November 6, 1959. No. 34677.

1. **Partition: Attorney and Client.** The meaning of the provision of section 25-21,108, R. R. S. 1943, that the district court shall by order divide the attorneys' fees awarded in a partition case among the attorneys of record in the case is that the total attorneys' fees fixed and awarded shall be by order of the court divided by it in the exercise of judicial discretion fairly and equitably among the attorneys who have participated in the case in the manner described in the statute.
2. ———: ———. If the district court does not make a fair and equitable division of attorneys' fees as the statute referred to above requires and if the failure constitutes an abuse of discretion, this court will, on an appeal therefrom, correct it.

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

John A. Bottorf, pro se.

Wright, Simmons & Harris, for appellee Stoddard.

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

BOSLAUGH, J.

The object of this action was the partition of the real estate described in the record. The original petition did not accurately allege the shares of the owners of the real estate or the existence of an encumbrance on a part of the land as found and confirmed by the judgment of the trial court. Shirley Gemar, a defendant in the case, the owner of one-sixtieth of the real estate, by answer filed in the action correctly alleged the shares of the owners of the land as they existed and as they were found and confirmed by the judgment of the district court; alleged the names of the persons who were respectively the owners of an interest in the real estate, the subject of the action, who had not been made parties to the case; alleged that Philip I. Johnson, named as a defendant and represented by the petition to be the owner of one-sixteenth of the real estate, had in fact no interest therein; and alleged that the plaintiff was indebted to the owners of the land for rental for the year 1958. The prayer of the answer was that necessary parties be brought into the case; that a judgment of partition be rendered in accordance with the statements of the answer; that an accounting for rents from the land for the year 1958 be had; and that a fee for the attorneys in the case be awarded and apportioned as provided by section 25-21,108, R. R. S. 1943.

Thereafter plaintiff by an amended petition corrected the inaccuracies of the original petition in harmony with the allegations of the answer of the defendant referred to above, and the additional persons who were necessary parties were brought into the case. Plaintiff also, by supplemental petition, offered an account-

ing for rentals from the land for the year 1958 in the sum of $1,351.22. A judgment of partition was rendered in accordance with the answer and the amended petition, a sale of the land was had and confirmed, and the proceeds were ordered distributed.

The district court, upon consideration of the record made in that court, found that the shares confirmed by the court of which the plaintiff had actual or constructive notice were not accurately pleaded in the original petition; that Shirley Gemar, a defendant, filed an answer correctly setting forth the interests; that an amended petition was filed by plaintiff based upon information obtained from the attorney for Shirley Gemar and from other sources; that fees for the attorneys in the action should be determined and divided as provided by the statute; and that the fees for the attorneys were determined to be the sum of $1,000 which should be divided between the attorneys as follows: $875 to Robert G. Simmons, Jr., the attorney for the plaintiff in the case, and $125 to John A. Bottorf, attorney for the defendant Shirley Gemar. The allowance to the attorneys was made a part of the costs in the case.

John A. Bottorf filed a motion for new trial in which he asserted error of the court in failing to divide the attorneys' fees equally between him and Robert G. Simmons, Jr., and that the order of the distribution was contrary to law. The motion was denied and John A. Bottorf has prosecuted this appeal. The amount of the attorneys' fees as awarded by the trial court has not met with objection. The dispute concerns the division of the fees of the attorneys who conducted the proceedings in the case. John A. Bottorf says there should have been an equal division of the fees, one-half to him and one-half to Robert G. Simmons, Jr. The latter contends the district court was required to make an apportionment of the fees between the attorneys in proportion to the value of the professional services rendered

by them respectively, that this is what the court did by the exercise of its discretion, and that the record does not show an abuse of discretion in that regard.

The record indicates that the trial court did not take evidence either as to the amount of the attorneys' fees or the division of them between the attorneys and that it considered and decided these matters upon the record of the case before it. This was permissible practice. In Mabry v. Mudd, 132 Neb. 610, 272 N. W. 574, this court said: "The trial judge was undoubtedly familiar with the professional work required and could not have been materially assisted in arriving at a proper fee by the taking of evidence. In such a case, the trial court has before it the facts necessary upon which to determine the reasonableness of the fee to be fixed." See, also, Johnson v. Emerick, 74 Neb. 303, 104 N. W. 169. What is said in Mabry v. Mudd, *supra*, is applicable to division of the fees after the amount of them had been determined. The transcript sufficiently presents the matters pertinent to the dispute to be resolved. There is no controversy of fact. The appeal has been submitted on the basis that the record is sufficient for the consideration and decision of the very narrow issue which it presents.

The relevant parts of section 25-21,108, R. R. S. 1943, are as follows: "If, in the proceedings in partition, judgment shall be entered directing partition, * * * the court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of fees to be awarded to the attorneys of record in the proceedings * * *. If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, such fees for the attorney shall be awarded entirely to the attorney for the plaintiff; otherwise, the court shall order such fees for the attorney to be divided among such of the attorneys

of record in the proceedings as shall have filed pleadings upon which any of the findings in the judgment of partition are based." The district court was, under the circumstances of this case and by virtue of the plain terms of the statute, required, after the confirmation of the sale, to determine a reasonable amount of fees to be awarded to the attorneys of record in the case and to divide it between the attorney for the plaintiff and the attorney for the contesting defendant, each of whom filed pleadings in the case upon which the findings and the judgment of partition were based.

It is argued by John A. Bottorf that the statute leaves to the discretion of the district court the determination of the amount of the fees to be awarded to the attorneys in the case but after that determination is made the statute withholds the exercise of discretion from the trial court and places the mandatory duty upon it to divide equally the amount of the total allowance of compensation among the lawyers who were authors of pleadings upon which the findings were made and the judgment was rendered. He says to "divide" in its plain, ordinary, and popular sense means to separate into two equal parts, and if the Legislature had intended any other method of apportionment than an equal one it would have committed the division to the discretion of the trial court. The dictionary definition of the word "divide" includes "to make partition of among a number; to give out in shares; to apportion." Webster's New Twentieth Century Dictionary, Unabridged (2d Ed.), divide, p. 538. The word "apportion" is defined in this manner: "To divide and assign in just proportion; to divide and distribute proportionally." Webster's New International Dictionary, apportion, p. 110.

Jones v. Holzapfel, 11 Okl. 405, 68 P. 511, says: "We do not understand that the word 'apportion' means that a certain ascertained sum shall be divided equally among certain persons. Apportion is simply, to divide."

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Iowa 1319, 253 N. W. 701, states: "According to Webster's New International Dictionary, the word 'distribute' means: 'To divide among several or many.' A synonym for the word 'distribute' is the word 'divide.'" See, also, Excise Board of Tulsa County v. City of Tulsa, 180 Okl. 248, 68 P. 2d 823; Commissioner of Internal Revenue v. Levi, 136 F. 2d 366.

The foregoing is sufficient to convince that the words "divide," "apportion," and "distribute" are synonymous and that the word "divide" does not always or necessarily mean to separate into equal parts. The language of the statute "* * * the court shall * * * determine a reasonable amount of fees to be awarded to the attorneys of record * * *" and "* * * the court shall order such fees for the attorneys to be divided among such of the attorneys of record * * *" indicates convincingly that the Legislature intended that each of the acts of the court, that is, the determination of the amount of fees to be awarded and the division of the total fees among the attorneys, was to be done by the exercise of judicial discretion. This conviction is supported by the title of the act which amended the statute on the subject of fixing and awarding fees in partition cases which includes the language "* * * to provide the method by which the court shall determine and award fees to attorneys of record in such proceedings * * *." Laws 1955, c. 93, p. 271. If the Legislature had intended that the fees awarded should be received by the attorneys in equal parts it would certainly have said just that and would not have required the division to be made by order of the court. It had for many years been the view and determination of this court that it was impossible to lay down a rule as to the allowance of attorneys' fees in partition proceedings that would apply in all cases and that the matter of allowance or apportionment of such fees must be left to the sound judicial discretion of the trial court. Mabry v. Mudd, *supra*. It must be assumed that the Legislature

knew that such was the policy and practice in this state when it made the amendment above mentioned. The language of the statute that "* * * the court shall order such fees for the attorneys to be divided among such of the attorneys of record in the proceedings as shall have filed pleadings upon which any of the findings in the judgment of partition are based," means that the total fees awarded shall be by the court divided by it in the exercise of a sound judicial discretion, fairly and equitably among the attorneys who have participated in the case in the manner described in the statute.

The shares of the real estate involved in the proceeding as confirmed by the judgment of partition and the existence of an encumbrance in the nature of a life estate on a part of the real estate were not accurately pleaded in the original petition of the plaintiff. The answer of a defendant represented by John A. Bottorf was filed in the case and it correctly alleged the shares of the owners of the real estate, the encumbrance on a part of it, the nonpayment of rentals by plaintiff, and the names of persons who were necessary additional parties to the proceedings. The findings and judgment were in harmony with and were based upon the allegations of the answer and an amended petition of plaintiff filed after the answer of defendant was filed. The record shows that John A. Bottorf attended and participated in the hearing of the case on January 26, 1959, when the shares of the owners were found and confirmed and the judgment of partition was rendered and he attended a further hearing of the case on March 16, 1959, when the sale had was confirmed and a distribution of the rentals owing by the plaintiff was made.

The division of the attorneys' fees made by the district court was, under the circumstances of this case, inequitable and an abuse of discretion and it may and should be corrected by this court. Mabry v. Mudd, *supra*, declares: "When the trial court fails to make

a just and equitable allowance of attorney's fees, and such failure amounts to an abuse of judicial discretion, this court will, in a proper proceeding, correct it."

The order of the district court which divided the attorneys' fees herein on the basis of $875 to Robert G. Simmons, Jr., and $125 to John A. Bottorf should be and it is reversed and the cause is remanded with directions to the district court for Banner County to enter an order in the case dividing the attorneys' fees as follows: To Robert G. Simmons, Jr., $650 and to John A. Bottorf $350. Each party should respectively pay the part of the costs incurred in this court by him.

REVERSED AND REMANDED WITH DIRECTIONS.

YEAGER, J., dissenting.

I respectfully dissent from the majority opinion in this case. In doing so I want to point out that I find no fault with any of the legal propositions, as such, announced in the opinion. Furthermore, I find no fault with the determination upon the true and only issue presented by the appeal to this court. My complaint is that the court by majority opinion, after making a proper determination upon the only issue presented, goes ahead and makes determinations upon matters not presented by the appealing party and not presented by anything partaking of the character of a cross-appeal. In truth the appealing party aptly points out by his brief that the power to do what was done in these respects, which incidentally was favorable to him, did not exist.

To present in proper perspective the things which are involved it is pointed out that Robert G. Simmons, Jr., was attorney for the plaintiff. John A. Bottorf was attorney for one of the defendants. The action in the district court was for partition of real estate. The original petition contained certain inaccuracies. In the light of this Bottorf, on behalf of one of the defendants, filed an answer. On the basis of the inaccuracies pointed out by the answer the petition was amended and the

proceeding went through its various steps and the partition was finally concluded.

Thereafter, in an attempted compliance with the provisions of section 25-21,108, R. R. S. 1943, the district court awarded as a fee for the attorneys in the case $1,000. This was apportioned $875 to Simmons and $125 to Bottorf. This statutory provision is as follows:

"If, in the proceedings in partition, judgment shall be entered directing partition, as provided in section 25-2179, the court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of fees to be awarded to the attorneys of record in the proceedings, which amount shall be taxed as costs in the proceedings. If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, such fees for the attorney shall be awarded entirely to the attorney for the plaintiff; otherwise, the court shall order such fees for the attorneys to be divided among such of the attorneys of record in the proceedings as shall have filed pleadings upon which any of the findings in the judgment of partition are based. The court shall also determine and tax as costs a reasonable fee for the referee."

From the apportionment Bottorf perfected the appeal herein. His right to do so is not questioned.

The theory of the appealing party is that under the terms of the statutory provision quoted he was entitled to one-half of the total amount allowed by the district court. The court by the majority opinion concludes otherwise and with that conclusion I fully agree. The conclusion depends upon the theory that the statute contemplates that the apportionment is a matter of discretion to be exercised by the district court.

That is where, I submit, the decision of this court should have stopped, the effect of which would have

been to affirm the apportionment made by the district court. Instead, this court, without any basis therefor, proceeded to, and did, determine that the district court abused its discretion in making the apportionment. In furtherance of this it set aside the apportionment and substituted $650 for Simmons and $350 for Bottorf.

It has been asserted herein that the appealing party has asked nothing on the appeal on account of abuse of discretion. This I repeat. It is true that he asserts in his assignments of error "That such Decree is contrary to the evidence," and he re-asserts this in his argument but he asks only that he be awarded one-half of the total allowance.

Even if it be assumed that this court had presented to it the question of whether or not the district court had abused its discretion in the apportionment of the fee, still the adjudication of this court may not be said to be sustained by the record.

It is axiomatic that basic in the allowance of attorney's fees is service performed, and that the major elements to be considered are amount, character, and quality. It is of course true that no fair and full appraisal in these areas may be made in the absence of full knowledge of the facts. A sound discretion may not be exercised in the absence of a knowledge of the facts. A necessary corollary is that on review unless there is a knowledge of the facts a reviewing court is without any basis for a determination that discretion has been abused.

Another axiomatic rule is that in a case where a reviewing court is asked to review the discretionary action of a trial court and there is no record which discloses an abuse, the presumption obtains that there was no abuse, by which presumption the reviewing court is bound.

In this case there is no record which discloses in any real measure or sense the amount, character, and quality of service performed by these two attorneys.

All that this court has before it is that which is disclosed by the transcript prepared by the clerk of the district court. There is no bill of exceptions. This transcript is proper to be considered for what it contains, but of course, as every lawyer and those who preside over the courts know, this cannot be presumed to represent the amount and character of the service performed.

It follows that by the majority opinion this court has discarded the presumption that the discretion of the district court may not be disturbed on review in the absence of a sufficient showing that it was abused. Further, without any justification it has set aside the adjudication as to the apportionment of fees, which is based upon a presumptively sound discretion, and substituted without any basis therefor an arbitrary apportionment.

It has been urged that knowledge of the surrounding extrinsic facts is not necessary to the determination of a proper apportionment since the statutory provision designates the facts which shall be considered in making the apportionment. This contention is without merit. Nothing of that character appears in or is inferable from the provision. The statute provides (1) for the allowance of attorneys' fees and the amount thereof; (2) the conditions under which the attorney for plaintiff shall be entitled to the entire fee; (3) the conditions requiring a division between or among attorneys; and (4) the description of attorneys between or among whom a division shall be made in case the entire fee shall not go to the plaintiff's attorney.

The adjudication of the district court fixing the amount of the fee and in making the apportionment thereof should have been affirmed.

ELIZABETH RICHARDSON, TESTAMENTARY TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF RALPH NEWTON PERKINS, DECEASED, APPELLEE AND CROSS-APPELLANT, V. THE WATERITE COMPANY, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

99 N. W. 2d 265

Filed November 13, 1959. No. 34550.

1. **Contracts.** It is not the province of the court in construing a contract to make a new agreement for the parties by construction; its duty is confined to the interpretation of the one which the parties made for themselves.
2. ———. Contracts are to be given a reasonable construction in the courts so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed.
3. **Sales.** Ordinarily where a purchaser has examined the subject of the purchase there is no implied warranty as regards defects which such examination ought to have disclosed.
4. **Fraud.** To vitiate a contract for failure to disclose pertinent facts amounting to a fraud the evidence must show that such facts were within the knowledge of the person charged, that a duty to speak existed, that such information was material, and that the suppression of the information tended to induce action which the other party would not otherwise have taken.
5. **Declaratory Judgments.** In a declaratory judgment action to have the validity of a written contract and the rights of the parties therein determined, the plaintiff may, after a determination thereof in his favor, obtain a judgment for the amount due him under the contract by original petition or by subsequent application in the same proceeding.

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

Marks, Clare, Hopkins & Rauth, for appellant.

Burbridge & Burbridge and *Rogers, Field, Gentry & Jackson,* for appellee.

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

CARTER, J.

This is a suit for a declaratory judgment by the trustee of a testamentary trust established by the last will of Ralph Newton Perkins, deceased, to determine the rights of such trustee in a contract entered into by Perkins and the Waterite Company. The trial court held the contract to be valid and decreed that defendant was liable for the amounts agreed upon for items manufactured and sold as set forth in the schedule attached to and made a part of the contract, including any scheduled items which have been improved. The defendant has appealed.

The deceased, Perkins, had been engaged for many years in designing, perfecting, and building a water filter for swimming-pool use. Prior to December 10, 1952, he had designed and was manufacturing and selling what is known in this record as the Perkins filter. It is described as a vacuum diatomite filter and consisted of a tank containing a battery of cylindrically-shaped filters called septa, the number of which in each filter depended upon the volume of water to be filtered. A septum consisted of a cylindrical brass wire mesh skeleton supported at the ends by bronze rings and in between by bronze spider rings. The skeleton was covered by a fine wire mesh metal alloy called Monel. Due to the fact that the septa operated by pulling the water through the Monel and the diatomaceous earth placed on the Monel wire mesh to secure proper filtration by the vacuum pressure exerted by an electric pump, it was necessary to close the end of the cylinder. This was done with bronze caps milled to size and pulled into place by a brass rod extending through the center of the cylinder. It appears that it was necessary that this method be used so that the end caps could be removed in order to clean the septa, the Monel being soldered to the cylinder and consequently not removable for that purpose.

The record shows and the contract indicates that

Perkins and the Waterite Company were, and had been for several years, working together to increase the efficiency of the Perkins septa. Tests were jointly made to discover a more effective and longer lasting material than the Monel cover, such as flannel, Orlon, Nylon, Dynel, and various other plastics, including one known as Saran. On December 10, 1952, with the foregoing situation existing, Perkins and Waterite entered into the contract constituting the basis of this suit.

The contract recites that the parties were engaged in the same line of business and had been closely associated for 5 years prior to the execution of the contract. The contract recites that its purpose was to have Waterite take over the patent interests and manufacturing facilities of Perkins for a period of 10 years. The contract stipulates that it is one in which the parties have a mutual interest.

Briefly stated, Perkins sold his interest in pending patent applications on his vacuum diatomite filter and its component parts, together with manufacturing and sale rights thereto. Perkins agreed to furnish all information he had on the filter and to act as consultant on all matters pertaining to its manufacture and sale during the term of the contract. He also conveyed title to his manufacturing and sales rights in all swimming-pool fittings, cleaning tools, and filter parts, including designs, patterns, core boxes, and special tools. Perkins agreed not to manufacture or sell any of the items enumerated and to submit any new items developed to Waterite for its consideration for 30 days. If Waterite failed to accept such new items within 30 days for manufacture and sale, Perkins was free to do so. All equipment and materials on hand were to be transferred to Waterite, together with all inquiries and pending proposals for swimming-pool and filter equipment.

The contract provided for payments by Waterite to Perkins in four categories described as (1) Equipment and Pattern lists, (2) Intangible list, (3) Shop Material

list, and (4) Schedule of Payment list. Full payment had been made on items (1), (2), and (3) at the time of the trial. The issue in the case was the meaning of item (4) and the amount due thereon.

The following rules are applicable in construing the contract: It is not the province of the court in construing a contract to make a new agreement for the parties by construction; its duty is confined to the interpretation of the one which the parties made for themselves. Johnson v. Loewen, 132 Neb. 389, 272 N. W. 217. Contracts are to be given a reasonable construction in the courts so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed. Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245; Southwestern Truck Sales & Rental Co. v. Johnson, 165 Neb. 407, 85 N. W. 2d 705.

The Schedule of Payments list attached to the contract was a list of specific parts of the Perkins filter and swimming-pool fittings for the sale of each of which Perkins was to be paid a specified amount by Waterite during the life of the contract. The number of such items sold was testified to by public accountants who examined the books of Waterite. The real controversy involves not only the number of items sold and the price to be paid to Perkins therefor, but whether or not certain items are within the scope of the schedule of payments set out in the contract.

We point out that the contract does not provide that Waterite must manufacture and sell the items listed as designed by Perkins. It does not state that such items have been patented or are subject to patent, which they were not. The agreement contains no express warranty of any kind by Perkins, nor any minimum requirements by Waterite as to volume of sales. The evidence shows that Perkins died on October 16, 1954, and consequently certain provisions of the contract pertaining to the agreement of Perkins to act as consult-

ant and expert adviser to Waterite were thereby terminated. This was an exigency contemplated by the contract when it provided that the contract was to be binding upon the heirs, administrators, and assigns of the parties thereto. On this point the contract also provided that Perkins would render personal service "during the life of this contract, so long as he is able to do so, or until this contract is terminated * * *."

It is contended that Perkins breached the contract in failing to obtain patents on the items upon which commissions were to be paid and that Waterite was thereby damaged in that competitors made use of the same filter at a lesser manufacturing cost. We point out that Perkins did not purport to sell Waterite patented items, nor did he contract that they were patentable. He contracted only to transfer any right to patents that he might have. Waterite relies upon a statement by Perkins in a letter to one Ackley that he had received no royalties on any of the items here involved. The evidence shows that Ackley was a half owner of any patent rights that might be obtained on these items. This would mean that Ackley would be the owner of one-half of any royalties that might accrue from any patent rights obtained. The statement by Perkins to Ackley that he had received no royalties on these items was a truthful one. The commissions that Perkins was to receive from Waterite were not royalties as that term is used in connection with patent rights. Such payments were nothing more than commissions or divisions of profit on items sold which were paid as a part of the consideration of the contract between Perkins and Waterite. We shall hereafter refer to these payments as commissions. The contract is indicative of this intended result when it refers to the payment for such items as "schedule of payments," and makes only a descriptive reference to them as "royalties." The term "royalties" was used throughout the trial in referring to these payments as a convenient descriptive term and

not in the sense of a patent royalty. They are not indicative of any fraud or misrepresentation practiced upon Ackley or Waterite.

Waterite contends that it was induced to enter into the contract by fraud and misrepresentation on the part of Perkins. In this respect it is urged that after the suit was filed Waterite discovered for the first time that Perkins withheld information of defects in the Perkins filter and that subsequent thereto such defects manifested themselves to the serious damage of Waterite. The evidence of fraud and misrepresentation are contained in two letters between Perkins and The International Nickel Company, Inc., bearing the dates of October 27, 1950, and November 3, 1950. The letter of October 27, 1950, from The International Nickel Company, Inc., to Perkins indicates that it was in reply to a letter from Perkins in which three specimens of damaged Monel filter cloth had been enclosed. The substance of the letter of October 27, 1950, is: The failure of specimen 1 does not appear to be due entirely to corrosion, the indications being that mechanical damage may have caused the defect. No corrosion was indicated in other parts of the sample. The crests of the wires on both sides of the Monel cloth were flattened out, probably due to the manufacturing operation and the fact that the breaks occurred in these sections. Specimen 2 indicated no evidence of failure, although discoloration of the specimen was indicated as caused by either sulphur or chlorine present in the water. It was stated that specimen 3 indicated a failure of the Monel cloth and that corrosion was a factor. It was pointed out that Monel is not completely resistant to corrosion, particularly where the Monel does not have continuous contact with water containing 3 grams per liter of available chlorine. It is stated also that the failure of the Monel mesh could be caused by careless operators of swimming pools in permitting excessive concentrations of chlorine resulting in excessive corrosion on filter cloth of such

fine mesh wire as Monel. The findings were that the writer was inclined to believe that the difficulty encountered is associated with the operation of the equipment in not maintaining close control of the elements in the water.

We fail to find any information in the foregoing letter which would apprise Perkins that the Monel covering was defective. It is insufficient as a basis for a claim that Perkins fraudulently withheld information from Waterite that he was required to make known to it to escape a charge of fraud and misrepresentation in entering into the contract of December 10, 1952.

The record discloses additional correspondence between Perkins and The International Nickel Company, Inc., commencing on October 15, 1953, almost a year after the contract in question was made. While these letters have little bearing, if any, on the issue of fraud and misrepresentation, they do indicate that Monel coverings had been used on thousands of filter elements and there had been failures in but two places prior to October 15, 1953. As late as October 26, 1953, Perkins was advised by The International Nickel Company, Inc., that the use of Monel wire mesh as a covering would seem satisfactory in view of the low percentage of failures. It is true that late in 1953 Perkins was advised that possibly other materials than Monel might be more resistant to corrosion. But the recommendations were made more than a year subsequent to the execution of the contract, and we fail to see how they support a claim of fraud and misrepresentation on the part of Perkins in withholding information which admittedly he did not then possess. The following rule applies: To vitiate a contract for failure to disclose pertinent facts amounting to a fraud, the evidence must show that such facts were within the knowledge of the person charged, that a duty to speak existed, that such information was material, and that the suppression of the information tended to induce action which the other party

would not otherwise have taken. 37 C. J. S., Fraud, § 16, p. 244. See, also, Dargue v. Chaput, 166 Neb. 69, 88 N. W. 2d 148.

Waterite further contends that Perkins breached his contract to its damage. On this issue the evidence shows that in 1954 Waterite began having great difficulty with the Perkins filter and was required to make replacements under its warranties at great expense to it. The defendant offered evidence of 16 installations which required extensive repairs and replacements of the septa designed by Perkins. The evidence indicates a total damage of $11,940.39 on these installations and an estimated future damage in a much greater amount. The trial court excluded much of this evidence and finally concluded that none of it was properly admitted on the theory that a breach of contract had not been shown.

It is contended by Waterite that Perkins warranted the Perkins filter and that it was in fact defective in design and failed to function properly because of the tendency of the Monel wire mesh covering to corrode and fail in its function.

Waterite relies upon a statement in the contract as follows: "They also have an interest in producing a quality product at a price which shall be consistent with their cost." Construed in context with the paragraph from which it was taken, the meaning of this sentence becomes clear. The substance of the paragraph is that the parties have a mutual interest in the contract; that Perkins is interested in seeing Waterite sell as many items as possible since he was to receive a commission on each, that Waterite was interested in pushing the sale of these items in order to maintain a manufacturing volume, that both had an interest in producing a quality product at a reasonable price, not as an intended warranty, but to create a public demand for the filter and a consequent increase in sales, and lastly, it was the intention of the parties to fulfill a desire to continue the same friendly cooperative interest between the parties

in the future as in the past. The paragraph was merely a recitation of the reasons why the parties had a mutual interest in the contract. It did not even indicate the existence of an express warranty.

It must be noted that both Perkins and Waterite had been engaged in the manufacture and sale of vacuum diatomite filters for swimming-pool use before the contract was entered into. Perkins was an expert in the field and Waterite also had capable engineers and water-filter experts among its officers and employees. Waterite was thoroughly familiar with the design, construction, and function of the Perkins filter, it having manufactured and sold a limited number of such filters before it entered into the contract. The claimed breach is based primarily on the fact that the use of five different metals in the Perkins filter septum, without insulating each from the others, brought about an electrolytic action that caused the Monel cover to corrode and fail in its function. The danger of using several noninsulated metals and the possibility of electrolytic action was well known to Waterite's experts. In fact, it brought this evidence into the record of this case. The designs furnished by Perkins not only showed the metals to be used, but they showed also their noninsulated use in the septa. It is apparent that Waterite was not mislead by the design and construction of the Perkins filter. Instead it indicates a reliance on its experience in the use of the Perkins filter and the success attained by Perkins in its manufacture and sale. We find no breach of any express warranty in the contract involved in the litigation.

Waterite contends that there was a breach of an implied warranty. In this respect it asserts that the sale of the filter designs and patterns, together with the manufacture and sale rights thereto, was within the provisions of the Uniform Sales Act, sections 69-401 to 69-478, R. R. S. 1943, and the implied warranties set forth therein. We point out at the outset that a stipulation

in the agreement provides that the contract is to be regarded as a conditional sales contract. We point out also that the contract is a lengthy one purporting to set forth expressly the whole agreement of the parties and negativing the idea of implying warranties not expressly made. It is the law that a court will not undertake to make a new contract for the parties by construction. The duty of the court is to interpret the contract the parties made for themselves. It is likewise clear that a court will not imply warranties into a contract where its terms indicate an intention not to make an express or implied warranty. This is consonant with the provision of the Uniform Sales Act that an implication of law under the act may be negatived or varied by express agreement, a course of dealing between the parties, or by custom. § 69-471, R. R. S. 1943. It will be noted that in the instant case Perkins did not sell a single water filter to Waterite. He sold the designs and patterns which he had perfected. The designs indicated the various metals and other materials that were to be used. He sold Waterite his equipment and stock of materials on hand in addition thereto. He sold his manufacture and sale rights to Waterite for the 10-year term of the contract. Both parties were experts in the field of water filtration, particularly for swimming pools. Waterite was fully informed of the nature and kind of materials prescribed by the design. It not only examined the design but it had manufactured and sold filters constructed in accordance with the design. Under such circumstances there is no warranty implied under section 69-415, R. R. S. 1943, of the Uniform Sales Act, which section provides in part: "(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. (4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." Waterite was fully in-

formed as to the design, materials used, and functional operation of the vacuum diatomite filter developed by Perkins. Waterite cannot rely on an implied warranty as regards defects which its examination ought to have revealed. The trial court correctly found that there was no basis for a claim for damages by Waterite for breach of either an express or implied warranty.

It is further contended by Waterite that material changes have been made in the Perkins filter and that such changes are of such a nature as to relieve Waterite of the payment of any commissions under the schedule of payments portion of the contract. The evidence shows that Waterite suffered many failures in installations of the Perkins filter due to corrosion of the Monel covers of the septa and that it sought a more effective material to use as a cover in lieu of the Monel wire mesh used in the Perkins filter. Tests and experiments were made with various other metals and materials as we have heretofore recited. The evidence shows that Perkins participated in this research. Waterite concluded in 1954 to use a plastic material described as Saran as a more efficient covering than the Monel wire mesh cover. The evidence shows that Perkins was of the opinion that the Saran cover could not be successfully used. The evidence shows, however, that the Saran cover eliminated the difficulties encountered in the use of the Perkins filter due to the corrosion of the Monel wire mesh filter. The use of the Saran cover brought about many changes in the construction of the Perkins filter, which changes, Waterite contends, relieved it of payment to Perkins of the commissions due under the schedule of payments contained in the contract.

The Saran cover was a plastic material resembling a heavy cloth and having much less rigidity than the Monel wire mesh cover. It was sewn in the form of a cylinder and fitted rather loosely over the skeleton of the septum. Its only opening was at the base of the septum. It was closed at the base by a rubber ring which fit snugly

around the base fitting. Diatomaceous earth was applied to it in the same manner as it had been applied to the Monel cover used in the Perkins filter. Many advantages accrued by the use of the Saran filter, advantages that made its use much to be preferred over the Monel cover.

The Saran cover could easily be slipped off of the skeleton of the septum. This permitted the cleaning of the septum by hosing the septum through its framework, an operation that could not be performed through the Perkins filter because the Monel cover was soldered in place and hence could not be removed. This eliminated the necessity for having removable caps in the ends of the septum and permitted the soldering or welding of the end caps to the frame of the septum. This in turn eliminated the brass rod through the center of the septum used to pull the end caps into position. It is these changes, together with the use of the Saran cover, which Waterite contends relieved it of the payment of commissions on the sale of the brass rods, the end caps, the Saran cover, and other component parts, described in the schedule of payments attached to the contract.

It seems clear to us that the elimination of the brass rod eliminated the obligation to pay for it because it was no longer manufactured or sold. The use of the Saran cover likewise eliminated the manufacture and sale of the Monel cover. Since the Monel cover was no longer used, no commissions would be due thereon. It cannot be logically urged that the list of parts on which commissions were to be paid did not relate itself to the component parts of the Perkins filter. New items developed by Perkins were to be included in the schedule of payments list only by supplemental agreement. On the other hand, the brass wire cylinder was still being manufactured and sold. Commissions provided for in the schedule of payments would be due on it under the contract. Commissions on the end caps are required to be paid under the contract, even though they were at-

tached in a different manner made possible by changes in construction due to the use of a removable cover. There is evidence that plastic bushings, and possibly plastic fittings, were developed by Waterite as a further means of eliminating the electrolytic action resulting from the use of several noninsulated metals of varying electromotive potential when exposed to chemically-treated swimming-pool water. Such items are not listed in the schedule of payments, and commissions are not due thereon under the contract. We conclude generally that new items developed by Waterite which displace items of the Perkins filter listed in the schedule of payments in the contract are not subject to the payment of the commissions set out in such schedule. Items contained in the schedule which are retained substantially as designed by Perkins are subject to the payment of such commissions even though changed to some extent to conform to improvements made in the general structure of the Perkins filter.

We again point out that the contract involved more than the sale of the designs and patterns of a water filter for swimming-pool use. It included the skilled personal service of Perkins during the life of the contract. It also involved the transfer of equipment, materials, and tools of Perkins' business, and an agreement to refrain from engaging in such business for a period of 10 years. It involved a transfer to Waterite of the manufacture and sale rights of the Perkins filter. One of the methods for the payment of the consideration of the contract by Waterite was the payment of fixed amounts on certain items manufactured and sold, such items being component parts of the Perkins filter. Such payments were not payments of a royalty, as that term is generally used, but a method of payment only of the consideration due on a contract involving many integrated and diverse provisions. Such a contract must be construed to carry out the contract made as gleaned from its four corners. So interpreting the contract, we

have reached the conclusions herein set forth.

The plaintiff complains on cross-appeal of the failure of the trial court to determine the amount due her under the contract and to enter judgment for such amount. The petition prayed for a judgment for $4,046.12 and interest, the amount claimed to be owing to plaintiff on January 10, 1955, and for such other and further equitable relief as is just and proper. In a declaratory judgment action on a contract, the court may not only construe the contract but it is authorized to enter judgment for the amount due thereunder in the light of the interpretation made. In the instant case plaintiff prayed for judgment for the amount due on January 10, 1955. Further amounts were admittedly due for the years 1955, 1956, and 1957. A judgment for the total amount due at the time of trial should have been entered. The point raised by the cross-appeal is well taken.

While the trial court arrived at substantially the same conclusion as this court as to the construction of the contract, there is merit in the contention advanced that the decree of the trial court was lacking in clarity and definiteness. It failed to specifically declare the rights of the parties in the contract under the issues raised under the pleadings and evidence. This makes it necessary that the cause be remanded to the district court for the entry of a decree in accordance with the holding of this opinion.

Leave is granted to plaintiff, under the provisions of section 25-21,156, R. R. S. 1943, of the Uniform Declaratory Judgments Act, to apply to the district court for Douglas County for such further relief as may be deemed necessary to finally terminate the litigation in accordance with the conclusions reached in this opinion. The applicable rule is: In a declaratory judgment action to have the validity of a written contract and the rights of the parties therein determined, the plaintiff may, after a determination thereof in his favor, obtain a judgment for the amount due him under the contract

by original petition or by subsequent application in the same proceeding. McNally v. Mosher, 210 Md. 127, 122 A. 2d 555, 60 A. L. R. 2d 388.

Even though a reversal of the judgment of the district court is required, the result of the appeal requires that the costs of this appeal be equitably apportioned between the parties. By the authority of section 25-1711, R. R. S. 1943, we direct that each party shall pay his own costs on the appeal.

The judgment of the district court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

EMIL J. PALLAS, APPELLEE, V. LILLIAN M. DAILEY ET AL., APPELLEES, IMPLEADED WITH CLARENCE R. MURPHY ET AL., APPELLANTS.

99 N. W. 2d 6

Filed November 13, 1959. No. 34647.

1. **Judgments.** A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings.
2. **Appeal and Error.** This court takes judicial notice of the mandatory requirements of the statute as to the necessity and time of filing a notice of appeal, and the effect of failure to comply with them.
3. **New Trial.** A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect.
4. **Appeal and Error.** This court is without jurisdiction to entertain an appeal from the district court unless, as provided by section 25-1912, R. R. S. 1943, notice of appeal is filed in the office of the clerk of the district court within 1 month after rendition of the judgment or decree, or within 1 month from the overruling of a motion for new trial timely filed in the cause.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Appeal dismissed.*

Tesar & Tesar, for appellants.

James R. McGreevy, for appellee Pallas.

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

WENKE, J.

This is an attempted appeal from the district court for Douglas County. It involves an equity action tried in the district court on November 14, 1958. At the conclusion of the trial counsel for certain of the defendants moved to dismiss plaintiff's petition because, as he claimed, the evidence adduced was insufficient to sustain plaintiff's burden of proof. The trial court took this motion under advisement, however, the record does not show that it was ever ruled on. The record does show that on November 14, 1958, after all the evidence had been submitted, the trial court found generally for the plaintiff and rendered a judgment accordingly. This judgment was journalized on January 29, 1959, and entered by the clerk of the court on that day in "Journal 611 at Page 409."

As to when a judgment has been rendered, within the meaning of the present statutes applicable to appeals, see Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167. As therein stated: "A judgment is rendered when the court announces its decision upon the law and the facts in controversy as ascertained by the pleadings." That is what was done here for, after the evidence had been submitted to the court on November 14, 1958, the decree goes on to recite that: "Upon consideration of the pleadings of the parties and the evidence submitted to the Court, the Court finds generally for the plaintiff." Judgment for plaintiff follows.

"This court takes judicial notice of the mandatory requirements of the statute as to the necessity and time of filing a notice of appeal, and the effect of failure to comply with them." Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894.

Defendants, who are seeking to appeal, filed two motions for new trial in the district court, the first on January 14, 1959, and the second on February 2, 1959.

Section 25-1143, R. R. S. 1943, as it relates thereto, provides: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, * * *." There are two exceptions to this requirement in the statute but neither has application here.

These were both, in our opinion, filed out of time and within the following principle: "A motion for new trial which is not filed within the time specified by statute is a nullity and of no force and effect." Frenchman-Cambridge Irr. Dist. v. Ferguson, 154 Neb. 20, 46 N. W. 2d 692. See, also, Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558.

On March 23, 1959, the trial court overruled both motions for new trial and thereafter, on April 20, 1959, this appeal was taken from both the decree rendered therein and from the order overruling the motions for new trial.

Section 25-1912, R. R. S. 1943, as it relates to the issues herein, provides: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, * * * shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, * * *."

The motions for new trial having been filed out of time the overruling thereof could not extend the time for appeal so the notice of appeal could only relate to the decree rendered. In this situation the following is

controlling: "This court is without jurisdiction to entertain an appeal from the district court unless, as provided by section 25-1912, R. R. S. 1943, notice of appeal is filed in the office of the clerk of the district court * * * within one month after rendition of the judgment or decree, or within one month from the overruling of a motion for new trial timely filed in the cause." Frenchman-Cambridge Irr. Dist. v. Ferguson, *supra*. See, also Powell v. Van Donselaar, *supra*.

This court, being without jurisdiction to entertain this appeal, must and does dismiss it.

APPEAL DISMISSED.

BURDETTE S. JOHNSEN, APPELLANT, V. HARRY A. TAYLOR, APPELLEE.

99 N. W. 2d 254

Filed November 20, 1959. No. 34583.

1. **Negligence: Trial.** The burden is on plaintiff in an action of the character of this case to show by the weight of the evidence the truth of one or more of the acts of negligence charged against the defendant, and that it or they are the proximate cause of an injury and damage to plaintiff and the extent thereof.
2. **Damages.** Damage which is uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof is not the basis of a recovery.
3. ———. Damage for permanent injury may not be based upon speculation, probability, or uncertainty but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury.
4. **Torts: Damages.** A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if he establishes by proof the extent of such harm and the amount of his damage with reasonable certainty.
5. **Negligence: Damages.** The element of time alone is not sufficient to establish causal connection between an accident and an alleged injury sustained thereby.
6. **Trial.** It is the duty of a district court to direct a verdict in a case if there is no conflict in the evidence or if the evidence,

though conflicting, is so conclusive that it is insufficient to sustain a verdict.

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

Nate C. Holman and *Chambers, Holland, Dudgeon & Hastings,* for appellant.

Cline, Williams, Wright & Johnson, for appellee.

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

BOSLAUGH, J.

Appellant seeks damages for an injury which he claims he sustained by the collision of an automobile owned and operated by him and an automobile owned and operated by appellee, the proximate cause of which he asserts was the negligence of appellee.

The occurrence which caused this litigation was described by appellant at the trial in this manner: He was traveling west on the outside or north lane of O Street between Eleventh and Tenth Streets in Lincoln in his automobile, a 1951 Imperial Chrysler, about 11 o'clock in the forenoon of April 3, 1956, at a speed of from 20 to 25 miles per hour. Appellee was operating his automobile at that time and place, traveling west in the lane immediately north of the center line of O Street about 18 or 24 feet ahead of and to the left of appellant. The automobiles were traveling at about the same speed and when they had reached about the center of the block appellee turned his automobile to the right into and across the north lane in front of appellant. Appellant applied the brakes of his automobile when he saw appellee turn to the north but appellant could not stop and he said he had to hit the automobile of appellee. Appellee was headed north and west about halfway into a parking stall on the north side of O Street at the time the automobiles made contact. Appellant did not get out of his automobile at the place of the collision

but he estimated he slid his wheels 6 or 8 feet. The left part of the front bumper of the automobile of appellant struck the right rear corner or end of the bumper of the automobile of appellee. The bumpers did not completely meet and the one on the automobile of appellant went over the bumper on the automobile of appellee and reached its right rear fender. Appellant was forced up over the steering wheel of his automobile. He was shaken and the front of him was "punched," he said. He then thought he had sustained no injury. Appellee got out of his automobile, looked at its rear, asked appellant if he was all right, and appellant said he was. Appellant backed up his automobile to let appellee back from the parking into the north lane and proceed to the west on O Street which he did to Tenth Street. The glass in one of appellant's directional lights was cracked, the fender and bumper were marred, and the horn on his automobile did not sound after the collision. Appellant remained in his automobile at the scene of the collision and he drove it from there to Ninth Street and to the Annex Garage.

A motorist who was traveling west on the inside lane of O Street at about the time and place of the accident involved in this case testified that appellant at that time was traveling in the outside lane of the street. The witness saw a car preceding him turn from the inside lane to the right into and across the outside lane and into a parking spot. He did not clearly see what was going on but he heard a screeching noise and saw dust in the air which he believed was from under automobile fenders caused by an abrupt stop. The witness did not stop but while he was proceeding west he saw the automobile of the motorist who had turned to the right and the automobile of appellant come together. He said he did not know anyone was injured; the collision did not look that serious to him.

Appellee, a physician in Lincoln for more than 40 years, while a witness related in substance the following

concerning the accident: He was in the outside lane going west on O Street on which there were diagonal parking stalls. He turned his automobile to the right immediately east of the alley in the block north of O Street and between Tenth and Eleventh Streets. The rear lights of his automobile were operating, warning that he was decreasing his speed and was going to stop. He gave no signal for a right-hand turn. He applied the brakes to retard the speed of his automobile and immediately he felt a slight impact on his rear bumper. The participants in the collision examined the automobiles for possible damage. They found none. Appellant stated that he was not injured and he gave no indications of injury. He walked toward and to appellee after the collision and following their conversation he walked naturally away from where they had been standing. Appellee said the impact of the automobiles was very slight. It did not jar or affect him in any way and there was no damage to his automobile.

Appellant testified that when he stepped out of his automobile at the Annex Garage, where he drove after the collision, he about collapsed. However, he walked from there to his place of business, a distance of three-fourths of a block, where he remained for an undisclosed period of time. He told his employees he was hurt. He did not claim that he made a more definite statement on that subject. He then went to the police station, made a report of the collision, and thereafter went to his home. He considered the collision a minor accident with no injuries involved until he was in the Annex Garage and alighted from his automobile. When he was asked what made him think he had been injured he said it was pain in his lower back and right leg in the same area in which he had suffered pain as early as the year 1954. He first said he also had a movement of his head "back and forth like such (indicating)" after he got to his place of business and sat down there but this was not true in the Annex Garage. Later he said he

noticed the described movement of his head at the garage. The pain and the movement of his head which he described were the only things he experienced which caused him to believe he had been injured in the collision of the automobiles. In a deposition of appellant taken a considerable period before the trial of the case he testified that he told appellee at the scene of the accident that he, appellant, thought he was badly hurt. He also testified that the only unusual thing that appellant experienced when he was in the Annex Garage and got on his feet was that he developed a terrific pain in his stomach which continued for several days. When appellant reached his home on the day of the accident he went to bed and remained there until the following morning. The pain in the lower back area was more severe and in the afternoon of that day he consulted Dr. J. E. M. Thomson at his office. He examined appellant and gave him medical management, tablets for discomfort, and a local anesthetic injection into his back, and applied strapping to his back.

Appellant had been afflicted with a low back pain from somewhere in the winter months of 1953 and 1954. It came on gradually, became more severe, and by February 1956, the pain had extended to and radiated into his right leg. The lower back pain reached such severity that appellant developed numbness in the leg. He had the experience of attempting to get out of bed in the morning and being unable to stand. Appellant consulted Dr. Ferciot, an orthopedist of Lincoln and a senior consulting orthopedist at the Veterans Administration Hospitals in Lincoln and Grand Island, on March 1 and March 4, 1954, concerning soreness and stiffness in his lower back and soreness in his legs. On March 1, 1954, X-rays were made and the examination of appellant was completed on March 4, 1954. The diagnosis was a weakness of the lumbosacral part of his back with what is known as spondylothesis, which is an incomplete fusion of one of the side processes of the fifth lumbar vertebra.

Both processes in this instance were a peculiarity formation in which the pedicle had failed to unite to the vertebral body. The doctor testified that it was an accepted conclusion that spondylothesis is either a peculiarity of congenital origin or results from something that happens very early in life.

The doctor next saw appellant professionally February 6, 1956. He was then complaining of persistent low backache with considerable discomfort on his right side. He complained bitterly that his condition was bothering him and interfering with his ability to perform his work. An examination was had of appellant with the aid of X-ray rechecks then made which were compared with the films made in 1954. There was very slight change in position except that there was evidence of first degree spondylolisthesis with some early shift of the bony structures and chronic strain. Spondylolisthesis was defined by the witness as the slipping of one vertebra forward on another occasioned by lack of bony stability. The doctor recommended further study of the condition and appellant entered the Veterans Hospital at Lincoln. During his hospitalization the status of Dr. Ferciot was that of a consultant for the hospital and not as the direct physician of the appellant. There was an operation performed on the back of appellant at that hospital by doctors other than Dr. Ferciot on March 14, 1956. The operation was a laminectomy or decompression operation sometimes referred to as removal of the neural arch or as an unroofing procedure. Its purpose was to relieve pressure on the structure in the lower back by removing the loose portion of bone and any fibrous tissue which overlay the roots of the spinal cord at the lumbar sacral level. The appellant had a loose neural arch at the bottom of the spine and this was a factor considered by the doctor in making a diagnosis of spondylolisthesis. The instability of the joints predisposed or made more probable strain to the ligaments and pressure on the nerves. There are different permis-

sible procedures for attempting to correct the condition from which appellant was suffering such as the operation which was accomplished, fusion, or both such operations. There are uncertainties concerning the result of any of these. The simplest of them from the standpoint of the patient is the one which was performed because of the shorter period of convalescence; and if the desired result is not obtained, a fusion operation is available and is sometimes necessary to eliminate the pain suffered by the patient. That was true in the instance of appellant. He had a laminectomy and two fusion operations before he secured relief from his affliction. If conservative treatment in such a condition does not bring relief to the patient, the most desirable procedure from the standpoint of the phyisician is generally the fusion operation.

Dr. Ferciot was consulted again by appellant on April 5, 1956, the second day after the accident. Appellant told the doctor that he applied the brakes on his automobile suddenly and that he had a severe jolting injury. The doctor said that the operative scar of appellant was not essentially different than he would expect to find after that recent an operation (March 14, 1956). There was some puffiness of the upper part of the incision and complaint of tenderness but that, said the doctor, was a common finding at that stage and may often be seen as there is often local swelling and tenderness and sometimes discoloration following an operation of the type appellant had. There was a deep approach to the spine and considerable tenderness could be expected so soon after such an operation. The doctor would only say the accident may have been an aggravating factor in the condition of appellant if, as he stated, he sustained a severe jolting injury and if there was an onset of symptoms following that, but the doctor also said that the symptoms of appellant following the accident may have been normal manifestations which follow in other cases where no accident is involved and where it is necessary to subse-

quently have fusion procedure following a decompression operation and that could have been the case with appellant. The X-rays taken on April 4, 1956, the day following the accident, were compared with the films made February 6, 1956, and no evidence was found of change except that the lamina had been removed at the fifth lumbar vertebral level. The spondylothesis of appellant was the same after the accident as it was before except the neural arch had been removed in the operation of March 14, 1956. The statement in the notes made by the doctor that considering the history furnished, it would appear the soreness in the low back was made worse following the accident reported was based upon the statement of appellant that he suffered a severe jolting injury in the accident. In any event the doctor concluded and testified that he knew of no way in which one could evaluate the degree of aggravation which any injury of the accident could have caused.

Dr. Getscher, an orthopedist of Lincoln, first saw appellant April 4, 1958, 2 years and 1 day after the date of the accident and more than 2 years after the first operation performed on the back of appellant. It was then that he first consulted Dr. Getscher professionally. The doctor was told by appellant that in the winter months of 1953 and 1954 he had pain in his low back and it became more severe for which he had conservative treatment but the pain continued and in February of 1956 the pain had extended into his right leg to the degree that it developed numbness in the leg and that he experienced such a condition that on an occasion when he was attempting to get out of bed he was unable to stand. He was hospitalized February 28, 1956, and in March of that year the operation occurred in which the arch of the fifth lumbar vertebra was removed. Appellant gave the doctor a history of the accident of April 3, 1956, and in that connection he said he was thrown upward and forward over the steering wheel and had immediate pain in the lower back which radiated up

the back and into his neck. He was able to get out of his automobile and walk around but when he put weight on the right leg there was a severe, sharp, shooting pain which extended from the lower back down into the leg. On August 6, 1956, a spinal fusion operation was done. It did not accomplish what was intended and appellant experienced no relief from the persistent severe pain in his back and leg. Dr. Getscher advised a reoperation on the lower back and a regrafting of the area to provide solidity and stability therein. The doctor found that appellant had a spondylothesis which had probably developed as he grew from birth. This condition antedated the accident of April 3, 1956, mentioned in the history given by appellant. The second fusion operation was performed on the back of appellant by Dr. Getscher June 13, 1958.

Dr. Getscher, on the basis of assumptions expressed in a hypothetical question propounded to him, in opposition to proper objection, was permitted to and did express an opinion that there had been definite aggravation of the previous condition of appellant. The question on which the expressed opinion of the doctor was based included an assumption that appellant made a normal recovery from the laminectomy and an assumption that the accident caused the appellant to be thrown up forward and over the steering wheel at which time he noted immediate pain in the lower back. The doctor also stated his opinion, over proper objection, that sufficient damage to the area previously described in the lower back of appellant occurred from the accident in the form of tearing of ligaments and general strain to convert a nonpainful condition to a painful condition that persisted in spite of treatment that was given. The doctor testified that it was his opinion that appellant would have a restriction of function the rest of his life that would impair his ability to work of about 10 to 15 percent of the body as a whole but he also said that the estimated permanent disability of which he spoke resulted from

all causes including the spondylothesis, the spondylolisthesis, and the surgical operations: "As a result of everything that has happened up until today * * *." He did not attempt to say what if any permanent disability was caused appellant by the accident of April 3, 1956. He testified that the opinion expressed by him necessarily took into consideration the history given him by appellant and the assumptions stated in the hypothetical question; that any variance by either of these from the actual facts would affect his opinion; and that if what was told him or if what he was asked to assume was materially incorrect, his opinion could be different or would be changed.

The gist of the case pleaded by appellant was negligence by appellee proximately causing the collision of the automobiles of the parties, injury thereby inflicted upon appellant from which he was damaged, and the quantum thereof. The defenses interposed by appellee were substantially a traverse of the claims of appellant and a plea of his contributory negligence. The district court at the close of all the evidence, on motion of appellee, found that the evidence was insufficient to sustain a verdict that the negligence of appellee caused appellant injury and damages and that any finding of damages in favor of appellant would be based on conjecture and speculation. The trial court discharged the jury and dismissed the case. A motion for a new trial was denied and this appeal is from that action of the trial court.

The injury received by appellant in the collision, as related in his petition, is that he was thrown forward against the steering wheel of his automobile, resulting in great pain, tearing loose a wound of a surgical operation to his back from which he was recovering, and resulting in internal bleeding and injury. The evidence is conclusive that the surgical wound on the back of appellant was not disturbed or affected by the accident. The record is silent as to any internal bleeding of appellant at any time. Appellant presented his case at the trial

substantially on the basis that the collision aggravated the condition of his back. The elements of the case of appellant were negligence of appellee, injury to appellant proximately caused thereby, the extent of the injury, and the damages resulting therefrom. The burden was on appellant to establish each of the elements by the weight of the evidence as a prerequisite of any recovery in the action. The burden on appellant was made difficult because of the congenital affliction he suffered and which was present long prior to and at the time of the accident. Appellant uniformly spoke of the pain and discomfort which he experienced as being in the area of his low back, where he had the defective fifth vertebra, and extending from there into his right leg.

In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, this court said: "In an action of this type the burden is on the one seeking to recover to establish by a preponderance of the evidence that the other party is guilty of one or more of the alleged acts of negligence, that if found guilty thereof that such negligence was a proximate cause of the accident, and that damages were caused as a result together with the extent thereof. These are the issues and the court should properly instruct in regard thereto."

Restatement, Torts, § 912, p. 574, states: "A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if, but only if, he establishes by proof the extent of such harm and the amount of money representing adequate compensation with such certainty as the nature of the tort and the circumstances permit." In Comment a appears the following: "Where a person seeks to recover damages for a particular harm which he claims has resulted to his person or to a tangible thing belonging to him, he has the burden of proving that the other has invaded a legally protected interest of his, that he has suffered such harm and that the act of the other was a legal cause of such harm. Thus where a person has been

wounded by another and subsequently blood poisoning develops in any portion of his body, he has the burden of showing that it is more probable than not that the initial wrongful contact was a substantial factor in producing it. * * * In all of such cases the recovery of damages for a particular harm is dependent upon proof that such harm occurred as the result of the tortious conduct and normally the plaintiff can recover damages therefor only by proving this with the same degree of certainty as that required in proving the existence of the cause of action." See, also, Wylie v. Czapla, 168 Neb. 646, 97 N. W. 2d 255; 15 Am. Jur., Damages, § 329, p. 768.

The district court is required to refrain from submitting to a jury the matter of damages and to decide the case as a matter of law if the evidence of claimant fails to establish that he has sustained an injury or fails to establish the extent of the injury he claims was inflicted upon him so that a jury cannot determine damages except by indulging in speculation and conjecture. In Harper v. Young, 139 Neb. 624, 298 N. W. 342, the plaintiff experienced an automobile accident. He, after a considerable period, returned to and pursued his employment. More than 9 months after the accident he was afflicted with a coronary occlusion of the heart. There was medical evidence that because of physical strain and worry the accident might have contributed to it; probably precipitated it; could have been the cause; the chain of events made it so appear; it might not have occurred otherwise; or it might happen to anyone in those years of life without having been in an accident. The court therein said: "The mere fact that a certain disease might consistently arise from the injury is insufficient to show that it was caused thereby. * * * There must be competent evidence, and a preponderance thereof, that plaintiff's heart condition was the probable and reasonable result of the accident and injuries. * * * Evidence that it was possibly the result is

not sufficient. * * * 'Where from the undisputed facts the court is able to see that the injury is remote and not the proximate result of defendant's acts, the question is properly decided as one of law.' 17 C. J. 1060. We have carefully read the evidence to determine the question, and conclude that the trial court properly excluded the matter of damages claimed by plaintiff because of the alleged coronary occlusion."

Wylie v. Czapla, *supra*, states: "As stated in Oleck, Damages to Persons and Property, § 319, p. 739, citing authorities: 'The party who claims pecuniary damages has the burden of proving both that they were the result of the wrong done by the other party, and their amount. * * * But ordinarily the claimant must prove his damages by presenting competent evidence which satisfies the applicable measure of damages, and from which the amount of the damages can be computed.'" See, also, Schneider v. Daily, 148 Neb. 413, 27 N. W. 2d 550. What is said above is in harmony with the doctrine that in each case before the evidence is submitted to the jury there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence but whether there is any evidence upon which the jury can find a verdict for the party producing it, upon whom the burden of proof is imposed. Christ v. Nelson, 167 Neb. 799, 95 N. W. 2d 128. A mere scintilla of evidence is not enough to require the submission of an issue to the jury. It is the duty of a trial court to direct a verdict where the evidence is undisputed or where the evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment. Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551; Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238.

The evidence of damages is required to be direct and certain. Proof that damage might or could have been caused or was probably caused by the accident is not sufficient to sustain a verdict for a claimant. Such evi-

dence is not of the quality required to satisfy the burden of a claimant to establish by a preponderance of evidence an injury and the extent thereof.

Bittler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318, declares: "Damages which are uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof are not the basis of a recovery." See, also, Harper v. Young, *supra;* Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350; O'Hara v. Frederickson Building Corp., 166 Neb. 206, 88 N. W. 2d 643; Wylie v. Czapla, *supra.*

Welstead v. Ryan Constr. Co., 160 Neb. 87, 69 N. W. 2d 308, states: "Damages for permanent injuries cannot be based upon mere speculation, probability, or uncertainty, but must be based upon competent evidence that permanent damages, clearly shown, are reasonably certain as a proximate result of the injury."

In Burkamp v. Roberts Sanitary Dairy, 117 Neb. 60, 219 N. W. 805, this court said: "An instruction is erroneous which tells the jury that, in fixing plaintiff's damages in a personal injury action, they may consider the pain and suffering which plaintiff 'will probably suffer in the future;' only such pain and suffering as the evidence shows with reasonable certainty plaintiff will experience in the future may be considered by the jury." See, also, Borcherding v. Eklund, *supra;* Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891.

The problem of whether or not appellant was caused any injury by the accident of April 3, 1956, should be considered with his established previous condition. He had a congenital or early developmental condition of the low back known as spondylothesis and later spondylolisthesis which caused him pain and difficulty in the low back and legs and especially in his right leg, from early in 1954. He was in the Veterans Hospital about 4 weeks before the accident. A spinal fusion before the accident was recommended but the less severe surgical procedure of a laminectomy, a permissible one which

sometimes furnishes good results, was decided on because of the shorter period of convalescence. It was performed less than 3 weeks before the accident. Appellant was then recovering from the operation which was normal because within that time some degree of residual soreness would be anticipated. Dr. Ferciot said it was a little more than 2½ weeks after surgery when the accident happened and the back of the patient was expected to be pretty sore. Appellant considered the collision of the automobiles a minor accident, without injury, until he afterwards alighted from his car at the Annex Garage. There was no physical or objective evidence or symptom of injury to appellant. The only mention of an immediate onset of pain in the back of appellant appears in the history which it is claimed he gave Dr. Getscher 2 years after the accident. The statement in the history that appellant was thrown over the steering wheel and that he had immediate pain in the lower back was self-serving and its admission was for the limited purpose of showing what the doctor relied upon in giving his conclusions and his testimony. It was not evidence of what was the fact and in any event it could not disprove the testimony of appellant that he experienced no pain until he got out of his automobile at the Annex Garage and that he then had pain in his back and leg in the same area where the pain originated in early 1954. The limited time which elapsed between the accident and the pain he said he experienced in the same area where it originated early in 1954 and persisted thereafter is the only fact which might indicate any connection between the accident and the pain at the garage but time element alone is not a valid basis for a finding of causal connection between the injury or disability and his accident.

In Hahl v. Heyne, 156 Neb. 599, 57 N. W. 2d 137, the court said: "We do not think the plaintiff established that her left leg was paralyzed as a result of the fall. * * * There is no evidence of objective symptoms of an

injury. In fact there is no evidence of any connection between the fall and the injuries sustained, other than the time element involved. The most that the medical testimony shows is that the accident possibly contributed to the injury, although it probably did not."

It is said in Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379: "This record is not convincing that plaintiff's right foot ever slipped, but assuming for purpose of argument only that it did, the evidence fails to establish any causal connection between such slip and plaintiff's claimed disability."

The circumstances of this case as recited in the foregoing were such that a solution of the problem whether or not there was a causal connection between the physical condition of appellant and the accident was not within the competency of laymen but was a question with respect to which only a medical expert could form a judgment or express an intelligent opinion. Dr. Ferciot, an orthopedist of 25 years' experience, testified that he was told by appellant that he had a severe jolting injury in the accident and an onset of symptoms. The doctor was asked if it would be difficult to make a direct relationship of the accident and the subsequent fusion operation experienced by appellant and his answer was that the question posed a very difficult problem which he could not answer with any authority. He then added that from the history he obtained he would have to conclude that the accident "* * * may have been an aggravating factor." He said that was based upon a history that appellant experienced a severe jolting injury and an onset of symptoms. The witness also testified that the symptoms of appellant following the accident may have been a normal manifestation which followed in other cases where no accident is involved and where it is necessary to subsequently have a fusion procedure following a decompression operation and that that could have been the case with appellant. The doctor concluded and testified that he knew of no way

in which one could evaluate the degree of aggravation which any injury of the accident could have caused. The record contains no evidence that appellant suffered a severe jolting injury in the accident, that any symptoms of injury were immediately manifested, or that any physical or objective symptoms of injury to appellant were found by either of the two doctors who examined him, one the day following the accident and the other the second day thereafter.

Dr. Getscher, an orthopedist, testified in answer to a hypothetical question that his opinion was that there had been by the accident definite aggravation caused to the previous condition of appellant as it was before the accident. The question assumed as a fact that at the time of the accident appellant experienced immediate pain in his lower back. The witness stated the opinion expressed by him was based upon the history given him and the assumptions of the question and any variance of actual fact from these would affect and could change his opinion. The history given the doctor by appellant included a statement that he had immediate pain in the lower back at the accident and that it radiated up the back and into the neck. The witness also stated his opinion that sufficient damage to the area described in the lower back of appellant occurred from the accident in the form of tearing of ligaments and general strain to convert a nonpainful condition to a painful condition that persisted in spite of given treatment.

The record yields no evidence that appellant experienced pain at the time of the accident as assumed in the hypothetical question or that any pain that then developed in the lower back radiated up the back and into the neck as stated in the history given the doctor on which he relied and based his opinion expressed in his answers. The hypothesis and history are contradicted by the repeated evidence of appellant that he experienced no pain and no indication of injury at the time

of the accident and that the pain thereafter was in the same area of the back and in the leg where pain originated early in 1954. Likewise there is an entire absence from the record of any proof that there was at the time of the accident any tearing of ligaments at any place in the body of appellant or any general strain. The witness who assumed this did not see appellant until more than 2 years after the accident. He made no mention in his findings of any such conditions and any assumption to that effect is directly contradicted by the testimony of appellant. He was examined by an orthopedist the day after the accident, by another orthopedist the second day thereafter, and by other doctors in the immediate months after the accident. Appellant was a patient at the Veterans Hospital at the time of the accident but was on leave granted by the hospital for the period of March 30 to April 6, 1956. He was seen by the physicians of the hospital staff on April 6, 1956, and they thought it was proper that he should go on leave again and another period of leave was granted him on April 6, 1956, the third day after the accident. It is not claimed that any of the doctors found evidence of torn ligaments, a general strain, or symptoms of any injury. The suggestion of these things exists only in assumption and as an afterthought. The doctrine is that the value of the opinion of an expert witness is dependent on and is no stronger than the facts on which it is predicated. The opinion is without probative force unless the assumptions on which it is based are shown to be correct. Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410.

An additional obstacle to the success of appellant in this litigation is the failure of proof of the extent of any physical injury to him or the extent of any aggravation of any previous physical condition of which appellant was a victim at the time of the accident. It was the conclusion of Dr. Ferciot that the accident may have been an aggravating factor in the condition of appellant

only if he sustained a severe jolting injury and there was an onset of symptoms, of which qualifying conditions there is no proof, or appellant might have had all the conditions with which he suffered if there had been no accident in which he was involved. The doctor said he knew of no way in which to evaluate the degree or extent of any aggravation which any injury of the accident could have caused appellant.

The estimate of Dr. Getscher of the permanent restriction of function of the body of appellant as a whole which impaired his ability to work was about 10 to 15 percent but he explained that the estimated disability of which he spoke resulted, in his opinion, from all causes which affected appellant, including his defective lower back, the result thereof, and the surgical operations. The doctor expressed this view in these words: "As a result of everything that has happened up until today * * *." Dr. Getscher or any other witness did not attempt to evaluate what if any disability or damage was caused appellant by the accident alone. The extent of the injury or damage was an element of the case of appellant and proof thereof was indispensable to his success. Borcherding v. Eklund, *supra;* Wylie v. Czapla, *supra;* Weisenmiller v. Nestor, 153 Neb. 153, 43 N. W. 2d 568; Restatement, Torts, § 912, p. 574.

The judgment should be and it is affirmed.

AFFIRMED.

JAMES HARRIS, APPELLANT, V. ROBERT PULLEN, APPELLEE.
99 N. W. 2d 238

Filed November 20, 1959. No. 34631.

1. **Negligence: Trial.** In a case where the defendant pleads that the plaintiff was guilty of contributory negligence the burden is on him to prove that defense by a preponderance of the evidence.
2. ———: ———. If the evidence adduced by the plaintiff tends

to prove the defense of contributory negligence the defendant is entitled to receive the benefit thereof and it is the duty of the court to so instruct the jury.

3. ———: ———. Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury.
4. **Trial.** A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
5. **Appeal and Error.** The function of this court, in determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts.
6. **Automobiles: Negligence.** It is the duty of the driver of a motor vehicle to have his vehicle under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care.
7. ———: ———. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be.
8. **Trial.** A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for a directed verdict which motion should have been sustained because of a want of evidence.

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

Philip T. Morgan, for appellant.

Luebs & Elson and *Howard E. Tracy,* for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries,

doctor and hospital bills, and property damage by James Harris, plaintiff and appellant, against Robert Pullen, defendant and appellee. The case was tried to a jury which returned a verdict in favor of the defendant and against the plaintiff. Judgment was rendered on the verdict. Thereafter the plaintiff filed a motion for judgment notwithstanding the verdict and in the alternative a motion for new trial. Both elements of the motion were overruled. From the judgment, the order overruling the motion for judgment notwithstanding the verdict, and the order overruling the motion for new trial the plaintiff has appealed.

The factual background of the action, about which there is no substantial dispute is that early in the morning while it was still dark on September 29, 1958, the plaintiff left his home in Fullerton, Nebraska, and proceeded southward on State Highway No. 14, a black-top road. At about 5:30 a.m. on that day after he crossed the county line into Merrick County, Nebraska, the front end of his automobile came into collision with the rear end of a truck owned by, and at the time used in the business of, the defendant and operated by Marvin Rogers, an employee of the defendant, in a southerly direction on State Highway No. 14. There is some evidentiary dispute about time but that is of no real importance. It is not disputed that the happenings involved occurred before daybreak.

It is the contention of the plaintiff that the collision came about as the result of the negligence of Rogers which negligence was attributable to the defendant. No contention is made that the defendant is not liable if Rogers was negligent. It is the further contention of the plaintiff that as results of the collision he was injured; he became obligated for doctor and hospital bills; and his automobile was damaged, by reason of all of which he suffered damages.

The plaintiff, to the extent necessary to state here, charged that the negligence of Rogers was as follows:

That the truck was being operated on the highway at night without lights; that Rogers failed to maintain a proper lookout; that he failed to yield the right-of-way; that he failed to yield one-half of the highway to the plaintiff; that he failed to signal his intention to turn left across the highway; and that he failed to exercise ordinary and reasonable care in the operation of the truck on the highway, and particularly in the light of his knowledge of the truck's equipment.

The defendant by answer denied that Rogers was guilty of any negligence, and charged affirmatively that any injury or damage suffered or sustained by plaintiff was the result of his own negligence. The charges of negligence against the plaintiff, which require mention, summarized are: That he operated his automobile at a high, dangerous, and unlawful rate of speed; that he failed to yield the right-of-way; that he failed under the circumstances to have his automobile under proper control; that in overtaking the truck he failed to pass to the left; that he failed to give a signal by use of his horn of his intention to pass; that he failed to apply his brakes; that he failed to have his automobile under such control as to be able to stop within the range of his vision; that he failed to swerve so as to avoid a collision; and that he failed to keep a proper lookout.

The case was submitted to the jury by instructions which outlined the issue of negligence tendered by the plaintiff, the denial of the defendant, and his affirmative defense which in essence is the defense of contributory negligence, which defense, if supported by sufficient evidence, required the court to instruct on the rules relating to the doctrine, which apply in this jurisdiction, controlling the comparison of negligence or comparative negligence.

As grounds for reversal the brief of appellant contains numerous assignments of error. The following is a substantial embodiment of the first five and the last three of these assignments: The trial court erred in refusing

to direct a verdict in favor of the plaintiff and against the defendant on the question of liability in consequence of which it was error to submit the question of contributory negligence of the plaintiff and the rules relative to the comparison of negligence to the jury. The theory of this is that there is no evidence from which a jury could find that the plaintiff was guilty of negligence which caused or proximately contributed to the collision and that Rogers was guilty of negligence which was the sole proximate cause. This requires an examination of the entire evidence bearing on that question.

It is pointed out here that this determination must depend upon the testimony of both parties bearing on the subject. In other words, as applied to this case, if a jury could properly have found from the evidence of the plaintiff, or of the defendant, or both of them, that the plaintiff was guilty of negligence causing or proximately contributing to the collision the decision herein must be against him on the stated embodiment of assigned errors.

A controlling rule is the following: "If the defendant pleads that the plaintiff was guilty of contributory negligence the burden is upon him to prove that defense and this burden does not shift during the trial of the case. However, if the evidence adduced by the plaintiff tends to prove that issue the defendant is entitled to receive the benefit thereof and the court must instruct the jury to that effect." Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394. See, also, Krepcik v. Interstate Transit Lines, 154 Neb. 671, 48 N. W. 2d 839; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250; Price v. King, 161 Neb. 123, 72 N. W. 2d 603.

Another controlling rule is the following: "Where different minds may reasonably draw different conclusions from the evidence, or there is a conflict in the evidence as to whether or not negligence or contributory negligence has been established, the question is for the jury." Price v. King, *supra*. See, also, Becks v. Schus-

ter, 154 Neb. 360, 48 N. W. 2d 67; Young v. Stoetzel, 159 Neb. 624, 68 N. W. 2d 186; Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Larsen v. Omaha Transit Co., 165 Neb. 530, 86 N. W. 2d 564.

The record discloses that the plaintiff was the only eyewitness to the actual collision. Rogers was the driver of the truck and was possessed of some firsthand information but his view of the collision was cut off by the body of the truck. On direct examination the plaintiff testified substantially that about 4:30 a.m. he left home in a 1947 Chevrolet automobile, which he had purchased about 2 weeks before for $35, and drove south on the highway, which was black-top; that the highway was straight and unobstructed; that he was proceeding at 40 to 45 miles an hour when he came over a hill; that he came upon the truck, hit his brakes, slowed up, and proceeded to pass; that when he got about even with the tailgate of the truck, the truck started cutting left across the white line down the center of the road; that the truck came clear over the white line; that he hit his brakes and came back to the right side as did also the truck, and the collision took place; that the truck had no lights and was dirty; that he had his own headlights, which were good, on bright; that his brakes were good and his horn was good; that he had the truck in view at all times as he approached and attempted to pass; that the driver of the truck gave no signal at any time; that the truck had no rear-view mirror and no license; and that the driver of the truck said he was attempting to turn into a pasture on the east or left side of the highway to feed cattle.

On cross-examination the plaintiff testified that he had stated previously that he was from 50 to 75 feet away when he saw the truck but that he was from 100 to possibly 150 feet away; that when he saw the truck he was going 35 to 40 miles an hour; that he did not know if he sounded his horn; that when he first saw the truck it was on the right side of the road as was also the

plaintiff; that he slowed down, moved over to the left or east side, speeded up, and proceeded to pass the truck which was going real slow, about 10 to 15 miles an hour; that he was going about 40 miles an hour when he got even with the tailgate of the truck at which time he was over in the east or left lane; that he let up on the footfeed, hit his brakes, and came back into the west lane as did also the truck; that when the impact took place two wheels of his automobile were on the black-top and two in the ditch; that the front end of the automobile came in contact with the right rear wheel of the truck; and that at that time he was moving at the rate of about 30 to 35 miles an hour. On redirect examination he testified that there was no room to pass the truck to the left.

The plaintiff testified that he hit his brakes a time or two but did not state that he tried to stop. He testified in effect that on approaching the truck he traveled down the right side of the road on which side the truck had been moving; that he then turned to the left side and proceeded until he was about even with the tailgate of the truck which was going 10 to 15 miles an hour but could not pass on that side because the truck had moved over; that he then turned to the right to pass but could not do so because the truck had also moved over to the right; and that during all of which time he was driving at speeds of from 30 to 40 miles an hour.

There is evidence on behalf of the plaintiff that the black-top on the highway was 25 feet 6 inches in width; that the collision occurred about 24 feet west of the east line and 53 feet north of a way into a pasture which Rogers intended to enter with the truck; that plaintiff's automobile stopped at the point of collision; and that there were skid marks made by plaintiff's automobile starting from a point 91 feet north of the point of collision in the middle of the road and extending toward the west side of the road.

Rogers was a witness for the defendant and on direct

examination in pertinent part he testified in substance that he was the driver of the truck; that the truck had no rear-view mirror; that when he wanted to look back he stepped outside and looked back while sitting on the edge of the seat; that this was necessary, but not difficult, because the body of the truck is wider than the front or cab; that the maximum speed is 10 miles an hour; that he was first aware of plaintiff's automobile when he started turning the steering wheel east, at which time he stepped out and saw the lights, after which he turned back to the right; that at that time he was about a foot across the center line of the highway; that when he saw the lights they were at least a half block away; that the automobile was at that time on the left side of the road; that he moved about 50 feet between the time he saw the lights and the time the collision occurred; that he could see that the car coming was trying to pass; that its speed was between 45 and 50 miles an hour; that he was clear over to the right or west side when the collision occurred; and that the speed of the truck as it was returning to the right side was about 5 to 10 miles an hour.

On cross-examination he testified that the truck was about 6 feet wide and that the cab was narrower; that he intended to make a left turn across the highway; and that he gave no signal of his intention. On redirect examination he said the left side of the truck body extended out about a foot farther than the end of the seat.

On this evidence this court is first required to determine the question of whether or not the plaintiff was entitled to a directed verdict on the ground that it was conclusively shown that Rogers was guilty of negligence which was the sole and proximate cause of the collision, and that therefore there was no question of negligence for submission to a jury. If this first question is to be decided adversely to the plaintiff then it becomes necessary to ascertain whether or not the court properly instructed the jury on the issue of negligence and whether

or not the verdict of the jury properly responded to the instructions.

Neither the form nor particular substance of any instruction relating to negligence is attacked. The attack is only upon the propriety of the giving of instructions in the light of the evidence.

The determination of whether or not a motion for directed verdict should be granted must be made in the light of the following: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Roberts v. Carlson, 142 Neb. 851, 8 N. W. 2d 175. See, also, Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614; Gutoski v. Herman, 147 Neb. 1001, 25 N. W. 2d 902; Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678.

If a record is examined in the light of the foregoing rule and it is found that there is conflicting evidence on an issue of fact a verdict may not be directed but the issue must be submitted to a jury for determination. See, Stoffel v. Metcalfe Constr. Co., 145 Neb. 450, 17 N. W. 2d 3; Gutoski v. Herman, *supra;* Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832; Norman v. Sprague, 167 Neb. 528, 93 N. W. 2d 637.

In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, that is, every controverted fact must be resolved in his favor and he is entitled to have the benefit of every reasonable inference which may be deduced therefrom. See, Clouse v. St. Paul Fire & Marine Ins. Co., 152 Neb. 230, 40 N. W. 2d 820, 15 A. L. R. 2d 1008; Norman v. Sprague, *supra.*

As pointed out the verdict in this case was for the defendant. It was as follows: "We, the Jury duly im-

panelled and sworn in the above entitled cause do find in favor of the defendant and that plaintiff has no cause of action."

Under the terms and content of the instructions the jury, subject to the existence or nonexistence of evidence and the determination of the weight which the jury concluded that it was entitled to receive, was empowered to return a verdict the effect of which was to say that the negligence of Rogers was the sole proximate cause of the collision, and accordingly the plaintiff was entitled to recover his entire damages; or that the plaintiff had failed to prove that Rogers was guilty of negligence, in which event the plaintiff would be entitled to no recovery; or that Rogers was guilty of gross negligence and the plaintiff was guilty of negligence which was slight by comparison, which would entitle the plaintiff to a verdict with the amount of recovery reduced on the basis of comparison; or that Rogers was guilty of gross negligence and the plaintiff was guilty of negligence more than slight by comparison, in which event the plaintiff could not recover; or that Rogers was guilty of negligence less than gross by comparison and the plaintiff was guilty of slight negligence, in which event the plaintiff could not recover.

In view of the fact that the verdict is general in its terms it is not possible to ascertain to which of these propositions the jury intended that its verdict should respond. It could have responded to any one or more of them, depending upon whether or not there was evidence or lack of evidence for support of the verdict.

In an approach to this it must be borne in mind that the function of this court is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of the jury in the exercise of its function as the trier of the facts. See, Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723; Danner v. Walters, 154 Neb. 506, 48 N. W. 2d 635; Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643; Jacobsen v. Po-

land, 163 Neb. 590, 80 N. W. 2d 891; Eden v. Klaas, 166 Neb. 354, 89 N. W. 2d 74.

Referring back now to the summary of evidence it is recalled that Rogers said that he was never more than about a foot over the middle line of the black-top and from that point he turned back to the right after seeing the lights on the plaintiff's car as much as a half block back at which time plaintiff was attempting to pass. If this was true there was a width of around 11 feet of black-top between the truck and the east edge of the black-top. The plaintiff said that he saw the truck when it was 100 feet, possibly 150 feet, away and that it passed entirely east of the middle line of the road and into the lane whereon he was seeking to pass, which lane he followed until he was about even with the tailgate of the truck. The plaintiff gave no testimony that he attempted to stop his car so as to avoid a collision. There is evidence of skid marks made by plaintiff's car starting in the middle of the road 91 feet back of the point of collision and extending to the right into the west lane. From this of course it could be inferred that plaintiff's car was never wholly in the east lane from the time it was 91 feet back of the point of collision. From this it becomes clear that there were facts as to the cause of collision which were materially in dispute.

Involved with the material facts to be considered herein are certain principles which define the duties and obligations of operators of automobiles on the highways. With particular reference in this case to the duties and obligations of the plaintiff at the time and place and under the circumstances disclosed by the record, the plaintiff was under a duty to observe the following rules:

"The law requires a driver of a motor vehicle to have his car under such reasonable control as will enable him to avoid a collision with other vehicles, assuming that the drivers thereof will exercise due care.

"The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even

though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance." Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559. See, also, Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290.

The plaintiff's duty in relation to passing the truck was to pass to the left at a safe distance. See § 39-7,109, R. R. S. 1943.

On the record made and under the cited rules it becomes clear that on none of the theories contained in the embodiment of assignments of error is the plaintiff entitled to prevail. The assignments are predicated on the basic theory that there was no question of negligence or of contributory negligence for submission to the jury, but on the contrary, on the evidence it was the duty of the district court and is now the duty of this court to hold as a matter of law that negligence of Rogers was the sole proximate cause of the collision.

The record justifies no such conclusion. From the evidence the jury, in the exercise of its function and in the light of the duties and obligations of the plaintiff under law, could have found by the verdict returned that in the exercise of ordinary care the plaintiff could have passed the truck to the left and avoided any collision, and in his failure so to do his negligence was the sole proximate cause of the collision. It could have found that Rogers was guilty of gross negligence which was a proximate cause of the collision and the plaintiff was guilty of contributory negligence which was more than slight. Further it could have found that Rogers was guilty of negligence less than gross which was a proximate cause of the collision and the plaintiff was guilty of slight negligence which contributed thereto.

As was indicated the theory which was employed by the jury is not ascertainable. The duty of this court however is not to ascertain the theory but to ascertain whether or not there was evidence sufficient to sustain the verdict of the jury on one or more of these theories.

As has been pointed out there was evidence from which the jury could have found that the plaintiff was guilty of negligence which was the proximate cause of the collision or that he was guilty of contributory negligence which proximately contributed thereto. The court did not therefore err in overruling the motion of the plaintiff for a directed verdict in his favor on the issue of negligence, and accordingly and for the same reasons it did not err in overruling the motion for new trial. Also for the same reasons the court did not err in overruling the motion for judgment notwithstanding the verdict. A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for a directed verdict which motion should have been sustained because of a want of evidence. See, § 25-1315.02, R. R. S. 1943; Hamilton v. Omaha & C. B. St. Ry. Co., 152 Neb. 328, 41 N. W. 2d 139; Pavlicek v. Cacak, 155 Neb. 454, 52 N. W. 2d 310; Borcherding v. Eklund, *supra*. This statutory provision and these cases declare the conditions under which a motion for judgment notwithstanding the verdict shall be sustained. They also make clear the proposition that when these conditions are not met, then it is improper and erroneous to sustain such a motion.

The conclusion reached is that there was no error in the submission of the issues as to negligence to the jury and nothing has been presented which impairs the validity of the verdict returned by the jury thereon.

There is but one other assignment of error which requires specific mention. This is true since all others refer either to the subject of damages, which subject is eliminated by the conclusion reached concerning the issues of negligence and the verdict of the jury, or they

are so indefinite and uncertain as not to permit of consideration.

The one requiring comment asserts that the court erred in submitting the "sudden emergency" doctrine to the jury. The assignment is not referred to in argument and is supported by no proposition of law. In this light consideration of it is not required herein.

For the reasons appearing herein it appears that the judgment of the district court should be and it is affirmed.

AFFIRMED.

IN RE ESTATE OF ADDIE THOMPSON, DECEASED. CLAUD E. TODD, EXECUTOR OF THE WILL OF ADDIE THOMPSON, DECEASED, ET AL., APPELLEES, V. COUNTY OF BOX BUTTE, STATE OF NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLANTS.
99 N. W. 2d 245

Filed November 20, 1959. No. 34646.

1. **Statutes.** The rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording rests on a presumption of legislative intention which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted, and the presence or lack of other indicia of intention.
2. ———. Where one state or sovereignty adopts a statute of another state or sovereignty, which has already received a known and definite construction in its courts, it is presumed to adopt the construction thus given.
3. ———. The essential elements upon which the presumption is based is, that it has already received a known and definite construction. The construction must have been fixed and uniform and must have been so long established as to have been known, or so that it reasonably might have been known, to the Legislature adopting it.
4. ———. The meaning of a statute cannot be considered as settled by judicial construction, so as to carry that construc-

tion with it to the jurisdiction where it is adopted, when it has not been so settled by the highest judicial authority which can pass upon the question.

5. ———. The fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself.
6. ———. It is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language.
7. ———. Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning.
8. ———. The court cannot read a meaning into statutes that is not warranted by the legislative language.
9. ———. Neither is it within the province of a court to read plain, direct, and unambiguous language out of a statute.
10. **Statutes: Taxation.** Statutes exempting property from taxation are to be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute.
11. ———: ———. The same rule applies to a statute exempting certain legacies from an inheritance tax.
12. ———: ———. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statute.
13. **Statutes.** Courts should give to statutory language its plain and ordinary meaning.

APPEAL from the district court for Box Butte County: EARL L. MEYER, JUDGE. *Reversed and remanded with directions.*

Gantz, Hein & Moran and *Lawrence E. Mitchell,* for appellants.

Reddish & Fiebig and *H. Alan Curtiss,* for appellees.

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

SIMMONS, C. J.

This appeal presents the question of whether an inheritance tax is payable under the rates provided in section 77-2004, R. R. S. 1943, or in section 77-2006, R. R. S. 1943.

The facts are not in dispute. Ella Thompson was born the daughter of Addie and Eugene E. Thompson.

Ella was married to Claud E. Todd in 1927. She died in 1932, being at all times from 1927 to the date of her death, the wife of Claud E. Todd. Claud E. Todd married Eldora in 1936 and they have remained husband and wife since that date.

By will dated May 31, 1957, Addie Thompson devised and bequeathed a substantial part of the residue of her estate to Claud E. Todd and Eldora Todd.

Addie Thompson died November 8, 1957.

The county court held that the inheritance tax was payable under the provisions of section 77-2006, R. R. S. 1943. The district court on appeal held that the tax was payable under the provisions of section 77-2004, R. R. S. 1943. The counties involved are Box Butte and Sheridan. They appeal here.

We reverse the judgment of the trial court and remand the cause with directions to hold the tax payable under the provisions of section 77-2006, R. R. S. 1943, and render judgment accordingly.

Section 77-2004, R. R. S. 1943, provides in part: "In the case of a father, mother, husband, wife, child, brother, sister, *wife or widow of a son, husband of a daughter,* child or children legally adopted as such in conformity with the laws of the state where adopted, any lineal descendant born in lawful wedlock, or any lineal descendant legally adopted as such in conformity with the laws of the state where adopted; or to any person to whom the deceased for not less than ten years prior to death stood in acknowledged relation of a parent; * * *." (Emphasis supplied.)

Section 77-2005, R. R. S. 1943, provides in part: "In the case of an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same, * * *."

Section 77-2006, R. R. S. 1943, provides in part: "In all other cases * * *."

The tax is a progressive one in amount depending upon which section is applicable. It is obvious that

those situations that do not fall within the provisions of sections 77-2004 or 77-2005, R. R. S. 1943, fall within the provisions of section 77-2006, R. R. S. 1943.

At the outset we are presented with the contention that we are bound by the construction placed upon a like statute in New York by In re Ray's Estate, 13 Misc. 480, 35 N. Y. S. 481, which held that: "Laws 1892, c. 399, § 2, exempting from the transfer tax a legacy to the 'husband of a daughter' of testator, includes the husband of a deceased daughter, though he has remarried."

This contention proceeds on the statement contained in In re Estate of Dowell, 149 Neb. 599, 31 N. W. 2d 745, that our "statute was taken" from New York; and on the fact that the decision in In re Ray's Estate antedated the adoption of our inheritance tax statutes. There is a statement, however, in In re Estate of Sanford, 90 Neb. 410, 133 N. W. 870, 45 L. R. A. N. S. 228, that our act is almost a literal copy of the Illinois act. Judge Fawcett in dissenting states that it was taken from New York's act of 1887.

It appears that New York first passed an inheritance tax law in 1885. Laws of New York 1885, c. 483, p. 820. The 1887 act was an amendment of the 1885 act. Laws of New York 1887, c. 713, p. 921. The act in section 1 provided a tax on "all property" passing by will or intestacy to any persons "other than to or for the use of his or her father, mother, * * * the wife or widow of a son, or the husband of a daughter, * * *."

It is interesting to note that in its original 1885 act (Laws of New York 1885, c. 483, § 2, p. 820) in setting out procedures where there was an estate for life or years involved, the statute referred only to "widow of a son." This provision does not appear to have been retained in the 1887 act. Laws of New York 1887, c. 713, p. 921. It does appear, however, in the Illinois act (Laws of Illinois 1895, § 2, p. 302), and in our 1901 act. Laws 1901, c. 54, § 2, p. 415. Illinois adopted an

inheritance tax act in 1895. Laws of Illinois 1895, p. 301. In it appears language found in the 1885 New York act and not in the 1887 New York act as above noted.

It is interesting also to note that Illinois added a provision comparable to our section 77-2005, R. R. S. 1943. Laws of Illinois 1895, § 1, p. 301. As it appears in our original act, Laws 1901, c. 54, p. 414, the language of our original act of 1901 appears to be substantially a copy of the Illinois act of 1895.

In People v. Beckers, 413 Ill. 102, 108 N. E. 2d 5, the Supreme Court of Illinois stated that its act, in part at least, was taken from the New York act of 1885. A comparison of the acts sustains that conclusion.

So an accurate statement, based on this research, would appear to be that we adopted substantially the Illinois act after Illinois had adopted a modification of New York's 1885 act.

But the quest for a source of the statute need not stop there. There were nine states that adopted inheritance tax laws before the New York act. Pennsylvania in 1826 was the first to do so. Pinkerton and Millsaps, Inheritance and Estate Taxes, c. II, § 14, p. 10.

Purdon's Digest (Brightly 9th Ed.), 1700-1861, page 148, sets out the Pennsylvania act. Repeatedly in the New York act language is used that is the same or quite comparable to the Pennsylvania act. It is apparent that whoever drafted the New York act studied the Pennsylvania act or one of comparable language. It is quite certain that before New York adopted its act the Supreme Court of Pennsylvania had construed its act as set out later herein. See Commonwealth v. Powell, 51 Pa. 438.

The general rule to which the appellees resort is one well established in this state. It is stated in James Forrester & Co. v. Kearney Nat. Bank, 49 Neb. 655, 68 N. W. 1059, as follows: "Where the legislature adopts the statute of another state, it likewise adopts the judi-

cial construction which it had already received by the highest court in such state."

In some of our decisions we use the expression "courts." We did so in In re Estate of Dowell, *supra*. We used "highest courts" in International Milling Co. v. North Platte Flour Mills, 119 Neb. 325, 229 N. W. 22. In Magner v. Kinney, 141 Neb. 122, 2 N. W. 2d 689, we referred to the "settled construction" of the foreign jurisdiction. In State v. Boatman, 142 Neb. 589, 7 N. W. 2d 159, 144 A. L. R. 585, we said: "We quite agree that in construing a statute borrowed from a foreign state there is a presumption that the legislature adopted it with approval of all interpretations given it by the court of last resort of that state."

"* * * when a statute has been adopted from another state, ordinarily the construction given prior to its adoption by the courts of that state will be followed in the adopting state, in the absence of any indication of a contrary intention on the part of the Legislature. The rule is subject to the qualification, however, that a construction of such a statute by the state from which it was adopted is entitled to no greater consideration than previous decisions of this court, and will be rejected for reasons which would require the overruling thereof had it been first adopted in this state." Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397.

The above is not intended to be an all-inclusive summary of our decisions.

The Supreme Court of the United States has recently stated the rule as follows: "The 'general rule that adoption of the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording * * * rests on a presumption of legislative intention * * * which varies in strength with the similarity of the language, the established character of the decisions in the jurisdiction from which the language was adopted and the presence or lack of

other indicia of intention.'" Yates v. United States, 354 U. S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356.

In Smith v. Baker, 5 Okl. 326, 49 P. 61, the rule was stated as follows: "* * * where one state or sovereignty adopts a statute of another state or sovereignty, which has already received a known and definite construction in its courts, it is presumed to adopt the construction thus given. * * * The essential elements upon which the presumption is based is, that it has already received a known and definite construction. The construction must have been fixed and uniform and must have been so long established as to have been known, or so that it reasonably might have been known, to the legislature adopting it. * * * The meaning of a statute cannot be considered as settled by judicial construction, so as to carry that construction with it to the jurisdiction where it is adopted, when it has not been so settled by the highest judicial authority which can pass upon the question."

It should be stated that reported decisions of trial and intermediate appellate courts are to be considered for whatever persuasive merit they deserve.

In re Ray's Estate, *supra,* was decided in July 1895. It was published in the New York Supplement Reports in 1896. Our inheritance tax law was enacted in 1901 and approved April 1, 1901. Laws 1901, c. 54, pp. 414, 422.

Judicial credulity does not require us to presume that our Legislature less than 5 years after the publication of the decision of In re Ray's Estate, *supra,* knew or should have known of that isolated decision of a surrogate's court in one New York county and intended to adopt the construction there placed on the act. Likewise that one isolated decision cannot be held to have established a known and definite construction of the act. Obviously it was not even a solitary construction of the highest judicial authority of New York.

We accordingly put aside In re Ray's Estate, *supra,*

as not having any controlling presumptive weight.

We have held that the fundamental principle of statutory construction is to ascertain the intent of the Legislature, and to discover that intent from the language of the act itself. It is not the court's duty nor within its province to read a meaning into a statute that is not warranted by legislative language. Chicago & N. W. Ry. Co. v. City of Seward, 166 Neb. 123, 88 N. W. 2d 175.

We have also held that: "Where words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning, and the court cannot read a meaning into statutes that is not warranted by the legislative language. Neither is it within the province of a court to read plain, direct, and unambiguous language out of a statute." Heppe v. State, 162 Neb. 403, 76 N. W. 2d 255.

The language of our statute here involved is the meaning of the phrase "husband of a daughter." It must be contrasted with "wife or *widow* of a son."

It will be noted that section 77-2004, R. R. S. 1943, relates to those "immediate relatives" as stated in the catch-phrase heading, those who are related by blood, or consanguinity; also those where the relationship depends upon marriage; and those legally adopted or those to whom the deceased stood in the relationship of a parent.

Section 77-2005, R. R. S. 1943, provides for a more burdensome tax in the case of named remote relatives by blood or legal adoption. This section incorporates no one because of a marriage relationship. Finally section 77-2006, R. R. S. 1943, applies "In all other cases * * *."

Sections 77-2004 and 77-2005, R. R. S. 1943, set out those certain named parties who are excluded from the heavier tax of section 77-2006, R. R. S. 1943.

The rules of construction applicable here are: "* * * statutes exempting property from taxation should be

strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute. * * * The same rule should be applied to a statute exempting certain legacies from an inheritance tax. To be exempt from an inheritance tax, a legacy must come within the strict letter of the statute." In re Estate of Rudge, 114 Neb. 335, 207 N. W. 520. See, also, In re Estate of Robinson, 138 Neb. 101, 292 N. W. 48.

"Courts should give to statutory language its plain and ordinary meaning." Foote v. County of Adams, 163 Neb. 406, 80 N. W. 2d 179.

It follows that Mr. Todd, to escape the higher tax burden of section 77-2006, R. R. S. 1943, must bring himself within the "husband of a daughter" classification. That he occupied that relationship from 1927 to 1932 is patent. That he did not occupy it after 1932 seems patent were it not for decisions upon which Mr. Todd relies. Accordingly we go to those decisions.

We take up first In re Ray's Estate, *supra*. The author of the opinion frankly states that he prepared the first two-thirds of the opinion before discovering that the tax exemption claimant had remarried and was living with a second wife. The first part of the opinion was written on the supposition that the testatrix and beneficiary were living together as mother and son. The opinion proceeds on the reasoning that "widower" would be a better designation of the claimant than "husband" and that "husband" or "surviving husband" means the same as widower. It is then argued that because the Legislature did not restrict the exemption to a husband whose wife was living that claimant came within the act. This reasoning assumes that the Legislature was required to exclude the claimant by specific language. On the contrary in this state he must show that he is included within the language of the exemption, for otherwise he comes within the "In all other cases" provision of section 77-2006, R. R. S. 1943.

The opinion next states that because the statute says "'wife' or 'widow' of a son" and says only "husband of a daughter" it was intended that the husband of a daughter was entitled to the exemption even though the daughter be dead because "both should be equally entitled to be exempted * * *." The opinion suggests that "no satisfactory reason can be urged" otherwise. Possibly the reason may be related to the ages-old promise of Ruth to Naomi: "* * * thy people *shall be* my people, * * *." Book of Ruth, c. 1, verse 16. But putting that aside, it is patent that the matter of the exemptions, to whom they apply, and the amount of the exemptions, is a legislative matter and not a judicial prerogative. The court in In re Ray's Estate, *supra,* treated it as a judicial prerogative.

After having found out that the claimant had remarried, the court arrived at the conclusion that the statute not having made remarriage a bar it did not intend to do so. Here again the court reverses the burden. Under our rules of construction the claimant must bring himself within the exemption. Our Legislature was not saying who was not exempt, but who was exempt from the higher tax burden of sections 77-2005 and 77-2006, R. R. S. 1943.

We have given the Ray case far more space than its merit deserves. We have done so because of the reliance that other courts and claimants here put upon it. We hold that this court is not bound by it nor are we persuaded that it is a sound precedent.

We have heretofore traced language comparable to our statutes back to the much earlier law of Pennsylvania. We now call attention to Commonwealth v. Power, *supra,* decided in 1866. There the statute provided exemptions to the "wife or widow of a son." Section 77-2004, R. R. S. 1943, uses this phrase. The court with reference to the meaning of widow said: "The word is so entirely and exclusively descriptive of an unmarried condition, having once been married, that

any other sense would be figurative." The court held: "To assert successfully a privilege or exemption against a general law, the party must bring him or herself clearly within the class exempted; * * *." That is our rule. The court held that a widow of a son, who remarried during the life of the testatrix (mother of son), was not entitled to the exemption. Here to sustain claimant it is necessary to first find that "husband of a daughter" includes "widower of a daughter" and that widower of a daughter includes a widower who has remarried.

The above is a decision of the Supreme Court of Pennsylvania and antedates the New York statute by 20 years and the New York decision by more than 25 years. If we are to follow the prior construction rule herein discussed, it would seem more reasonable to presume that our Legislature knew of the decision of the Supreme Court of Pennsylvania than that it knew of the then recent decision of a surrogate's court in a New York county. We do not extend the presumption to either case.

In re Rhead's Estate, 288 Mich. 220, 284 N. W. 706, involved the construction of the term "widow of a son." The widow had remarried. The court held that the term "widow" refers to the person and not the state or condition of the woman. The court construed the term to mean widow of a son who was deceased. The case is not precisely the one which we have before us. We are unable to follow the reasoning of the court. Clearly a "person" in the "state or condition" described in the statute must exist before the exemption applies.

In re Atherton's Estate, 333 Mich. 193, 52 N. W. 2d 660, involved the husband of a daughter who had remarried. The court there put aside In re Rhead's Estate, *supra,* as not materially helpful. The court following In re Ray's Estate, *supra,* and largely its reasoning, reached the conclusion that "husband of a daughter" included the widower of a deceased daughter. The court accepted the prior interpretation of the New York stat-

ute rule. The court refused to follow Canal Nat. Bank of Portland v. Bailey, 142 Me. 314, 51 A. 2d 482 (to which we refer later), because there the decision "seems to have turned" upon the fact that the claimant had remarried (as claimant did here) before the testator's death and therefore was not the "widower" of a daughter. To that extent the decision is in accord with the conclusion we reach here. The case finally turned on a construction that "husband" included "widower." If that be true, then "wife" includes "widow" and the term "or widow" must be held to be surplusage in our act. The Michigan court did not comment on that situation. We commend a reading of the dissenting opinion as being more in accord with our rules of construction and our construction of our act.

Claimant relies on Clay v. Edwards, 84 N. J. L. 221, 86 A. 548, which held that "husband of a daughter" meant husband of a living or deceased daughter and that subsequent remarriage did not affect the situation. The court relies almost entirely on the prior construction rule and In re Ray's Estate, *supra*. We see no reason to discuss it more.

Claimant relies also on In re Waters, 63 Ohio L. Abs. 34, 101 N. E. 2d 815. This is a decision of the probate court of Hamilton County. There the son of a testatrix predeceased the testatrix. His widow remarried before the death of the testatrix. The court seemed to recognize the validity of Tax Commission of Ohio v. Hirsch, 31 Ohio App. 325, 167 N. E. 400, to which we refer later. The case seems to have been decided on the difference in the act between "wife or widow of a son" and "husband of a daughter." We do not consider it to be of controlling persuasive force.

Claimant relies also on People v. Snyder, 353 Ill. 184, 187 N. E. 158, 88 A. L. R. 1012. There the language of the statute is the same as ours. There also the daughter died before the testator. Claimant, the husband, had not remarried. The court, pointing out that Illinois got

its statute from New York, applied the rule of prior construction by New York and held that the words "husband of the daughter" meant both "husband of a living daughter and husband of a deceased daughter." The court followed a rule of strict construction in favor of the taxpayer and not a rule, such as ours, in favor of strict construction against the exemption.

Appellants here rely on Canal Nat. Bank of Portland v. Bailey, *supra*. There the court followed a statutory rule of construction not unlike our rule as quoted from Foote v. County of Adams, *supra*. There the statute read "husband or widower of a daughter." The widower had remarried prior to the death of the testator. The court held that "a man ceases to be a widower when he marries again." That holding appears to be correct. The court referred to In re Ray's Estate, *supra*, and held that it disregarded well-established and accepted definitions. The judgment went against the claimant.

Calvert v. Fisher (Tex. Civ. App.), 259 S. W. 2d 944, involved a statute that referred to "wife of a son" and "husband of a daughter." It did not use the term "widow," as does our statute. In previous decisions the court had followed the reasoning that affinial relationships created by marriage survive the dissolution of such marriage by death, but do not survive if the marriage is dissolved by divorce. The court held that when the widower remarried he dissolved the affinial relationship created by his first marriage. In doing so the court refused to follow the authorities relied upon by claimant here and relied upon and followed Canal Nat. Bank of Portland v. Bailey, *supra*.

In Cahn v. Calvert (Tex.), 321 S. W. 2d 869, the married daughter of the settlor of a trust died. Her widower remarried. He was then divorced. The settlor of the trust then died. The widower claimed that he was the "husband of a daughter." The court held that he lost his status as the husband (widower) of a daughter by remarriage and that dissolution of the marriage by divorce

did not restore his former status. The court said: "A contrary holding would not simply involve giving the statute a liberal construction; it would involve a taking of liberties with the statute which its words all but prohibit."

We next refer to Tax Commission of Ohio v. Hirsch, *supra.* There the court traced Ohio's statute to New York and refused to follow the New York construction, pointing out that the Legislature was advised to include the term "widower of a daughter" in the language of the act. The court then pointed out: "We are asked to hold that the Legislature intended in the term 'husband of a daughter' to include both husband of a deceased daughter and husband of a living daughter, although in a previous line of the same section the Legislature specifically states, as applicable to the spouses of sons, 'the wife or widow of a son.' "

This is the exact situation presented by our statutes. The court refused to construe the language to include widower of a daughter.

We direct attention to our decision in Zimmerer v. Prudential Ins. Co., 150 Neb. 351, 34 N. W. 2d 750. In that case Judge Landis had been the brother-in-law of a litigant. Mrs. Landis had died prior to the litigation. The question was whether Judge Landis was related to Mrs. Landis' brother by affinity within the fourth degree. We held: "Affinity is the relationship which arises as a result of the marriage contract between one spouse and the blood relations of the other, in contradistinction from consanguinity or relationship by blood.

"Clearly, when Judge Landis married Miss Cattle, the relationship of affinity arose between him and Robert T. Cattle, her brother. In would seem that when that marriage was dissolved by the death of Mrs. Landis, the relationship of affinity with Robert T. Cattle likewise was dissolved, for the relationship by affinity rests upon a subsisting marriage, not a dissolved one. * * * The plain meaning of the word 'affinity' as used here implies

a relationship that begins and ends with the beginning and ending of the marriage relation. * * * To hold that Judge Landis was disqualified under the statute would be to add a disqualification that is not there. We are neither inclined nor authorized so to do."

Consistent with these decisions we hold that the relationship by affinity between Mr. Todd and Mrs. Thompson was dissolved by the death of Mrs. Thompson's daughter who was Mr. Todd's wife, and that the tax here is to be calculated on the basis of the rates provided in section 77-2006, R. R. S. 1943.

Claimant is concerned that such a holding will render meaningless the terms "husband" and "wife" in section 77-2004, R. R. S. 1943. He argues that where either dies there is no "wife" or "husband" to receive the benefits. We anticipate no difficulty with that contention should it be presented so as to require a determination of it.

The judgment of the trial court is reversed and the cause is remanded with directions to render a judgment affirming the judgment of the county court.

REVERSED AND REMANDED WITH DIRECTIONS.

GERALDINE HALSTED, APPELLEE, V. LAWRENCE HALSTED, APPELLANT.

99 N. W. 2d 384

Filed November 20, 1959. No. 34683.

1. **Judgments.** A judgment lien on real estate attaches only to the actual interest of the judgment debtor therein and is subject to all the then existing equities thereto, whether of record or not.
2. **Frauds, Statute of.** An oral agreement purporting to establish an express trust in real estate is within the statute of frauds.
3. ———. Where such an oral contract has been established by evidence which is clear, convincing, and satisfactory, it will be enforced by a court of equity when it has been partly performed.
4. ———. Where part performance is relied on to enforce an oral

agreement otherwise barred by the statute of frauds, the acts alleged to constitute part performance must be referable solely to the contract sought to be enforced, and unequivocally indicate the existence of the contract alleged, and no other.

5. ———. Acts which are alleged to constitute part performance of an oral agreement otherwise barred by the statute of frauds must be established by a preponderance of the evidence which is clear, convincing, and satisfactory.

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

Baskins & Baskins, for appellant.

Sam S. Diedrichs, for appellee.

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

CARTER, J.

This is an application to obtain the release of the lien of a child-support judgment on certain real estate described in the application. The trial court denied the prayer of the application and the applicant has appealed.

The evidence shows that Lawrence Halsted was granted a divorce from Geraldine Halsted on July 28, 1943. The decree directed the payment of $10 a month by Lawrence Halsted for the support of David Henry Halsted, a 1-year-old child of the parties whose custody was granted to Geraldine Halsted. An amount in excess of $1,100 remains due and unpaid on this support judgment which appears as a judgment lien on the real estate described in the application.

The evidence shows that the real estate consisted of a house and lot in Hershey, Nebraska, which was owned by the parents of Lawrence Halsted prior to 1947. They occupied the property as a residence until their deaths in 1954. On September 5, 1947, the parents of Lawrence Halsted conveyed the property to him by warranty deed without any restriction therein for a consideration of $1 and other valuable consideration.

Lawrence Halsted is the only witness who testified at the trial. His testimony was that after some discussion of the matter his parents deeded the property to him with the oral understanding that the parents were to live in the property until their deaths and keep the taxes paid up thereon, and after their deaths the property was to be sold and the proceeds used in payment of the parents' debts, expenses of last sickness, funeral expenses, and the cost of grave markers. His testimony is that pursuant to this understanding he sold the property for $1,500 by contract of sale on November 27, 1954, and that all of the sale price has been paid except $217.34. He testified that he has paid taxes on the property in the amount of $231.83 and expenses of last illness and funeral costs in the amount of $953.24. He estimated abstract and legal expenses in transferring the property at $50 and the cost of grave markers at $300. The total amount of these expenses is $1,535.07, an amount obviously in excess of the sale price of the property.

The evidence shows that the parents of Lawrence Halsted were the owners of no other property at the time of their deaths except some used furniture of little value. The record does show that the parents deeded a lot, on which the father's shop was located, to their other son, which Lawrence Halsted testified was for the brother's share. The only evidence of value of this property is the testimony of Lawrence Halsted that it had an assessed valuation for tax purposes of $300.

It is the contention of the applicant that the lien of a judgment attaches only to the actual interest of the judgment debtor in the land and that the lien is therefore subject to the equitable interests arising out of the parol restrictions made contemporaneously with the conveyance to Lawrence Halsted.

It appears to be well settled in this state that a judgment lien on real estate in the name of the judgment debtor is a lien only on the actual interest of the judg-

ment debtor and is subject to all existing equities whether of record or not. Knaak v. Brown, 115 Neb. 260, 212 N. W. 431, 51 A. L. R. 237; Roberts v. Robinson, 49 Neb. 717, 68 N. W. 1035, 59 Am. S. R. 567.

It is well established that the burden of proof is upon one seeking to establish and enforce either a resulting or constructive trust to prove the same by a preponderance of evidence which is clear, satisfactory, and convincing in character. Giacomini v. Giacomini, 163 Neb. 798, 81 N. W. 2d 194; Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912; Holbein v. Holbein, 149 Neb. 281, 30 N. W. 2d 899. The burden of proof is no different in establishing an express oral trust.

An oral agreement purporting to establish an express trust in real estate is within the statute of frauds. § 36-103, R. R. S. 1943. Where such a contract has been established by evidence which is clear, satisfactory, and convincing in character, and it has been partly performed, it will be enforced by a court of equity. Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N. W. 593. Before a court of equity will enforce an oral agreement within the statute of frauds because of part performance, the acts alleged to constitute part performance must unequivocally indicate the existence of the contract. Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66. Where the evidence of part performance is as consistent with another relationship as with that of a trust, a trust will not ordinarily be found to exist. Olsen v. Best, 167 Neb. 198, 92 N. W. 2d 531; O'Connor v. Burns, Potter & Co., 151 Neb. 9, 36 N. W. 2d 507.

In the instant case the oral arrangement testified to by Lawrence Halsted purported to create a trust in the real estate for the benefit of third persons, with Lawrence Halsted as trustee. It is asserted that as Lawrence Halsted sold the property after the deaths of his parents and proceeded to pay medical and funeral ex-

penses, it indicates such a part performance that a court of equity is required to enforce it.

But the evidence is as consistent with an absolute conveyance of the property to Lawrence Halsted and a promise by him to pay the hospital, medical, and funeral expenses of his parents as a consideration therefor. The testimony of Lawrence Halsted of his acts which are asserted as part performance do not unequivocally establish that he took the title to the property as trustee and it follows that it is insufficient to establish part performance adequate to relieve against the operation of the statute of frauds. Part performance must be such as is referable solely to the contract sought to be enforced. Smith v. Kinsey, 148 Neb. 786, 28 N. W. 2d 588. The statute of frauds would be reduced to a mere shell if a party to such an agreement could await the death of his parents and by his own evidence, incapable of being disputed, create the interest taken by the unrestricted warranty deed which suited his best interests. The very purpose of the statute of frauds is to protect against any such result.

While it is true that only the actual interest of a titleholder of real estate may be subject to the satisfaction of a judgment lien, the rights of others therein must be established by the quantity and quality of proof which the law requires. The courts of this state have been reluctant to ingraft a trust by parol on the legal title to real estate and they have consistently refused to do so except where the terms of the parol agreement and the part performance required to permit a court of equity to enforce it have been established by a preponderance of the evidence which is clear, convincing, and satisfactory. While the evidence of Lawrence Halsted stands uncontradicted, the evidence of part performance is as consistent with other relationships as it is with that of a trust. Such evidence of part performance is not sufficient to remove the bar of the statute of frauds.

The necessity for adhering to the foregoing rules is

well stated in Dailey v. Kinsler, 31 Neb. 340, 47 N. W. 1045, wherein we said: "This has been the rule in this state for nearly twenty years, and if changed it should be by statute. No doubt there are cases where the justice of the matter creates a strong desire to allow parol testimony to be given to establish the trust. The law, however, gives security to titles, prevents fraud and perjury in the assertion of alleged trusts, and conduces to the general welfare. It is not to be supposed that a party will make an absolute conveyance of real estate where he still retains an interest therein, without that interest being stated in writing. The law, at least, requires it to be so stated, and it is the duty of the court so to declare."

The competent evidence in the record is insufficient under the statute of frauds to show that Lawrence Halsted was a trustee of the property conveyed to him by warranty deed, absolute on its face. The trial court arrived at the same conclusion. The decree of the trial court is in all respects correct and the judgment is affirmed.

AFFIRMED.

TED ANEST ET AL., APPELLANTS, V. CHESTER B. BROWN COMPANY, APPELLEE.
99 N. W. 2d 615

Filed November 27, 1959. No. 34605.

1. **Pleading.** Ordinarily, at any time before judgment is rendered, a party in default may, in the discretion of the court, be permitted to answer upon such terms as to the payment of costs as the court may prescribe. However, the court must permit the answer to be filed where it is apparent that the party in default has a meritorious defense to the action, for the court can not deprive a suitor of a substantial right under the plea of the exercise of discretion.
2. **Trial.** The trial court shall, at the time of the pretrial hearing, make a record of the proceedings which recites the action

taken at the conference; counsel shall forthwith acknowledge their assent thereto, or, in the alternative, state into the record any and all objections they may have thereto; and such order, when entered, controls the subsequent course of the action unless modified at the trial to prevent manifest injustice.

3. **Landlord and Tenant.** Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease and until the crop is harvested and divided.
4. **Evidence.** Admissions in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts.
5. ———. Admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party.
6. **Witnesses.** A witness may be interrogated as to his previous conviction for a felony in a civil action.

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

Paul Rhodes, for appellants.

Herman & Wood, for appellee.

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

WENKE, J.

This is an appeal from the district court for Morrill County. It involves an action brought by Ted Anest against the Chester B. Brown Company, a corporation, to recover the sum of $1,073.50 as the fair and reasonable market value of 113 bags of beans raised by plaintiff during the crop year of 1956 and placed in storage with the defendant at Bayard, Nebraska, in October 1956. Defendant's answer alleged ownership of all of said beans, except 1.99 hundredweight, to be in Melvin V. Hallgren. The jury returned a verdict for the plaintiff in the sum of $18.91, that being the agreed value of the 1.99 hundredweight of beans admittedly the property of plaintiff and for which the defendant had offered

to pay. Plaintiff filed an alternative motion for either a judgment notwithstanding the verdict or for a new trial and has perfected this appeal from the overruling thereof.

Many contentions are made by appellant Ted Anest, whom we shall refer to herein as appellant, as to why the verdict and judgment entered thereon should be vacated and set aside.

Appellant contends the trial court erred in failing to sustain his motion for judgment by default made on January 27, 1959. The record shows this action was commenced on March 25, 1958. Thereafter, on April 5, 1958, appellee Chester B. Brown Company, defendant below, filed a demurrer to appellant's petition claiming that it failed to state a cause of action. This demurrer the trial court overruled on May 5, 1958, but granted appellee 45 days from that date to further plead. On January 27, 1959, the appellee had failed to further plead and appellant made a motion for judgment by default. This motion was overruled and appellee given leave to answer instanter. This is the ruling complained of.

It has long been the holding of this court, as stated in Blair v. West Point Manufacturing Co., 7 Neb. 146, that: "A party in default may be permitted to answer upon such terms as to the payment of costs as may be prescribed by the court, at any time before the judgment is rendered. And where it is apparent that the party in default has a meritorious defense to the action, the court must permit the answer to be filed. The court cannot deprive a suitor of a substantial right under the plea of the exercise of discretion." See, also, § 25-822, R. R. S. 1943; Clutz v. Carter, 12 Neb. 113, 10 N. W. 541; Haggerty v. Walker, 21 Neb. 596, 33 N. W. 244; Greenwood v. Cobbey, 24 Neb. 648, 39 N. W. 833; Grand Island & W. C. R. R. Co. v. Swinbank, 51 Neb. 521, 71 N. W. 48; Swan v. Bowker, 135 Neb. 405, 281 N. W. 891. As stated in Clutz v. Carter, *supra*: "It is the spirit and policy of the law to give every party an op-

portunity to prosecute or defend his case in court, * * *." And in Greenwood v. Cobbey, *supra,* we said: "* * * the fact that the time to answer or reply has expired has never been held (in this state at least) to preclude the court or judge from extending the time in which to file such answer or reply; and where the application is made in good faith, the fact that the party is in default will not deprive him of the right."

Such matters rest largely within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify a reversal on such a ground. None is here shown. In fact, it would have been reversible error for the trial court to have held otherwise.

The issues to be tried were here fixed by a pretrial order of January 29, 1959. It provides that: "Pursuant to stipulation of the parties it is hereby considered, ordered, adjudged and decreed as follows:

"1. That during the crop year of 1956 the plaintiff, Ted Anest, by reason of a verbal lease, farmed real estate described as the West Half of the Northwest Quarter of Section 31, Township 20, North, Range 48, West of the Sixth P.M., owned by one Melvin V. Hallgren; that 266.44 hundredweight of beans were raised on said real estate and delivered to the defendant by the plaintiff Ted Anest.

"2. That on or about October 16, 1956, the plaintiff, Ted Anest, sold and was paid for 86.83 hundredweight of beans over which there is no dispute. That on or about October 15, 1956, 66.61 hundredweight of said beans was set over to Melvin Hallgren, about which there is no dispute.

"3. That on the 25th day of March, 1958, the price of beans of the type and quality involved in this case was $9.50 per hundredweight.

"4. It is the plaintiff's Ted Anest's, contention that under his lease agreement with the said Melvin V. Hallgren he was to pay as rent one/fourth of the beans raised on said real estate delivered to market, or 66.61

bags of beans; that the entire crop of beans, to-wit: 266.44 hundredweight of beans were delivered to the defendant's warehouse at Bayard, Nebraska, 66.61 hundredweight of which plaintiff paid or set over to the said Melvin V. Hallgren, leaving 199.83 hundredweight of beans belonging to the plaintiff, Ted Anest, 86.83 hundredweight of which have been sold, leaving 113 hundredweight belonging to the plaintiff, Ted Anest.

"5. The defendant contends that two/thirds of 266.43 hundredweight of beans delivered to its warehouse by reason of the lease agreement between the plaintiff, Ted Anest, and the said Melvin V. Hallgren, or 177.62 hundredweight of beans, belonged to the said Melvin V. Hallgren, and 88.82 hundredweight belonged to the plaintiff, Ted Anest; that of said 88.82 hundredweight of beans the plaintiff sold and was paid for 86.83 hundredweight of beans, leaving only 1.99 hundredweight of beans in its possession belonging to the said plaintiff, Ted Anest, for which it is willing to pay at the rate of 9.50 per hundredweight.

"6. The plaintiff, Gust Anest, Jr., contends that he has a lein (sic) on the beans belonging to plaintiff, Ted Anest, which contention is denied by the defendant by reason of want of sufficient information upon which to affirm or deny.

"It is further ordered, considered, adjudged and decreed that Paragraphs 1, 2 and 3 above shall be accepted as true without further proof thereon and that the contentions set out in Paragraphs 4, 5 and 6 are the sole issues in this case and that proof shall be restricted thereto."

In this respect our rules on pretrial procedure provide: "The court shall at the time of the pre-trial hearing make a record of the proceedings which recites the action taken at the conference, * * * that counsel shall forthwith acknowledge their assent thereto, or, in the alternative, state into the record any and all objections they may have thereto; and such order when entered controls the subsequent course of the action, unless modi-

fied at the trial to prevent manifest injustice." Revised Rules of Supreme Court, 1959, Pre-Trial Procedure, p. 35.

No objections were made to this pretrial order, nor was it modified at the trial. It controlled the trial of this case as to the issues in dispute. In view thereof, and the evidence adduced by both parties, instructions No. 5 and No. 7, as given by the court, were proper.

There was competent evidence to support either appellant's or appellee's contention, as stated in the pretrial order, and, in view of that fact, it was a question for a jury to decide as to whose contention was correct. Its finding in that regard, as evidenced by its verdict, is here controlling.

Appellant further complains of the fact that appellee was represented at the trial by counsel for Melvin V. Hallgren and that Hallgren's counsel verified and filed the answer of appellee. He contends this is in violation of section 25-301, R. R. S. 1943, which requires, insofar as here applicable, that "Every action must be prosecuted in the name of the real party in interest," and section 25-823, R. R. S. 1943, which provides that: "Every pleading in a court of record must be subscribed by the party or his attorney."

This is primarily a suit involving the ownership of a crop of beans raised on land owned by Melvin V. Hallgren and, for the crop year of 1956, farmed by appellant. After these beans had been harvested in the fall of 1956 they were, in October of that year, placed in storage with appellee at Bayard, Nebraska. Thereafter a dispute arose between appellant and Hallgren as to the respective interests of each of them therein. That is the issue that was tried in the court below. On October 15, 1957, which was before this suit was brought, Hallgren had sued appellee in the district court for Morrill County for the beans then remaining in storage with it, which included the 113 bags here in dispute. Pursuant thereto an agreement was entered into by Hallgren

and appellee on March 21, 1958, under the terms of which appellee was to turn over to Hallgren all of the beans then remaining in storage with it at Bayard, the latter, in return, agreeing to hold appellee harmless from any and all claims and demands made by appellant or any other person by reason of surrendering the beans to Hallgren. Appellee delivered the beans to Hallgren and the action commenced by Hallgren was dismissed.

Although not raised here by cross-appeal we think, in view of the foregoing, that the trial court was in error when it denied Hallgren's motion, filed on May 7, 1958, that he be substituted as party defendant, see section 25-317, R. R. S. 1943; and when, after permitting Hallgren to file a petition of intervention, it sustained appellant's motion to strike such petition, see section 25-328, R. R. S. 1943.

That Hallgren could continue the action in the name of appellee is provided for by section 25-322, R. R. S. 1943. Insofar as here material, that section provides: "In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." See, also, Commercial Nat. Bank v. Faser, 99 Neb. 105, 155 N. W. 601; Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N. W. 2d 403. We find this contention to be without merit and that Hallgren's counsel could properly prepare, verify, and file pleadings in behalf of Hallgren in the name of appellee and conduct the trial in its behalf. The answer having been properly filed the giving of instruction No. 2 by the court was proper.

Appellant complains of the trial court's failure to give his requested instruction No. 2 which is as follows: "You are hereby instructed that a tenant with a lease to pay rent in crop shares has title to the crop until a division is made the right of property in the crop and possession thereof as to the whole crop is in the tenant." In Sims v. Jones, 54 Neb. 769, 75 N. W. 150, 69 Am.

S. R. 749, this court held that: "Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease," and would, of course, remain such until the crop is harvested and divided. See, 15 Am. Jur., Crops, § 51, p. 242; Wendt v. Stewart, 74 Neb. 855, 105 N. W. 550; Northrup v. Bathrick, 80 Neb. 36, 113 N. W. 808; Leis v. Beckmark, 133 Neb. 467, 275 N. W. 679. As held in Leis v. Beckmark, *supra*: "* * * the relation of the parties to each other is that of tenants in common of the crops." We find this contention to be without merit.

Appellant complains of the court's refusal to give his requested instruction No. 4 in view of the evidence of Glen Morris as to what appellant stated in the presence of Morris and Hallgren. Requested instruction No. 4 is as follows: "You are hereby instructed that an offer to compromise shall not be construed as evidence against the plaintiff."

Glen Morris, manager of appellee's business in Bayard, Nebraska, testified that late in the fall of 1956, after the beans had been placed in storage and a dispute had arisen as to the ownership thereof, he got appellant and Hallgren into appellee's place of business in Bayard and at that time appellant told him the balance of the beans, some 111 bags, were Hallgren's beans.

" 'Admissions' in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts." Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183. We think the statements of appellant referred to are admissions against interest of appellant, rather than offers to compromise, and that the following is applicable thereto: "Admissions of a party against interest made in court or out of court, with reference to and pertinent to the issues being tried, are admissible in evidence against such party." Anderson

v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182. This contention is without merit.

Appellant also complains of the fact that he was required to answer as to whether or not he had ever been convicted of a felony, claiming it was error for the court to require him to do so. He answered that he had.

Section 25-1214, R. R. S. 1943, provides: "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof." In Bosteder v. Duling, 115 Neb. 557, 213 N. W. 809, we held the statutory provision applicable in civil cases.

Appellant Gust Anest, Jr., brother of appellant Ted Anest, claimed, under the allegations of the appellant's petition and as evidenced by the issues left undetermined in the pretrial order, that he had a lien on the beans belonging to his brother. This issue was not presented to the jury, apparently because the evidence adduced in support thereof was not sufficient to either determine the amount thereof or that he had a lien. It is not covered in any judgment rendered by the trial court, no motion for new trial was filed in Gust Anest, Jr's., behalf, and no contention is made in regard thereto in appellant's brief. In view thereof, there is no issue in regard thereto before this court.

We have come to the conclusion that none of appellant's contentions have merit and, in view of that finding, affirm the judgment of the trial court.

AFFIRMED.

IN RE ESTATE OF FRED L. MILLER, DECEASED. WILMER CASTLE, APPELLANT, V. EVERETT O. RICHARDS, EXECUTOR OF THE ESTATE OF FRED L. MILLER, DECEASED, APPELLEE.

99 N. W. 2d 473

Filed November 27, 1959. No. 34627.

1. **Witnesses: Attorney and Client.** A communication of a client to his attorney, to be accorded the privilege of confidentiality, must be one made in the course of professional employment with respect to the subject matter thereof and necessary and proper to enable the attorney to discharge the functions of his office.
2. ———: ———. The burden of establishing a confidential character of a communication made by a client to his attorney is on the party who objects to the disclosure of the communication.
3. **Husband and Wife.** A contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract.
4. ———. If a money judgment in general form is rendered against a woman, upon a contract executed during coverture, where she binds her separate estate, but which is not made with reference to her own separate trade, business, or profession, such judgment can be enforced only against the property or the proceeds thereof which she possessed at the time of executing the contract.

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

Smith & Wertz, Maupin, Dent, Kay & Satterfield, Thomas O. David, and *James J. Duggan,* for appellant.

Baskins & Baskins, for appellee.

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

BOSLAUGH, J.

A claim filed by appellant in the proceedings for the administration of the estate of Fred L. Miller, deceased, in the county court of Deuel County for labor performed and material furnished by appellant, as he alleged, at the request and for the benefit of Fred L.

Miller, hereafter called the deceased, in the conduct of farming operations on a half-section of land in the named county during the period commencing with the year 1948 and continuing through the year 1954, is the subject of this litigation.

The substance of the objections of appellee to the claim was a denial of the statements of the claim as made by appellant; a plea of the statute of limitations as a bar to all items thereof alleged to have accrued during the years 1948 to and including the year 1951; the payment by deceased to appellant for all seed wheat described in the statements of the claim; a plea that deceased performed labor for appellant; that deceased loaned large sums of money without interest to appellant, in consideration whereof it was agreed by the parties that no amount would accrue or become due to or against either of them for labor done by either of them for the other except for the expense of combining and hauling wheat; and that deceased paid appellant for all combining and hauling of wheat done by him for the deceased. A hearing of the claim and the objections thereto was had in the county court and the claim was disallowed. An appeal therefrom was taken to the district court by appellant. The issues joined by the pleadings of the parties in that court were substantially identical with those presented to the county court though they were pleaded with somewhat enlarged elaboration in the district court. The result of the trial in that court was a verdict for appellee. A motion for new trial was denied and a judgment of dismissal of the claim was rendered. This appeal is from that action of the district court.

Appellant claims prejudicial error in the action of the district court which permitted appellee to testify concerning a statement made to him by appellant, probably on September 22, 1952. Appellee was then an attorney and a member of the bar of Nebraska. He had resided, maintained an office, and practiced law in Chap-

pell since November 1939. On October 5, 1951, he prepared a note in the sum of $12,500 payable to the order of the deceased on October 5, 1956, without interest, and a real estate mortgage securing the payment of the note on real estate in Deuel County, at the instance and request of the deceased and appellant. These instruments were executed and the mortgage acknowledged by appellant and his wife in the presence of appellee. They were that date delivered to the deceased and the mortgage was then filed for record. The instruments and the abstract of title to the land were left with appellee by deceased and they were kept in the safe in the office of appellee.

Appellant made payments on the note by check payable to the deceased but delivered to appellee at his office. Each payment was endorsed on the note by appellee and each was delivered to the deceased. The first endorsement thereon was $4,500 bearing date September 22, 1952. Deceased placed his initials, F. L. M., opposite each endorsement. The instruments representing a prior loan of $22,000, without interest, by deceased to appellant were prepared and handled and payments were made thereon in the same manner as was done in reference to the $12,500 loan.

Appellee handled all legal matters that appellant submitted to him for a period of years until 1953 or 1954. In other words, appellee was the attorney for appellant when he required legal services. Appellee had also represented the deceased in the same manner. The record does not show that appellee was employed as attorney in any matter for appellant in September 1952. It is shown that he had never talked with appellee about any of the matters involved in this litigation.

Appellee testified that at the time a payment was made on the note at his office by appellant, probably on September 22, 1952, he made the statement in the presence of appellee that: " 'This goes on the principal because there is no interest being charged or paid, because I

am doing the work out there'—or words to that effect." Appellee agreed with leading questions on cross-examination that the substance of the statement made by appellant at the time above mentioned was that the payment he made should be credited on the principal: "Because I don't need to pay any interest because I am doing the work for Fred in lieu of the interest." The statement by appellant was not a part of any conversation of the parties, it was not solicited or discussed by appellee, it was volunteered by appellant, and it was not made by him in seeking legal advice or to appellee in his professional capacity to assist him in the performance of any professional duty he had undertaken for or that he owed to appellant. At that time appellee was not acting as attorney for appellant; in fact, he was not acting for appellant in any capacity. He was then acting for the deceased in receiving a payment on the note owing to him. The statement was an instruction or direction as to how the payment being made by the debtor was to be endorsed as a credit on the note. The evidence concerning the statement made by appellant on September 22, 1952, was very prejudicial and may have been disastrous to the claim of appellant. On the other hand it was vital to the defense that the work done for the deceased by appellant was offset or satisfied by the foregoing of interest on the loans made him by the deceased. If the evidence of appellee in this respect concerned a privileged communication, its admission was prejudicial error.

A provision of section 25-1201, R. R. S. 1943, is: "The following persons shall be incompetent to testify: * * * (3) an attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court * * *."

The relevant part of section 25-1206, R. R. S. 1943, is: "No practicing attorney * * * shall be allowed in giving testimony to disclose any confidential communication,

properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

It is not every communication of a client to his attorney that is accorded the privilege of confidentiality but only those properly entrusted by a client to his attorney in his professional capacity and necessary and proper to enable the attorney to discharge his office according to the usual course of practice. Stated differently and more precisely, a communication to be privileged from disclosure must relate to a professional matter and must have been made because of the relationship then existing of attorney and client.

Brady v. State, 39 Neb. 529, 58 N. W. 161, declares: "But all authorities recognize one essential to a privileged communication, viz., the attorney, solicitor, or counsel must have been acting for the time being in the capacity of a legal adviser."

Ehlers v. State, 133 Neb. 241, 274 N. W. 570, states: "A communication from client to attorney is not privileged when it is not made to the attorney in his professional capacity. * * * Where attorney is acting as agent for his client, a communication in connection with such agency is not privileged."

Beacom v. Daley, 164 Neb. 120, 81 N. W. 2d 907, says: "A communication made to an attorney at law, where the relationship of attorney and client does not exist, is not privileged, although the attorney was employed as such in some other capacity."

In Stoddard v. Kendall, 140 Iowa 688, 119 N. W. 138, the Iowa court said: "It is first argued that the court erred in admitting the testimony of Mr. Willett. The objection, we think, is untenable. The mere fact that the person offered as a witness is an attorney at law does not render it improper for him to relate statements or communications made to him by another, nor is the fact that the person whose statements are sought

to be proven was a client of said lawyer at the time the communication was made sufficient in itself to exclude the testimony of the latter concerning it. That which the statute forbids is a disclosure of 'confidential communications' properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office, according to the usual practice and discipline. Code, section 4608. The preparation of wills, though appropriately and commonly done by lawyers, is by no means exclusively confined to members of the profession. * * * If a lawyer be employed in such service, the testator may ask at his hands legal advice and intrust him with confidential information to which without doubt the protection of the statute would apply, but the mere fact that the lawyer was engaged in preparing a will at or about the time a given statement was made * * * does not necessarily give it a confidential character. * * * In short, a communication made at such a time may or may not be privileged, according to its nature; and, if upon its face it bears no indication of being a communication of a confidential nature, and there be no other fact or circumstance tending to so characterize it, the testimony of the attorney thereto ought not to be excluded. The burden of showing the confidential relation is upon the party objecting."

In Knox v. Knox, 222 Minn. 477, 25 N. W. 2d 225, it is said: "Communications between an attorney and his client which are protected as privileged under Minn. St. 1945, § 595.02 (2), are limited to those made in the course of the professional employment and with respect to the subject matter thereof."

Stormon v. Weiss, — N. D. —, 65 N. W. 2d 475, contains the following: "The ground of the objection was paragraph 1 of Section 31-0106, N. D. R. C 1943, which provides: 'An attorney, without the consent of his client, cannot be examined as to any communication made by the client to him, nor as to his advice given

thereon in the course of professional employment * * *.' The basis of any valid objection under this provision must be the relationship of attorney and client. The burden of showing that such relationship existed is on the objector. * * * 'The privileged character of the communication must appear; the mere fact that the person offered as a witness is an attorney at law does not render it improper for him to relate statements or communications made to him by another; nor is the fact that the person whose statements are sought to be proven was the client of a particular lawyer at the time the communication was made, sufficient in itself to exclude the testimony of the latter concerning it.' Thornton on Attorneys at Law, Sec. 96."

State v. Addington, 158 Kan. 276, 147 P. 2d 367, says: "Not every communication to a lawyer by a client is incompetent. It must be of a confidential nature and made to the party in his capacity as a lawyer."

Cafritz v. Koslow, 167 F. 2d 749, states: "The principle of attorney-client privilege is an exception to general liability of every person to give testimony upon all facts inquired of in a court of justice. * * * Mere relation of attorney and client does not, ipso facto, establish principle of attorney-client privilege, and if circumstances do not imply confidentiality to a communication between client and attorney the privilege does not attach * * *."

In Richards v. Richards, 64 Misc. 285, 119 N. Y. S. 81, the New York court said: "Section 835 of the Code of Civil Procedure does not protect against disclosure every communication which the client may choose to make to his attorney under a pledge of secrecy. It protects only such communications as the client may make, not pending the attorney's professional employment, but 'in the course of it.' To come within the protective provisions alluded to, therefore, the communication must be one essentially confidential and relate to the subject-matter upon which the attorney's advice was given or

may be sought." See, also, Modern Woodmen of America v. Watkins, 132 F. 2d 352; In re Hall's Estate, 120 N. Y. S. 2d 886; Bridges v. State, 131 Tex. Cr. 482, 100 S. W. 2d 372; Pollock v. United States, 202 F. 2d 281; Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 113 N. Y. S. 2d 12; Anderson v. Thomas, 108 Utah 252, 159 P. 2d 142; 97 C. J. S., Witnesses, § 277, p. 790, § 283 (b), p. 799; 58 Am. Jur., Witnesses, § 484, p. 270. The communication here in question was neither professional nor confidential and there was no error in the trial court admitting the testimony of appellee challenged by appellant as being privileged.

Maureen Castle, wife of appellant, testified as follows: She and appellant were married in 1938 and about 3 years thereafter they occupied a farm southwest but in the vicinity of the farm of the deceased. They became acquainted with the deceased and moved onto a farm owned by him in the fall of 1946 under a 3-year lease. Thereafter through the year 1954 they saw the deceased practically every day. They became very close friends and deceased frequently was in the home of appellant and had meals there. Appellant did farm work on the land leased by him from the deceased commencing in 1945. Appellant was advised in the spring of 1947 that deceased desired to sell the land leased to appellant and it was offered to him. He soon thereafter bought a section of the land and about 2 years later bought the other half-section of it. He operated this land and did custom farming for deceased from the year 1948 on a half-section of land, known as the Johnson land, which was leased to the deceased, to and through the year 1954. The deceased died in 1955. Until 1954, when wheat allotments became in force, half of the land was planted to wheat each year and half of it was summer tilled. Thereafter the acreage was somewhat reduced because of the wheat allotment plan.

In 1954 during April or May appellant conducted a one-way operation on the part of the land that was to

be summer tilled. He did a like operation but not so deep about a month later. He conducted two Graham-Hoeme operations with sweeps, a rod weeder operation, and finally drilled the area to wheat. Appellant also did all the summer tilling of the land in 1953, 1952, and 1951. The deceased did no work on the land during any of the years of 1951 to and including 1954 except a small amount of plowing during the last year. The witness assisted her husband in the farm work and knew the work he was doing each day.

The deceased left on a trip to Hawaii in 1954. The day he started on his trip he told the witness that appellant should do whatever he thought should be done or whatever was necessary to keep the land in good condition. The gas used for fuel and the grease for the machinery while the operations were conducted on the land of deceased by appellant were furnished by deceased. Appellant furnished the seed wheat each year but it was paid for by the deceased except for the year 1954 when he did not pay for the seed wheat used that year. There were about 100 bushels of it. The deceased did not pay appellant for any part of the work that was done by him on the Johnson land during the years 1951 to 1954, inclusive. The deceased told the witness the day before he left on his last trip, while he was getting ready to make the trip to Hawaii, that when he returned he would settle up with appellant.

The district court at the close of the cross-examination, on motion of appellee, struck from the record all the testimony of Maureen Castle, the wife of appellant. The reason stated for the motion was that "because of her interest in this lawsuit; because she individually is liable she is incompetent to testify as a witness." The action of the trial court in this regard is assigned by appellant as prejudicial error because, as he asserts, the witness was not shown to have had a direct legal interest in the result of the litigation. Appellee argues that witness signed the note and mortgage of October

5, 1951, given to the deceased, and a part of the indebtedness represented thereby was unpaid; that she was liable for its payment; that if appellant secured an allowance of his claim the amount of it could be used as a set-off in any action against appellant and the witness for the unpaid balance due on the note and mortgage; and that the witness by her testimony established she was asserting the right of set-off. These considerations, appellee asserts, exhibited a direct legal interest of the witness in the result of the litigation.

The statute relied upon recites that no person having a direct interest in the result of any proceeding, when the adverse party is the representative of the deceased person, shall be permitted to testify as to any transaction or conversation had between the deceased and the witness. § 25-1202, R. R. S. 1943. A part of the testimony of the witness concerned conversations and transactions with the deceased and a part of it did not. The motion was to strike all her testimony and the action of the court was that all of it was stricken from the record of the trial. That ruling had no condition, limitation, or exception. It was all-inclusive. It was not changed or modified. Her testimony was material to the case of appellant.

The argument of appellee that the witness by her testimony was asserting the right of set-off is not supported by the record. She testified on cross-examination, referring to the unpaid balance of the note secured by mortgage to the deceased, that "* * * we did try to pay it * * *." She was then asked: "You went and offered to pay it after Mr. Miller's death, did you?" She answered: "We tried to straighten this business up many times; if that is what you are saying." This misses by considerable distance establishing or even permitting an inference that the witness was "asserting the right of set off." The claim of appellee that if appellant secured an allowance of his claim, the amount of it could be set off in an action on the note and mortgage against

the makers for any balance unpaid thereon disregards the fact that the witness has no legal control of the claim of appellant or what use or disposition he would make of the proceeds of it if it were allowed. She could not even legally plead a set-off, much less compel it in such a situation. It is more important, however, that the wife of appellant was not obligated because she signed the note and mortgage except that the indebtedness could be enforced against her separate estate, if any, which she possessed at the date she signed the instruments, and that the record yields no proof that she possessed any separate estate or that she carried on a separate trade or business on her sole and separate account at the time the instruments were signed by her. The record does not show, therefore, that the witness had any obligation on the instruments or any legal interest in any matter of set-off.

It was decided as early as the case of Kocher v. Cornell, 59 Neb. 315, 80 N. W. 911, that: "The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract."

The decision in that case was approved in Giltner State Bank v. Talich, 115 Neb. 236, 212 N. W. 536, by this language: "It will serve no useful purpose to review the common-law liability of a married woman upon her contracts, and the enlargement of her powers and liabilities as affected by statutes. The discussion of these questions can readily be found in the reported decisions of this court. In Kocher v. Cornell, 59 Neb. 315, the question now before us is discussed and the general rule announced that 'The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract.' " It is also said in Giltner State Bank v. Talich, *supra*: "Where a money judgment in general form is rendered against a woman, upon a contract executed during coverture, wherein she binds her separate estate, but which is not

made with reference to her own separate trade, business, or profession, such judgment can be enforced only against the property or the proceeds thereof she possessed at the time of executing the contract." See, also, Myers v. Rosenberg Bros., 143 Neb. 930, 12 N. W. 2d 77.

The record does not show that the wife of appellant had a direct legal interest in the result of this litigation. Her testimony was competent evidence. The striking of it out of the record was prejudicial error.

Lowell Castle, a brother of appellant, testified: He was and had been a wheat farmer of 22 years' experience. His farm was in the vicinity of the home of appellant. The half-section of land leased by deceased and farmed by appellant was across the road from appellant's land. There were always transactions and relations between the witness and appellant in their farming operations, some of which were joint. They exchanged work and the witness often helped appellant in his farming operations on his land and the land of others. The witness knew that appellant did all of the work on the half-section of land leased by deceased from the year 1948 until the end of 1954. The witness helped and assisted appellant in about every farming operation that he did including those on the land of deceased in the year 1954 and that was done on the basis of the trading or exchanging of work by him and the witness. The summer tilling of the land of the deceased that year consisted of two one-way operations, the first with a smaller machine and the other with a larger machine, three operations with a Graham-Hoeme, rod weeding, and finally drilling the area to wheat. The witness assisted appellant at various times in the farming operations on the land of the deceased for the years involved in the claim of appellant. The witness had no conversation with deceased concerning payment for the work the witness did and made no demand or request for payment therefor to the deceased. The witness in his testimony disclaimed having any claim of any kind

or character against the deceased or his estate on any account. The deceased asked the witness to do some rod weeding on the land in August 1954. That is the only time he was asked by the deceased to do anything. He did not pay the witness for the rod weeding but the witness was paid therefor by appellant when the brothers adjusted their accounts.

The witness was asked about a conversation he had with the deceased in the fall of 1953 about the work done on his place by appellant and the compensation therefor, and a second conversation the witness had in the fall of 1954 with the deceased concerning the same matters. He was not permitted to answer concerning either conversation because of the statute above referred to excluding testimony of a person who has a direct legal interest in the controversy under the circumstances stated in the statute. It is a permissible inference from the record that the work done on the land by the witness was at the instance, for the benefit, and was the responsibility of appellant; that he alone was liable to the witness for his compensation for the work done; and that this was the attitude of all the interested parties. The burden was on appellee to establish that the witness had a direct legal interest in the result of the proceeding. This burden was not satisfied. The testimony of the witness which was excluded because of the statute was competent and material. Its exclusion was error.

The judgment should be and it is reversed and the cause is remanded to the district court for Deuel County for further proceedings according to law.

REVERSED AND REMANDED.

HAZEL ROPKEN, APPELLANT AND CROSS-APPELLEE, V. RUDOLPH J. ROPKEN, APPELLEE AND CROSS-APPELLANT.
99 N. W. 2d 480

Filed November 27, 1959. No. 34673.

1. **Marriage.** The validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be valid everywhere.
2. ———. A common-law marriage is not recognized in this state unless entered into prior to 1923, the date of the adoption of section 42-104, R. R. S. 1943.
3. ———. Common-law marriages are recognized in Iowa, and one asserting a valid marriage in that state must show that the requirements of its laws have been met.
4. ———. Where cohabitation in its origin was meretricious the presumption is that it continues to be such.
5. ———. Where cohabitation was in its beginning meretricious, affirmative proof of a subsequent present agreement to change such relation into a marital one is essential to the establishment of a common-law marriage.
6. ———. Intention to become husband and wife cannot be inferred from cohabitation and reputation alone. The primary question is whether or not the minds of the parties have met in mutual consent to the marriage status and have subsequently cohabited with intent thereby to be husband and wife.
7. **Divorce.** Jurisdiction of the court in matters relating to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must have its source in the statute, or it does not exist.
8. **Partition: Actions.** A cross-petition for the partition of real estate owned in joint tenancy by the parties to a divorce action, in a suit in which the cross-petitioner alleged that the parties were never husband and wife, is not germane to such action and cannot be properly joined therewith.
9. **Actions.** Property rights not growing out of the marriage relation cannot properly be joined with an action for divorce.

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

Leamer & Graham, for appellant.

Mark J. Ryan, for appellee.

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

CARTER, J.

Plaintiff brought suit for a divorce from the defendant and alleged cruelty as a ground therefor. The defendant denied the existence of the marital relation and prayed for a partition of the real estate owned by the parties in joint tenancy. The trial court found that the plaintiff and defendant never became husband and wife, and denied a partition of the real estate held in joint tenancy by the parties. The plaintiff has appealed and the defendant has cross-appealed.

The evidence shows that plaintiff and defendant never entered into a ceremonial marriage. On September 18, 1942, they commenced living together on a farm near Homer, Nebraska. In 1944 the parties moved to South Sioux City, Nebraska, where they have since resided except from February 9, 1955, to November 23, 1955. The defendant was employed by a packing company in Sioux City, Iowa, until the fall of 1954 when the packing company plant was closed. Defendant subsequently obtained employment as a farm hand at Kingsley, Iowa. On or about February 9, 1955, the parties moved into a residence on the farm of defendant's employer near Kingsley. They lived on this farm until November 23, 1955, when defendant gave up his farm employment and the parties returned to South Sioux City, Nebraska, where they have since resided.

From the time the parties commenced living together they have continuously held themselves out as husband and wife. They lived together openly as such. They borrowed money and signed notes as Rudolph J. Ropken and Hazel Ropken, husband and wife. They purchased real estate and took title as husband and wife in joint tenancy. They signed mortgages and acknowledged themselves to be husband and wife. It is clear that the public, as well as their own immediate families, considered them to be husband and wife. There is testimony by the parties that they talked among themselves of entering into a ceremonial marriage, but it was not

done. When the parties moved to Kingsley, Iowa, in 1955 they continued to hold themselves out as husband and wife in the same manner as they had in Nebraska. There is no evidence in this record that the parties entered into an agreement to become husband and wife in Iowa, nor is there any evidence of acts or circumstances from which such an agreement can be inferred. The plaintiff contends that the evidence is sufficient to establish a common-law marriage in Iowa where such marriages are recognized as valid.

Common-law marriages are not recognized in Nebraska by legislative enactment. § 42-104, R. R. S. 1943. Cohabitation in Nebraska without a ceremonial marriage is meretricious. It is not evidence of a marital status in this state. It is presumed that a meretricious relationship having its origin in this state continues to be such. Necessarily, the presumption follows even when the parties subsequently live in a state recognizing common-law marriages.

The validity of a marriage is determined by the law of the place where it was contracted. It follows that if the marriage of the parties was valid in Iowa, it will be recognized as valid in Nebraska. Abramson v. Abramson, 161 Neb. 782, 74 N. W. 2d 919. The question to be here determined is whether or not there was a valid common-law marriage in the State of Iowa. The presumption is that the meretricious relationship originating in Nebraska continued when the parties moved into that state. Common-law marriages are recognized in Iowa. In re Estate of Stopps, 244 Iowa 931, 57 N. W. 2d 221.

The law of Iowa as to common-law marriages is stated in In re Estate of Boyington, 157 Iowa 467, 137 N. W. 949, as follows: "It is well settled that, while cohabitation and the reputed relation of husband and wife may be shown as tending to give color to the relation of the parties and the recognition each by the other of the existence of a marriage between them, the

fundamental question is whether their minds have met in mutual consent to the status of marriage which will be sufficiently established if it appears that they have lived together, intending thereby to be husband and wife. Neither such intention nor consent can be inferred from cohabitation alone, and reputation is of no significance, save as it has a bearing on the question of intent." See, also, Reppert v. Reppert, 214 Iowa 17, 241 N. W. 487. It is necessary, therefore, under the law of Iowa to establish an intent of the parties to enter into the marriage relation in the State of Iowa. There is no evidence in this record of an agreement, either express or implied, that the parties to this suit intended any different relationship than that which they had in Nebraska. Upon their removal to Iowa they practiced the same deceptions as they had in Nebraska. There is no evidence of an agreement to become husband and wife after the parties removed to Iowa, nor any evidence of acts or circumstances indicating any intent to enter into a marital relationship in that state. In other words, there is no evidence of an intent to change their meretricious relationship into a marital one. On such evidence the law of Iowa does not recognize anything other than the continuance of the meretricious relationship. In re Estate of Boyington, *supra*. Since the law of Iowa does not recognize a common-law marriage under such circumstances it cannot be recognized in this state. The rule is well stated in Pegg v. Pegg, 138 Iowa 572, 115 N. W. 1027, wherein it was said: "We recognize so-called common-law marriages as valid; but for such a marriage to be valid there must be a present agreement to be husband and wife, followed by cohabitation as such." The judicial pronouncements of the State of Iowa are legion in support of this rule. In a case similar in principle this court announced a rule that supports the holding of this case. Abramson v. Abramson, *supra*. The finding of the trial court that a common-law marriage did not exist was clearly correct.

The defendant by cross-appeal complains of the failure of the trial court to grant a partition of the real estate after the finding that a common-law marriage did not exist. In this, also, the trial court was correct. The partition of real estate is not germane to a suit for a divorce. Although a divorce action is tried as in equity, it is a special proceeding provided by statute. While it is true that the fact that the parties have engaged in an illicit relationship does not bar either party from asserting against the other such property claims as would be otherwise enforcible, as was stated in Abramson v. Abramson, *supra,* this does not imply that such property claims may properly be asserted in a divorce proceeding. Our statutes on divorce and alimony do not contemplate the determination of legal and equitable rights wholly disconnected from the dissolution of the marriage relation, and the allowance of alimony and division of property incident thereto. In Reed v. Reed, 70 Neb. 775, 98 N. W. 76, this court announced the rule as follows: "As stated in our former opinion in this case, the rule without exception is, that property rights not growing out of the marriage relation can not be joined with an action for divorce." See, also, Hunter v. Hunter, 88 Neb. 153, 129 N. W. 422; Annotation, 93 A. L. R. 329.

The powers of the court in a divorce action are statutory. Unless the source of the power is found in the statute, a court is without authority to exercise it. In Cizek v. Cizek, 76 Neb. 797, 107 N. W. 1012, the rule is stated as follows: "Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." See, also, Brown v. Brown, 130 Neb. 487, 265 N. W. 556. We find no authority in the divorce statutes of this state for the court to partition the real estate owned in joint tenancy by the parties to a divorce proceeding where a divorce is not granted.

We conclude that the trial court was correct in finding that the parties were not husband and wife, and in refusing to partition the real estate owned in joint tenancy by the parties to the divorce action.

AFFIRMED.

SCHOOL DISTRICT NUMBER 162 OF GAGE COUNTY, NEBRASKA, ET AL., APPELLEES, V. GROSSHANS & PETERSEN, INC., A CORPORATION, APPELLANT.
99 N. W. 2d 601

Filed December 4, 1959. No. 34600.

1. **Witnesses: Appeal and Error.** Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse.
2. **Damages: Appeal and Error.** An instruction with reference to the measure of damages is not reversible error where the amount of the judgment is sustained by evidence as to damages to which no objection is made and the defeated party makes no complaint as to the amount of the verdict and judgment.
3. **Appeal and Error.** A slight error in an instruction will not cause a reversal of the judgment, where it is manifest the party complaining was not prejudiced thereby.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

Sackett, Brewster & Sackett, William B. Rist, and *Robert F. Galloway,* for appellant.

P. M. Everson and *Halcomb, O'Brien, Knapp & Everson,* for appellees.

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

SIMMONS, C. J.

This is an action for damages to a school building owned by plaintiff district allegedly caused by dyna-

mite explosions in a rock quarry operated by the defendant. Issues were made. Trial to a jury was had. The jury found for the plaintiffs. Judgment was entered on the verdict. Defendant appeals. We affirm the judgment of the trial court.

At the close of all the evidence defendant moved for a directed verdict on the ground that the plaintiffs had failed to prove any causal connection between the operations of the defendant and damages to plaintiffs' property.

By assignment here defendant contends that the failure to sustain the above motion was error. This in turn rests upon the argument that the evidence of plaintiffs' expert witness was erroneously admitted and that, absent that evidence, the required proximate cause resulting in damage was not established.

The evidence is here stated under the established rule that such a motion admits the truth of all competent evidence favorable to the party against whom the motion is directed; that every controverted fact must be resolved in its favor; and that it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. We state the evidence favorable to the plaintiffs.

The school building was built about 1920. It was of brick construction on a concrete foundation. There was no steel reinforcement. Sometime prior to 1954 a settlement crack appeared in the east wall. That was repaired in 1954. There is also evidence of some replastering that was done prior to that time. The building was inspected, repaired, and repainted in 1954.

The quarry operated by defendant was located about one-half mile from plaintiffs' building. The building was in the village of Holmesville.

Beginning about December 23, 1955, and at various times until April 27, 1956, defendant used dynamite to blast rock in the quarry. The blasting was so done as to break the rock into pieces sufficiently small to

go through a crusher so that the rock could be used in highway construction. Defendant often prepared as many as 48 holes for one explosion. These were drilled to depths of as much as 20 feet. Dynamite was placed in these holes to within 30 to 36 inches of the top. Dirt was then tamped in the holes to lessen any upward push of the explosion. The dynamite was so wired that it exploded in "delays" of 25/1000 of a second, and there were from two to four delays in each explosion. Beginning December 23, 1955, and ending April 27, 1956, defendant exploded dynamite 2 days in December, 9 days in January, 10 days in February, 21 days in March, and 11 days in April. On several days there were two and sometimes three and four explosions a day.

Plaintiffs offered evidence of lay witnesses living within a radius of 2½ miles of the schoolhouse, and other witnesses who were close to or in the schoolhouse when blasts occurred. These witnesses described the effects of explosion blasts at the quarry which they observed as "the house shook"; "vibration" was felt when a car was driven near the quarry; "barn vibrated"; the "house commenced to quiver and the windows rattled"; "dishes rattled in the cupboard"; an elevator building "shook," windows rattled, and "the bars on my scale * * * rattled"; "could feel the ground shake"; cans on the shelves of a store "shook" and the floor "shook"; china in a cabinet "shook"; large rocks were blown out and upon land of one of the witnesses; the blast "shook the earth"; a furnace rattled; in the school building the blast "shook us"; light fixtures swayed; and there was rattling of the windows and vibration in the schoolhouse.

The above paragraph is not an all-inclusive statement of the evidence of what lay witness after witness testified as to what they saw and observed.

Defendant does not contend that said vibrations did not follow directly from these explosions. Rather defendant's evidence was to the effect that the vibrations

could not have been of sufficient magnitude to have caused the damage about which complaint is made.

During the months of the blasting large cracks appeared in the walls of the schoolhouse where the brick separated, and cracks appeared in the plaster on walls and ceiling and in the concrete tunnel in the basement. Bricks pulled away from joists at the top of the walls. The extent of these cracks need not be recited as the extent of the damage to the building is not an issue here. It is sufficient to point out that they appeared to a large extent in that part of the building that received the first impact of vibrations from the quarry.

Plaintiffs' expert witness investigated the plaintiffs' school building and examined its exterior and interior walls for evidence of structural failure; he examined the attic, the basement tunnel, and the roof; he described the construction; and he described the condition of the walls, ceiling, etc., largely in corroboration of plaintiffs' custodian witness.

Plaintiffs' expert witness was examined and cross-examined extensively and often as to his qualifications. He was a graduate of the College of Engineering of the University of Nebraska; he worked for several years as a structural engineer designing power plant buildings; he worked with a consulting engineering firm doing structural design and cost estimates on schools, churches, dwelling houses, warehouses, and factory buildings; his work involved the structural soundness of masonry walls; in training and practice he had made a study of the various causes of structural failures in buildings in order to avoid their recurrence in buildings designed; he had had formal training in the effect of vibration on structures and in dealing with the loads which come or fall on structures caused by vibration; he had studied writings devoted solely to the subject of ground vibrations; in his practical experience he had noted the effect of forces upon buildings; he had read technical articles and books upon building failures; he

had knowledge of the nature of the ground between the quarry and the schoolhouse; he had examined the exposed soil profile at the quarry and made a soil boring at the schoolhouse; and he explained the types of vibrations which occur in the soil when an explosion occurs. He testified that in his opinion the damage was caused by a horizontal movement of the bearing walls; as to the effect of a repetition of vibrations, which singly might not cause a failure but if repeated eventually could do so; and that the appearance of the damage may be delayed.

The witness was permitted to testify as to the age, in his opinion, of the cracks in various parts of the building. His testimony in this regard was largely corroborative of the custodian's evidence. He gave as his reason the difference of color of the surface in contrast with the surface of the cracked area, the absence of dust or debris, etc. The witness was also permitted to testify that in his opinion the damage to plaintiffs' building (other than the settlement cracks which appeared earlier and which no one claims were caused by defendant) was caused by a horizontal force which was vibration in the ground.

Defendant contends that the expert witness was incompetent to testify as to all of the above evidence and more of like kind.

On cross-examination the witness testified that wind was not the cause of the failure and that the only other possible source of failure was a ground movement exerting force upon the building. He distinguished a settlement crack from the cracks here involved. He testified that the ground vibrations were the only possible cause of the cracks and other conditions that appeared in the building during and after the blasting operations of the defendant.

Defendant's contention here is that there is no direct evidence that explosions in the quarry caused the damage to the school building, and that proximate cause

could only be established by resort to the opinion evidence of plaintiffs' expert witness.

The rule is: Whether a witness' qualification to state his opinion is sufficiently established rests largely in the discretion of the trial court, and its ruling thereon will not ordinarily be disturbed on appeal unless there is a clear showing of abuse. Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617.

We see no abuse of discretion in the court permitting the witness to testify. Having in his opinion eliminated soil settlement as a cause and established ground vibration as a cause, there remained only one source of the cause of vibrations and that was the dynamiting of rock at the quarry by the defendant.

We find no error in the admission of the evidence of the expert witness and accordingly no error in the trial court's refusal to sustain a motion for a directed verdict.

Defendant assigns error in the giving of instruction No. 10 which was as follows: "You are instructed that defects existing in the school building before the blasting operations in the Holmesville quarry by the defendant form no issue in this case.

"However, in determining the damages in the event you find for the plaintiff, you should not diminish the amount of the damages by the cost of repair of defects in said school building existing prior to blasting if you find by preponderance of evidence that repairs of such pre-existing defects is necessary to effect repairs of defects resulting proximately from blasting." Instruction No. 9 was in part: "You are instructed that if, under the evidence and these instructions, you find for the plaintiff, then you will assess the amount of plaintiff's recovery at such sum as you find to be the reasonable cost of such repairs as will put the school building in the same condition as it was immediately preceding the injury."

Plaintiffs' expert witness on damages excluded any

items requiring repair which existed prior to the defendant's blasting operations. He fixed the fair and reasonable cost for the repairs, including architect's fee, at $53,900. Defendant's expert witness made like exclusions and fixed the reasonable cost of repairs at $23,100. Defendant here states that there is no evidence that repairs to preexisting damage were required in order to effect repairs to the damage claimed to have resulted from the blasting. The jury fixed the damages at $25,750. Defendant does not contend that there was error in that amount. We had a similar situation in Acree v. North, 110 Neb. 92, 192 N. W. 947, where there was no evidence to which a clause in an instruction could apply. We held the giving of the instruction in the manner noted was an inadvertence which could not have misled the jury. The holding of the case is that an instruction with reference to the measure of damages is not reversible error where the amount of the judgment is sustained by evidence as to damages to which no objection is made and the defeated party makes no complaint as to the amount of the verdict and judgment.

Finally defendant complains because the court in instruction No. 7 referred to "proximate *cause* of the blasts" where patently proximate result was meant. Defendant does not claim prejudice and none appears.

In Stein v. Vannice, 44 Neb. 132, 62 N. W. 464, we held: "A slight error in an instruction will not cause a reversal of the judgment, where it is manifest the party complaining was not prejudiced thereby."

We find no merit in the assignment.

The judgment of the trial court is affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

LILLIE THOMAS, APPELLEE, V. CECIL OWENS, APPELLANT.
99 N. W. 2d 611

Filed December 4, 1959. No. 34610.

1. New Trial. Where a ground or grounds for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge of such questions of fact.
2. ———. The above rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury.

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

Story, Pilcher & Howard, for appellant.

Martin A. Cannon, for appellee.

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

SIMMONS, C. J.

This is an intersection automobile collision case.

Plaintiff was a passenger in a car driven by her daughter. We will hereafter refer to it as plaintiff's car, with the explanatory statement that no question of imputed negligence is involved.

Defendant was the owner and driver of the other car.

Issues were made and trial was had to a jury resulting in a verdict for defendant upon which the trial court entered judgment for the defendant. The trial court sustained a motion for a new trial. Defendant appeals from that order.

We reverse the judgment of the trial court and remand the cause with directions to reenter the judgment in favor of the defendant.

Defendant brings the cause here.

The procedure is that set out in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, which we quote in part: "Where a ground or grounds

for a motion for a new trial present a question or questions of fact which are in dispute, the district court becomes the judge of such questions of fact. If a party desires a review of that determination, the showing thereon must be preserved in the record. * * * That rule does not authorize the district court to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury. * * * Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. * * * Whether the decision was to grant a new trial or deny one, the questions here are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining. * * * Under this rule if the trial court gave reasons for the granting of a new trial, the duty rests upon the appellant to present those reasons and in appropriate manner support his contentions that those reasons are not sustainable from the record and applicable rules of law. The appellee has then the duty, if he desires, of meeting those contentions. The appellee has the right to point out and submit additional reasons to sustain the trial court's judgment. * * * If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions."

The trial court gave no reason for the action taken in its order granting a new trial. However, the trial court indicated to the parties its conclusion for so doing. It was that the evidence established concurrent negligence of the defendant proximately contributing to cause the accident. Stated otherwise, the trial court found the defendant guilty of negligence as a matter of law proximately contributing to the cause of the accident.

We review the evidence here under the long-established rule that such a motion admits the truth of all competent evidence favorable to the party against whom the motion is directed; that every controverted fact must be resolved in his favor; and that he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

The accident happened at the intersection of Seventy-second and Dodge Streets in the city of Omaha on May 20, 1957. It occurred in the afternoon, the weather was good, the sky was clear, and the pavement was dry. No atmospheric conditions enter into the problem.

Dodge Street at that intersection runs east and west. It is a paved street. On all four corners there are lanes for right turns from and into Seventy-second Street. There are also two westbound and two eastbound lanes for traffic, separated by a lane designed for use by vehicles making left turns. These lanes are each 12 feet wide.

Seventy-second Street, south of Dodge Street, in addition to the turning lanes has two lanes for southbound and two lanes for northbound traffic. These northbound and southbound lanes are separated by an island that runs from near the intersection southward.

Seventy-second Street north of Dodge Street, in addition to the right-turn lanes, has two lanes for southbound traffic and, for a short distance, has two lanes for northbound traffic. These in turn are separated by an island.

Plaintiff's car going south in the inner lane of Seventy-second Street came to the intersection at a speed of not to exceed 5 miles an hour. The green light showing permission to proceed was in her favor. The electric signal on her car indicating an intent to make a left turn was operating. Plaintiff's car, reducing its speed, proceeded south and was partly across the inner west-bound lane when the driver looked and saw defendant's car some 25 feet or more south of the intersection and proceeding north in the east or "through" lane of traffic.

Patently defendant's car was visible a considerable distance to the south before plaintiff's driver saw it. Defendant's car had come from the south at a speed of 35 miles per hour or less. As it approached the intersection there was a red light against its line of travel. The light changed to green and defendant's car slowed down momentarily. It proceeded into the intersection. Defendant saw plaintiff's car "creeping" south. She was not in his lane of travel. Her left turn light was operating. Defendant construed the slow speed of plaintiff's car as an indication that he was to pass on through ahead of her left turn into Dodge Street. He continued his course and speed. Plaintiff's driver passed across the middle east and west passing lane and looked to the east on Dodge Street. She then turned into defendant's lane of travel. The inevitable collision followed.

Courts must recognize that in these days many jurors are experienced automobile drivers and that city jurors probably have had experience in driving in congested areas such as the one involved here. The method of passing and turning which is exemplified here occurs repeatedly and is a matter of common knowledge. We think the jury could well have found that the slow speed of plaintiff's driver into and through the intersection, maintaining a position away from defendant's line of travel and her patent failure to exercise any right-of-way which she may have had, was an invitation

to defendant to go ahead and pass in front of her. See Hammond v. Emery-Bird-Thayer Dry Goods Co. (Mo.), 240 S. W. 170.

Plaintiff here claims the right for her driver to move at a slow pace through a heavily used intersection and yet maintain a right-of-way over all other traffic. The jury could well have found that she created the situation that resulted in the accident and, as it evidently did, that plaintiff's driver was negligent and that negligence was the proximate cause of this accident. The facts bring the question within the area of the jurisdiction of a jury. Its decision is conclusive, where prejudicial error otherwise is absent.

The trial court erred in sustaining the motion for a new trial for the indicated reason.

Pursuant to the rule in the Greenberg case, plaintiff here sets up assignments of error other than that advanced by defendant, which she claims justifies the court's order. Plaintiff's first two assignments of error are that the court erred in not directing a verdict for the plaintiff on all issues except damages and in submitting the issue of defendant's reasonable control of his car to the jury.

The cause presented at best a jury question. We see no prejudice to plaintiff nor reason for discussing these assignments in view of our determination on the principal question above discussed.

Plaintiff claiming that instruction No. 11 set out the "undisputed facts in this case" contends that it required a verdict for plaintiff and that the jury was guilty of misconduct in finding for the defendant. We see no reason for discussing the instruction. It did not purport to set out all of the undisputed facts. The trial court did not consider that it did so, nor did the jury. We do not so consider it.

The plaintiff next assigns as error the failure of the trial court to give a series of requested instructions. Some of them would result in an invasion of the area

of fact determination reserved for the jury. Others are requests for instructions to prevent the jury from "wrongly interpreting the law." One is an abstract statement of a purported rule of law without any effort to advise the jury of its application, even if found applicable. Finally there is a complaint about the definition of proximate cause.

We have examined these matters and find no indication of error prejudicial to the plaintiff. We see no reason for an extended discussion of them.

The judgment of the trial court is reversed and the cause remanded with directions to overrule the motion for a new trial and to reinstate the judgment for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

NANCY THOMAS, APPELLANT, V. CECIL OWENS, APPELLEE.
99 N. W. 2d 605

Filed December 4, 1959. No. 34635.

1. **Trial.** A motion for directed verdict or its equivalent must, for the purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. Before the evidence in a case is submitted to a jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party upon whom the burden of proof is imposed.
3. ———. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination.
4. **Automobiles: Negligence.** The operator of a motor vehicle on a highway who would otherwise have the right-of-way under

statutory regulations if he operates it at a lawful rate of speed forfeits that right-of-way if he operates it at an unlawful rate.

5. ———: ———. The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be.
6. ———: ———. The failure of the driver of a motor vehicle, upon approaching an intersection, to look in the direction from which another vehicle is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery.
7. ———: ———. When one, being in a place of safety, sees or could have seen the approach of a motor vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery.
8. ———: ———. The duty of the driver of a motor vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight.
9. **Negligence.** Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence.

APPEAL from the district court for Douglas County: JAMES J. FITZGERALD, JUDGE. *Affirmed.*

Martin A. Cannon, for appellant.

Story, Pilcher & Howard, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries by Nancy Thomas, plaintiff and appellant, against Cecil Owens, defendant and appellee. The case was tried and at the conclusion of the evidence a motion was made by the defendant in the alternative for a directed verdict in his favor or for dismissal of the action. The motion for dismissal was sustained by the order of the court. A motion for new trial was duly filed. This motion

was overruled. From the orders dismissing the action and overruling the motion for new trial the plaintiff has appealed.

The action is based on an accidental collision between an automobile operated on a highway or highways in Omaha, Douglas County, Nebraska, by the plaintiff, and one owned and operated by the defendant.

On its face the order on the motion for dismissal was rendered either on the ground that the evidence disclosed that the plaintiff was, as a matter of law, guilty of acts which proximately caused the accident and her claimed injury and damage, or that she was guilty of contributory negligence which proximately contributed to the accident in a degree which likewise as a matter of law would defeat a right of recovery. Obviously from an examination of the bill of exceptions it was sustained on the latter of the two grounds, since it may not well be said as a matter of law that the defendant was free from negligence in the premises. The consideration of the case herein will be thus limited.

The brief of appellant contains as ground for reversal but one assignment of error. It is: "The trial court erred in sustaining defendant's motion and in refusing to submit the case to a jury for determination."

The determination of this question must be made in the light of the following rules: "A motion for directed verdict or its equivalent must, for purpose of decision thereon, be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Davis v. Spindler, 156 Neb. 276, 56 N. W. 2d 107. See, also, Kepler v. Chicago, St. P., M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161; Morse v. Gray, 166 Neb. 557, 89 N. W. 2d 842.

"In every case, before the evidence is submitted to

the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Krichau v. Chicago, B. & Q. R. R. Co., 150 Neb. 498, 34 N. W. 2d 899. See, also, Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758; Morse v. Gray, *supra*.

"Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144. See, also, McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179; Allen v. Kavanaugh, 160 Neb. 645, 71 N. W. 2d 119.

The collision which is the basis of this action took place in the early afternoon on May 20, 1957, somewhere in the southeast quadrant of what is known as the intersection of Seventy-second and Dodge Streets in Omaha, Nebraska. Dodge Street extends east and west and is a main highway passing through the city. It has three direct traffic lanes leading westward into the intersection and two on westward out of it. It has three direct lanes leading into the intersection from the west and two leading out to the east. There is a narrow island within and to the south edge of the center lane of Dodge Street to the east of the intersection and a like island within and to the north edge of the same lane west of the intersection. Seventy-second Street extends north and south through the intersection. From the north, two lanes lead into the intersection. Neither of these is obstructed. Two lanes lead out to the north. However, located in the inner of the two lanes and commencing a short distance to the north is an island the width of the lane and extending northward. From the south two lanes enter and two leave the intersection. Between the two inner lanes is an island which at its north end

is about the same width as a regular lane. It starts about 24 feet back from the intersection and extends southward about 300 feet. It becomes gradually narrower as it extends southward. At each corner of the intersection is an island. Each fits into the corner outside the outer lines of the outside driving lanes going in opposite directions. Outside of these islands are right-turn lanes which after passing the islands parallel the outside driving lanes. All lanes are 12 feet in width. An automobile coming from the north on Seventy-second Street to turn east into Dodge Street from the inner southbound lane on Seventy-second Street would in passage have to cross the three westbound lanes on Dodge Street and the two northbound lanes of Seventy-second Street. About all of this there can be no dispute since it is taken from a plat in evidence, the correctness of which has been stipulated.

The plaintiff testified in substance, which testimony with its reasonable inferences must for the purposes of this case be accepted as true, that she was operating a Buick automobile in a southerly direction on Seventy-second Street and as she approached the intersection of Dodge Street she slowed down almost to a stop and then moved into the intersection at a speed of about 5 miles an hour; that as she approached she saw another automobile waiting next to the island in the inside northbound lane to make a left turn into Dodge Street; that she was in the turning lane, meaning obviously the inner lane as it appears on the exhibit which has been mentioned; that the traffic lights were green; that while in this situation her view to the south was partially blocked; that she drove into the intersection, going south, and as she did so she looked to the south, where she could see approximately to the middle between the two middle posts on the island to the south which we interpret from the record to be somewhere between 175 feet and 220 feet away; that at that time she saw no car coming from the south; that at that time she started at

about the middle of the street, obviously Dodge Street, to turn east into Dodge Street and the automobile on the opposite side of Dodge Street started to turn west into Dodge Street; that the other automobile passed to the south and while the two were passing she had no view to the south; that during all of this time she was operating her automobile at about 5 miles an hour; that when she and the other driver started to make their turns into Dodge Street she looked east up Dodge Street, and did not thereafter look to the south until the left front of her automobile was about on a line between the islands at the northeast and southeast corners of the intersection at which time she observed the automobile of the defendant in the outer driving lane at the north end of the island to the south in Seventy-second Street, which was a distance of 20 to 25 feet south of the intersection; that when she saw the defendant's automobile she increased the speed of her own; and that the right front corner of her automobile and the front end of the defendant's automobile came into collision.

There is no question but that the defendant came from the south and that the two automobiles came together in the eastern northbound lane of Seventy-second Street in the intersection and quite probably the northern eastbound lane of Dodge Street. The record discloses that the speed of defendant's automobile was variously estimated at from 30 to 50 miles an hour. There is no question that the view to the south was open and unobstructed from the time her view was cleared by the passage of the automobile which turned west into Dodge Street. A witness for the plaintiff gave testimony the effect of which was to say that there was a clear view 789 feet south from the center of Dodge Street.

As has been said, at the time of this passage she was proceeding at about 5 miles an hour. She could not have been far into the inner lane when her view was no longer obstructed. It is pointed out here that the evidence on behalf of plaintiff disclosed that an automobile

moving at the rate of 35 miles an hour would move 53 feet in a second, and at the rate of 50 miles an hour it would move 75 feet in a second. Thus it becomes apparent that when the plaintiff looked to the south first after her view was no longer obstructed the automobile was one second or less of driving time away.

Under the evidence viewed most favorably to the plaintiff she had the right-of-way under the ordinances of the City of Omaha and the controlling statutes. The evidence indicates she was in the intersection first and that she indicated her intention to turn and was turning before the defendant reached it. The maximum legal speed on Seventy-second Street, as provided by section 55-7.5 of the Municipal Code of Omaha, is 35 miles an hour. Section 39-751, R. R. S. 1943, provides that the driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might have had under the statute. There was evidence that the defendant was not traveling in excess of 35 miles an hour but evidence most favorable to the plaintiff indicated that he was.

Notwithstanding this, certain duties and obligations devolved upon the plaintiff which require examination in the ascertainment of whether or not the case should have been submitted to a jury. These duties find their definition and exposition in the following statements of principle and those already set out herein:

"The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance." Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. See, also,

Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628.

"The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery." Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491. See, also, Nelson v. Plautz, 130 Neb. 641, 265 N. W. 885; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Wieck v. Blessin, *supra*.

"When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." Cuevas v. Yellow Cab & Baggage Co., 141 Neb. 662, 4 N. W. 2d 790. See, also, Troup v. Porter, 126 Neb. 93, 252 N. W. 611; Gade v. Carlson, 154 Neb. 710, 48 N. W. 2d 727; Ring v. Duey, 162 Neb. 423, 76 N. W. 2d 433; Farag v. Weldon, 163 Neb. 544, 80 N. W. 2d 568.

"The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight." Kraft v. Wert, 150 Neb. 719, 35 N. W. 2d 786. See, also, Vandervert v. Robey, 118 Neb. 395, 225 N. W. 36; Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673.

"Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence." Cuevas v. Yellow Cab & Baggage Co., *supra*. See, also, Klement v. Lindell, 139 Neb. 540, 298 N. W. 137; Corbitt v. Omaha Transit Co., *supra*.

These principles and the pertinent facts which have been summarized lead to the inescapable conclusion that the plaintiff did not, in the exercise of ordinary care, do those things which she should have done in the interest of her own safety and which if she had done would have

caused avoidance of the collision. Further she did things which, in the exercise of ordinary care, she should have avoided, which if she had avoided doing, would have prevented the collision. Particularly stated, she turned with her view to the south obstructed going at the speed of about 5 miles an hour to cross on a curved line an area about 24 feet in width straight across, and never looked again until she was practically across the area when a danger, which could have been seen at any time after her view was no longer blocked by the automobile which had been across Dodge Street to the south, was no more than a second of time away. Instead of stopping, as in the exercise of ordinary care she should and could have done, and without looking she moved into the path of defendant's automobile.

These acts and failure to act amounted to contributory negligence of a character and degree which as a matter of law defeat any right of recovery of damages in this case. Accordingly the trial court did not err when it sustained the motion to dismiss.

The judgment of the district court is affirmed.

AFFIRMED.

RUTH THOMPSON, ADMINISTRATRIX OF THE ESTATE OF HOWARD S. THOMPSON, DECEASED, APPELLEE, V. COMMERCIAL CREDIT EQUIPMENT CORPORATION ET AL., APPELLANTS.

99 N. W. 2d 761

Filed December 4, 1959. No. 34644.

1. **Usury.** An implement dealer may, in good faith, sell farm machinery 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.
2. ———. 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.

3. ———. Every inhibitory provision contained in the Installment Loan Act, sections 45-114 to 45-158, R. R. S. 1943, as amended, apply alike to licensees and nonlicensees.
4. **Statutes.** The Legislature during a session may do and undo, consider and reconsider, as often as it thinks proper, as only the final result will be regarded as the thing done.
5. **Constitutional Law: Statutes.** A legislative act which is amendatory of existing laws is unconstitutional where such act does not contain the section or sections amended and does not repeal said original sections.
6. **Statutes.** However, an independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them.
7. ———. An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections.
8. ———. Where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.
9. ———. Any provision in a legislative bill which is not clearly expressed in the title cannot be enacted into law.
10. ———. Where the title to an act is one for the amendment of an existing statute or section thereof, any legislation may be included in the amendatory act which is germane to the subject of the statute or section thereof sought to be amended.
11. ———. However, the Legislature may make the title to an act as restrictive as it pleases. If it does so the courts cannot enlarge the scope thereof and the Legislature, by so doing, limits itself accordingly.

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

Wright, Simmons & Harris and *Atkins & Ferguson*, for appellants.

Robert L. Gilbert, for appellee.

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

WENKE, J.

This is an appeal from the district court for Scotts Bluff County. It involves an action brought in that court by Howard S. Thompson against Commercial Credit Equipment Corporation and Brubaker-Sommers Company to have declared void a certain obligation executed by plaintiff to defendant Brubaker-Sommers Company in the form of a "Purchase Agreement" and assigned by it to defendant Commercial Credit Equipment Corporation. The basis for the action is the claim that the obligation owing under the "Purchase Agreement," which is payable in installments, was in fact a loan and, as such, within the provisions of the Nebraska Installment Loan Act, and because the amount charged as interest for the use thereof is in violation of the inhibitory provisions of the act, the obligation is void.

The trial court so found and held accordingly, finding it was a loan and that the interest charged therefor was in excess of that authorized by section 45-138, R. S. Supp., 1957, and, because thereof, held it was void and unenforcible. It also held that section 45-155, R. S. Supp., 1957, the provisions of which the defendants sought to have applied if the trial court should find the indebtedness to be an installment loan, was unconstitutional. The trial court also enjoined the defendants from repossessing the equipment described in the "Purchase Agreement," dismissed Commercial Credit Equipment Corporation's cross-petition whereby it sought to do so, and enjoined the defendants from in any manner attempting to enforce or collect the indebtedness. Defendants filed separate motions for new trial and have perfected this appeal from the overruling thereof.

After judgment had been rendered by the trial court the death of the plaintiff Howard S. Thompson was called to that court's attention. The action was there-

upon revived in the name of Ruth Thompson as the administratrix of decedent's estate.

Appellants contend the trial court erred in finding that the "Purchase Agreement" was in fact a loan; in holding that the purchase agreement was void and unenforcible by reason of certain provisions in section 45-138, R. S. Supp., 1957; in holding section 45-155, R. S. Supp., 1957, to be unconstitutional; and in enjoining the appellants from enforcing the collection of the purchase agreement.

Appellant Brubaker-Sommers Company is a partnership consisting of B. C. Brubaker and Edward D. Sommers. It engages in the sale of farm machinery with its place of business located in Scottsbluff, Nebraska. Commercial Credit Equipment Corporation engages in financing Ford products, including those purchased by the appellant Brubaker-Sommers Company from that manufacturer. Howard S. Thompson was a farmer living in the vicinity of Morrill, Nebraska, when the transaction herein involved was entered into. We shall hereinafter refer to Edward D. Sommers as Sommers; to Howard S. Thompson, deceased, as Thompson; to Brubaker-Sommers Company as the partnership; and to Commercial Credit Equipment Corporation as Commercial. It appears Commercial was the successor of Dearborn Motors Credit Corporation.

The obligation evidenced by the "Purchase Agreement" executed by Thompson arose out of a deal whereby Thompson purchased from Brubaker-Sommers Company a new Ford tractor and Ford cornpicker, negotiations for the purchase of which were carried on by Thompson entirely with Sommers. Both of these men testified at the trial and there is conflict in their testimony as it relates to material matters concerning the agreement itself. In this situation the following principle has application: "Suits in equity, on appeal to this court, are triable de novo, subject to the rule that when evidence on material questions of fact is in ir-

reconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than another." Wilkie v. Banse, 166 Neb. 138, 88 N. W. 2d 181. We might add that there are circumstances disclosed by the evidence, as they relate to parts of Sommers' testimony, that seriously affect its weight.

In view of the foregoing we find the evidence adduced establishes the following: That in September of 1957 Thompson was wanting to buy a new tractor and cornpicker, shopping around for that purpose; that, among others, he contacted the partnership through Sommers; that he told Sommers of his desire, advising him that he had a used tractor, cornpicker, cultivator, and plow that he wished to trade in on any deal he made; that thereafter, in the latter part of September, Sommers came out to Thompson's farm to see those items; that on October 1, 1957, Sommers advised Thompson that he would make the following deal, that is, that the partnership would sell him a new Ford tractor and cornpicker for $5,093 and take in trade his used tractor, cornpicker, cultivator, and plow for $1,593, thus leaving a balance owing on the purchase price of $3,500; that Thompson accepted this offer, having advised Sommers that he would have to finance the balance; that Sommers then advised Thompson that the balance could be financed through Dearborn in Kansas City but that there would be some difference added in the form of finance charges; that on October 1, 1957, Sommers prepared an "Invoice" setting forth the terms of this agreement, showing "Terms: DMCC," meaning Dearborn Motors Credit Corporation, a copy of which Sommers handed to Thompson; that some 3 or 4 days after October 1, 1957, Sommers came out to the Thompson farm and got the trade-ins; that some 6 or 7 days thereafter Thompson first saw and then signed the "Purchase Agreement," dated October 1, 1957, showing a balance owing

of $4,275 payable at the rate of $1,425 on April 1, 1958, April 1, 1959, and April 1, 1960, respectively, receiving a copy thereof; and that some time thereafter, toward the end of October, the new Ford tractor and corn-picker were delivered to Thompson.

It will be observed that finance charges in the sum of $775 were added to the balance of $3,500 owing on the cash sale. This is far in excess of what is authorized by section 45-138, R. S. Supp., 1957, which, in this respect, provides: "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 three thousand dollars."

The "Purchase Agreement" was assigned to Commercial and, on October 31, 1957, the partnership received from Commercial the sum of $3,393 with the understanding that when the obligation had been paid in full it would receive an additional sum of $105 and credit in a reserve fund of $97.05. It is apparent that the partnership was an agent of Commercial in making the loan to finance the balance of the purchase price.

"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. * * * In order to have the foregoing principle apply it must appear that the buyer actually was informed of and had the opportunity to choose betwen a time sale price and a cash sale price." State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55.

Sommers never informed Thompson of any time sale price either before or at the time the deal was closed on October 1, 1957. He did inform Thompson, however, that finance charges would be added if he wanted to finance the balance of the cash price over a period of time. Sommers obtained the amount of those charges

from a "Retail Time Payment Chart" furnished by either Commercial or Dearborn Motors Credit Corporation. We think the following from State ex rel. Beck v. Associates Discount Corp., *supra,* has application to the foregoing situation: "It is not a time sale if a car dealer (here implement dealer), in selling a car (here farm machinery), actually agrees with the buyer that he will finance * * * 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 * * *. 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."

We hold that the transaction between Thompson and the partnership was a cash sale; that Commercial, through the partnership, financed the balance owing on an installment basis; and that the finance charges made for doing so were in excess of those authorized by section 45-138, R. S. Supp., 1957. The question then arises, what is the effect thereof?

The foregoing statute provides, in respect thereto, that: "Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan."

Here both appellants are nonlicensees. We have frequently held, and we think correctly, that every inhibitory provision contained in the Installment Loan Act (sections 45-114 to 45-158, R. R. S. 1943, as amended) apply alike to licensees and nonlicensees. See, Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1; Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19.

Having come to the conclusion that the inhibitory provision of section 45-138, R. S. Supp., 1957, as it relates to the rate of interest that may be charged on a loan in excess of three thousand dollars has been violated, the question arises, what civil penalties are provided by the act, or any amendments thereto, that are applicable in such cases to nonlicensees. Formerly the violation thereof by any such person in connection with any indebtedness, however acquired by such person, rendered the indebtedness void and uncollectible. See, § 45-138, R. S. Supp., 1955, and §§ 45-154 and 45-155, R. R. S. 1943; Powell v. Edwards, *supra;* State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; McNish v. General Credit Corp., *supra;* McNish v. Grand Island Finance Co., 164 Neb. 543, 83 N. W. 2d 13; Curtis v. Securities Acceptance Corp., *supra.*

However, it is apparent the 1957 Legislature, by enacting L. B. 33, sought to change the civil penalties for violations of the Installment Loan Act. See Laws 1957, c. 194, p. 688. This act, which is now section 45-155, R. S. Supp., 1957, provides as follows: "Violation of sections 45-114 to 45-155 and amendments thereto, by any lender licensed thereunder in connection with any loan indebtedness however acquired, or by any lender of money for whom a license is by this act required, shall, in addition to the penalties as to interest provided by law, render the first one thousand dollars of such principal indebtedness void and uncollectible. If any other lender of money charges interest at a rate of interest higher than the lender is permitted by law to charge or in any event any initial indebtedness to the seller arising entirely from the bona fide sale of property is held to be a loan or forbearance, the penalty shall not be that provided in sections 45-114 to 45-155." It is appellants' thought that the provisions thereof are controlling here.

Legislation, like that here under consideration, is

within the public policy making power of the state and the fixing of that public policy, within constitutional limits, is for the Legislature and not the courts. See, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; McNish v. General Credit Corp., *supra;* Althaus v. State, 99 Neb. 465, 156 N. W. 1038.

It will be observed that the civil penalties contained in section 45-138, R. S. Supp., 1955, were left intact by the 1957 Legislature when it amended that section by enacting L. B. 404. See Laws 1957, c. 193, § 2, p. 685. Nor does L. B. 33, passed by the 1957 Legislature, either directly repeal or amend section 45-138, R. S. Supp., 1957. See Laws 1957, c. 194, p. 688. But appellants contend it does so by implication.

L. B. 404 was approved on May 9, 1957, to become effective on September 20, 1957, whereas L. B. 33 was approved May 14, 1957, but, because it contained an emergency clause, became effective immediately. We said in Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N. W. 2d 174: "The Legislature during a session may do and undo, consider and reconsider, as often as it thinks proper, as only the final result will be regarded as the thing done."

Article III, section 14, Constitution of Nebraska, provides, in part, that: "And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed." In Tukey v. Douglas County, 129 Neb. 353, 261 N. W. 833, we said: "This court has frequently held that a legislative act which is amendatory of existing laws is unconstitutional where such act does not contain the section or sections amended and does not repeal said original sections." And, as stated in 50 Am. Jur., Statutes, § 538, p. 542: "Repeals by implication are not favored, and there are many instances in which particular statutes are held not to be repealed by implication."

However, that a law may be repealed by implication is well settled by the opinions of this court. See Union P. R. R. Co. v. Sprague, 69 Neb. 48, 95 N. W. 46. As stated in Union P. R. R. Co. v. Sprague, *supra*: "An intention to repeal all laws inconsistent with a proposed measure of legislation is necessarily implied and need not be expressed in the title of the legislative bill." But, to do so, the act must be complete in itself. See, Tukey v. Douglas County, *supra;* State ex rel. Kaspar v. Lehmkuhl, 127 Neb. 812, 257 N. W. 229; Endres v. McDonald, 115 Neb. 827, 215 N. W. 114; State ex rel. Hall County Farm Bureau v. Miller, 104 Neb. 838, 178 N. W. 846; State ex rel. Graham v. Tibbets, 52 Neb. 228, 71 N. W. 990, 66 Am. S. R. 492. As stated in State ex rel. Graham v. Tibbets, *supra*: "An act not complete in itself, but which is clearly amendatory in its nature and scope, must set forth the section or sections as amended, and repeal the original section or sections." And in State ex rel. Hall County Farm Bureau v. Miller, *supra*, we held: "An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them." And in State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N. W. 835, we said: "That such an act is invalid needs no citation of authority; in fact, we think its invalidity is conceded subject to the one exception, that an act complete in itself is not invalid because it may incidentally modify, change or destroy the effect of existing statutes."

Section 45-155, R. S. Supp., 1957, is not a complete act by itself because reference to other sections of the Installment Loan Act are necessary in order to interpret and apply it and, without which, it would be meaningless and without effect.

We think the following language, quoted in State ex rel. Taylor v. Hall, *supra*, from State ex rel. Beal v. Bauman, 126 Neb. 566, 254 N. W. 256, is applicable here: " 'In truth, the new enactment accomplished nothing

of independent nature and its effect is wholly confined to "changes" of what theretofore existed, with the evident intent of its authors that by the mingling of the new changes with the old provisions a connected piece of legislation covering the same and original subject would result. But this is strictly a process of amendment.' " And as stated in Tukey v. Douglas County, *supra*: "Even though the act professes to be independent and complete in itself, yet if it is clearly not such, but is one amendatory in character, the court must so hold." That, we think, is the situation here. We hold that section 45-155, R. S. Supp., 1957, does not, in any way, amend section 45-138, R. S. Supp., 1957, by implication and that the latter section's provisions as to civil penalties applicable to any contract of loan made in violation thereof are still in full force and effect.

There is a further reason why the quoted provisions of section 45-138, R. S. Supp., 1957, dealing with civil penalties, are still in force and effect. This section deals specifically with installment loans in excess of three thousand dollars, whereas section 45-155, R. S. Supp., 1957, is general in its application. In Lee v. Lincoln Cleaning & Dye Works, 144 Neb. 659, 14 N. W. 2d 227, we said: "The general rule in such cases is: 'It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' " See, also, Nitzel & Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197; 50 Am. Jur., Statutes, § 561, p. 562.

Article III, section 14, Constitution of Nebraska, pro-

vides, in part, that: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title."

The title to L. B. 33 is as follows: "AN ACT to amend section 45-155, Reissue Revised Statutes of Nebraska, 1943, relating to installment loans; *to change the provisions for violations, as prescribed, by a lender licensed under the provisions of sections 45-114 to 45-155,* Reissue Revised Statutes of Nebraska, 1943, and amendments thereof; to repeal the original section, and also section 45-154, Reissue Revised Statutes of Nebraska, 1943; and to declare an emergency." (Emphasis ours.)

Appellants contend this title was sufficient to authorize any amendments germane to section 45-155, R. R. S. 1943, which had to do with civil penalties for violation of the Installment Loan Act, and sufficient to permit the repeal of section 45-154, R. R. S. 1943, thereof.

"Any provision in a legislative bill which is not clearly expressed in the title can not be enacted into law." Union P. R. R. Co. v. Sprague, *supra.* " 'The purpose of the constitutional provision under consideration, * * * is to give notice, through the title of the bill, to the members of the legislature and the public, of the subject-matter of the projected law,—in other words, that the title should clearly indicate the legislation embraced in the bill.' " County of Dawson v. South Side Irr. Co., 146 Neb. 512, 20 N. W. 2d 387. See, also, Midwest Popcorn Co. v. Johnson, *supra.*

"Where the title to an act is one for the amendment of an existing statute or section thereof, any legislation may be included in the amendatory act which is germane to the subject of the statute or section thereof sought to be amended." In re Estate of Austin, 116 Neb. 137, 216 N. W. 171.

However, as said in In re Estate of Austin, *supra*: "We think it may be conceded that under the restricted title of the act of 1905 no power could have been conferred upon the district court to grant licenses to execu-

tors, administrators or guardians to mortgage the real estate of their trust estates, because that act, by its title, purported to give authority only to county courts to grant such license."

The latter is the situation here for the Legislature limited itself by the title to licensed lenders under the Installment Loan Act and therefore could not enact a law thereunder relating to nonlicensees.

As stated in State ex rel. Graham v. Tibbets, *supra,* by referring to Board of Commissioners v. Aspen Mining & Smelting Co., 3 Colo. App. 223, 32 P. 717, as follows: "The opinion, after citing the cases in support of the doctrine, continues with the following quotation from Cooley, Constitutional Limitations (5th ed.), 179: 'As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might, with entire propriety, have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been unnecessarily restrictive. The courts cannot enlarge the scope of the title. They are vested with no dispensing power. The constitution has made the title a conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so.'" Therein we held: "An act is unconstittuional and void if the 'title is not broad enough to include the subject-matter of legislation.'" We think the latter is true here.

Article III, section 18, Constitution of Nebraka, provides, in part, that: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever."

Appellee contends section 45-155, R. S. Supp., 1957,

violates the foregoing provisions of Article III, section 18, Constitution of Nebraska, insofar as it creates four classes to which the civil penalties apply, to-wit: Licensed lenders, any lender of money for whom a license is by the act required, other lenders of money (apparently nonlicensees), and any holder of the initial indebtedness arising entirely from a bona fide sale of property should, it be held, that such indebtedness is a loan or forebearance. There would seem to be no reasonable basis for the making of such classifications and the granting of such special privileges and immunities, particularly in view of the purpose for which the Installment Loan Act was enacted. As stated in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 122: "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, an all-inclusive and proper classification. Thus, the inhibitory provisions thereof include and apply to all lenders of installment loans, whether they be licensees or nonlicensees. We therefore conclude that sections 45-114 to 45-158, R. R. S. 1943, are not local or special laws 'Regulating the interest on money' in violation of Article III, section 18, Constitution of Nebraska."

There are other questions raised which we do not find it necessary to discuss, in view of what we have herein held. We find the trial court was correct in holding the original was a cash sale, the balance of which was financed by an installment loan; that section 45-155, R. S. Supp., 1957, as passed by the 1957 Legislature, is unconstitutional; and that the installment loan, made to finance the balance of the cash purchase price, violated the inhibitory provisions of the Installment Loan Act and therefore is void and uncollectible. In view thereof, we affirm the judgment of the trial court en-

joining the appellants from in any manner collecting or attempting to collect said indebtedness.

AFFIRMED.

PENELOPE H. ANDERSON ET AL., PLAINTIFFS, V. F. A. HERRINGTON, STATE TAX COMMISSIONER OF NEBRASKA, ET AL., DEFENDANTS.
99 N. W. 2d 621

Filed December 4, 1959. No. 34717.

Building and Loan Associations: Constitutional Law. The method authorized for valuing the shares or stock of domestic building and loan associations under section 77-707, R. R. S. 1943, as amended by the 1959 Legislature, results in discrimination against obligations of the United States.

Original action. *Demurrer overruled.*

Morsman, Maxwell, Fike & Sawtell and *Wells, Martin, Lane, Baird & Pedersen,* for plaintiffs.

Clarence S. Beck, Attorney General, *Clarence A. H. Meyer, John C. Hanley,* and *John C. Burke,* for defendants.

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

WENKE, J.

This is an original action for a declaratory judgment and injunctive relief commenced in this court pursuant to leave granted. See, Rule 2 a 1, Revised Rules of the Supreme Court; §§ 25-21,149 to 25-21,164, R. R. S. 1943. Leave to file the action was granted under authority of Article V, section 2, of the Constitution of Nebraska, and section 24-204, R. R. S. 1943.

Plaintiffs brought the action in their own behalf and in behalf of all shareholders of domestic savings and loan associations similarly situated. Plaintiffs' petition, to which the defendants demurred, alleges that plaintiff

Penelope H. Anderson owned shares of stock in the Omaha Loan & Building Association which she reported in her individual property tax schedule for 1959, filed with the county assessor of Douglas County, at 10% of its value for assessment purposes, and that the plaintiff Catherine M. Martin owned shares of stock in the Conservative Savings & Loan Association which she reported in her individual personal property tax schedule for 1959, filed with the county assessor of Douglas County, at 10% of its value for assessment purposes. These shares of stock were reported by the plaintiffs under and pursuant to the requirements of section 77-707, R. R. S. 1943, as amended by 1959 Legislature. See Laws 1959, c. 22, § 3, p. 153.

The petition alleges that the state Tax Commissioner, pursuant to the provisions of section 77-707, R. R. S. 1943, prepared a formula to ascertain at what percentage of the withdrawal value the stock or shares of each Nebraska savings and loan association should be valued for assessment purposes, after deducting from the withdrawal value those items authorized to be deducted therefrom by section 77-707, R. R. S. 1943, as amended, without deducting therefrom any proportionate value of the bonds and other obligations of the United States of America included in the assets of the associations; that the county assessors of the state were advised, by bulletin, of the withdrawal value of the shares of stock in each of said savings and loan associations by use of the foregoing formula; that the county assessor of Douglas County and the assessors of all the other counties of the state have changed or are preparing to change the individual taxpayer's reported value of his or her shares or stock in each of said savings and loan associations to comply with the state Tax Commissioner's percentages, as determined by the formula he used; and that, by doing so, the county assessors of the State of Nebraska have or will violate "the provisions of Title 31 U.S.C.A. Section 742 of the

Laws of the United States in that it unlawfully discriminates against the bonds and other obligations of the United States of America and is, therefore, unconstitutional; that the assessment procedure violates the Constitution of the State of Nebraska, particularly as provided in Section 1, Article VIII."

The prayer is "for a declaratory judgment adjudicating that the assessments of the stock of the plaintiffs be fixed by the County Assessor at a percentage of withdrawal value which will reflect their proportionate share of a reduction of value represented by the bonds or other obligations of the United States of America owned by their associations, as well as which will reflect their proportionate share of reduction of value represented by those other types of assets owned by their associations as set forth in Section 77-707, Revised Statutes of Nebraska (1943) as Amended, and further pray for an injunction enjoining the defendant, JOE C. STOLINSKI, Assessor of Douglas County, Nebraska, from assessing the stock of savings and loan associations in the manner now illegally pursued by him."

Section 77-707, R. R. S. 1943, provides: "The stock or shares of domestic building and loan associations organized under the laws of this state and the stock of building and loan associations organized under the laws of the United States, or any other state, and doing business in this state, shall be assessed to and the tax paid by the individual owners thereof, who shall pay tax upon the value of their shares or stock in said associations, less the proportion of the value of said stock or shares invested by the associations in real estate mortgages or other property, both tangible and intangible, listed and taxed in this state."

The 1959 Legislature amended this section by enacting L. B. 701, but such amendment is not material to the issue here involved. See Laws 1959, c. 22, p. 151.

It is apparent the state Tax Commissioner followed

the provisions of section 77-707, R. R. S. 1943, in preparing the formula he used in determining what percentage of the withdrawal value of the shares of stock of each Nebraska savings and loan association that should be used to reflect the value thereof for assessment purposes thereunder.

The question involved is stated by plaintiffs as follows: "Must obligations of the United States, its agencies and instrumentalities, be deducted from the value of the shares in Savings (Building) and Loan Associations on which a shareholder pays the tax imposed by Section 77-707 R. R. S. 1943?"

It will be observed that the individual owner of the stock or shares of such building and loan associations shall be assessed and pay tax upon the value thereof "less the proportion of the value of said stock or shares invested by the associations in real estate mortgages or other property, both tangible and intangible, listed and taxed in this state."

In Peter Kiewit Sons' Co. v. County of Douglas, 161 Neb. 93, 72 N. W. 2d 415, we dealt with a comparable statute. We stated the question therein, so far as here material, as follows: "A further question is raised as to whether or not section 77-706, R. R. S. 1943, in view of taxing practices authorized thereunder, could result in discrimination against the tax-exempt character of securities held by domestic Nebraska corporations in the form of government obligations." The statutory provision therein involved, insofar as material to the foregoing question, provided: "The value of the shares of stock * * * shall be determined for the purpose of taxation by deducting from the actual value of the paid-up capital stock, surplus, and undivided profits of such corporation available for stock dividends, the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state * * *." § 77-706, R. R. S. 1943. See, also, Peter Kiewit Sons' Co. v. County of Douglas, *supra*. Then, after

discussing the authorities relating thereto, we held: "Under these holdings we can come to no other conclusion than that the method authorized for valuing the shares of stock of domestic corporations under section 77-706, R. R. S. 1943, results in discrimination against United States obligations and that the trial court was correct in so holding." We think the foregoing is applicable to section 77-707, R. R. S. 1943, as amended. See Laws 1959, c. 22, § 3, p. 153.

We shall not again discuss the authorities that are applicable and controlling, as they are cited and sufficiently discussed in Peter Kiewit Sons' Co. v. County of Douglas, *supra,* except to again set out the following from Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. Ed. 91, as therein set forth: "The point is that the State has chosen a portion only of the net assets of the corporation as a measure of the tax, whether the exaction be from the company or its shareholders. The State has exempted certain assets on the theory that to measure the tax in part by their value would in effect be to tax them twice. If to measure the shareholder's tax by inclusion of these taxed or exempted securities found amongst the company's assets would be to tax the shareholder in virtue of the company's ownership of those securities, it seems clear that to refuse to exempt United States securities from the measure of the tax is to lay a tax reckoned upon their value. To put it otherwise, if to exclude securities already taxed or exempted from tax pursuant to the policy of the Commonwealth avoids double taxation, to include United States securities in the measure of the tax seems inevitably to increase the burden of the tax by reason of their ownership."

We have come to the conclusion that plaintiffs' petition states a cause of action and therefore overrule defendants' demurrer thereto, but grant defendants 30 days in which to further plead. If the defendants do not further plead within that time then the Clerk of

the Supreme Court is ordered to enter a judgment granting plaintiffs the relief prayed for.

DEMURRER OVERRULED.

IN RE ESTATE OF RUTH B. ZORN, DECEASED.
ROY O. BUCHANAN ET AL., APPELLANTS, V. HOWARD B. ZORN, APPELLEE.
99 N. W. 2d 773

Filed December 11, 1959. No. 34544.

1. **Wills.** A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of one who is aged or infirm in making disposition of his property by will; provided, only, that his mentality conforms to the accepted tests at the time of the execution of such testamentary instrument and the same was not procured by undue influence.
2. ———. In a will contest upon the ground of undue influence the burden is upon contestants to prove by a preponderance of evidence, which as a whole is of such a substantial nature as to contain some competent and relevant proof of each and all of the following elements: (1) That testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.
3. ———. Undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised at the very time the will was executed.
4. ———. In order to invalidate a will duly executed by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own.
5. **Trial.** In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
6. ———. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury.

7. ———. If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict.

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

Heaton & Heaton and *Wright, Simmons & Harris,* for appellants.

Martin, Davis, Mattoon & Matzke, Maupin, Dent, Kay & Satterfield, James O. David, and *James J. Duggan,* for appellee.

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

YEAGER, J.

This action was originally instituted by petition of Roy O. Buchanan filed in the county court of Cheyenne County, Nebraska, for the probate of the last will and testament of Ruth B. Zorn, deceased. Objections to probate of the will were filed by Howard Zorn, also referred to in the pleadings as Howard B. Zorn, the only son and heir of the deceased. There were numerous objections but those requiring mention here are that the will was the result of undue influence exerted upon the mind of the testatrix and that it is not her will, and that the testatrix lacked testamentary capacity when she executed the instrument. There was an answer controverting the objections. A hearing was had in the county court after which the will was duly admitted to probate. From the adjudication admitting the will to probate the objector, Howard B. Zorn, appealed to the district court.

In the district court Roy O. Buchanan filed a petition for probate of the will of Ruth B. Zorn. By the

petition it was alleged that Ruth B. Zorn died on June 15, 1957, leaving a last will and testament. The will was not made a part of the petition in the district court but it was by reference made a part of the petition in the county court. There is however no controversy about its contents. The petition named Howard B. Zorn, a son, as the only heir at law. Roy O. Buchanan, a brother, Ray Buchanan, a brother, and Betty Buchanan Wholford, a niece, were named as other persons interested in the estate of Ruth B. Zorn.

The will is dated July 27, 1953. It was drafted by Paul Rhodes, an attorney of Bridgeport, Nebraska. It was witnessed by Clark Willhite and Margaret Skarboe. To the extent necessary to state here, by the terms of the will Howard B. Zorn was to receive $1. Nellie B. Cox, Roy O. Buchanan, and Ray Buchanan were each to receive one-third of the real estate provided that they were living at the time of the death of the testatrix. In case of the death of any of them before the testatrix, then the real estate should be divided equally between those remaining. Incidentally Nellie B. Cox did predecease the testatrix. The personal estate was to go to Betty Buchanan Wholford.

To the petition Howard B. Zorn filed an answer in which he objected to the probate of the will on the same grounds he asserted in the county court.

Thereafter Roy O. Buchanan and Ray Buchanan moved for summary judgment which if sustained would have required admission of the will to probate. In the light of the review of the entire record the conclusion reached is that neither this proceeding nor the determination made by the district court thereon requires any consideration by this court. At the time the motion for summary judgment was filed Ray Buchanan joined as a proponent in the proceedings.

The case was tried to a jury on the issues presented by the petition for probate filed by Roy O. Buchanan, proponent, and the objections thereto by Howard B.

Zorn, the contestant. The jury returned a verdict in favor of the contestant and against the proponents. An appropriate judgment was rendered on the verdict. A motion in substance for judgment notwithstanding the verdict or for new trial was made and in due course overruled. From the judgment and the order overruling the motion for judgment notwithstanding the verdict and the motion for new trial the proponents have appealed. They will be referred to as appellants. Howard B. Zorn, contestant, will be referred to as appellee.

At the conclusion of the evidence of the appellee a motion was made in effect to remove from the consideration of the jury the question of the mental competency of the testatrix and to find in favor of the appellants in this respect. This motion was sustained. No appeal from this finding was taken by the appellee. That issue is not before this court for consideration.

At that time also the appellants in substance moved for an order removing from the consideration of the jury the question of undue influence and for a finding that the evidence was insufficient to sustain the charge that undue influence had been exercised on Ruth B. Zorn with reference to the making of the will. This motion was overruled. This motion was renewed after the evidence in the case on the issues was concluded. It was again overruled.

In the light of this state of the record it becomes clear that the only issue submitted and the only one on which the jury made a finding was that of whether or not the will of Ruth B. Zorn was the result of undue influence.

By assignment of error the appellants contend that the case should not have been submitted to the jury for the reason that the evidence adduced was insufficient upon which to submit the issue of undue influence.

A review of this question by this court must be made in the light of certain well-established principles con-

cerning which there is no dispute. The statement of these principles appears with citations and quotations from other decisions of this court in Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568. In that case it is said:

"A testator may dispose of his property as he pleases. The law does not require that he recognize his relatives therein nor does it put any obstacle in the way of the aged or infirm in making disposition of their property by will; provided, only, that their mentality conforms to the accepted tests at the time of the execution of such testamentary instrument and same was not procured by undue influence.

"In a will contest upon the ground of undue influence the burden is upon contestants to prove by a preponderance of evidence, which as a whole is of such a substantial nature as to contain some competent and relevant proof of each and all of the following elements: (1) That testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.

"Undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised at the very time the will was executed. * * *

"In order to invalidate a will duly executed by a testator having testamentary capacity, undue influence must be of such character as to destroy the free agency of the testator and substitute another's will for his own.

"In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.

"It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. * * *."

The application of these principles must be made in the light of what developed on the trial as disclosed by the bill of exceptions. This bill of exceptions contains over 900 pages and in addition more than 100 exhibits. The first 112 pages consist of evidence adduced by the appellants. It is in proof of proper execution of the will and mental competency of the testatrix. As pointed out these are not matters remaining for review by this court. The remainder of the bill of exceptions, except a few pages of rebuttal, consists of evidence from witnesses called to testify on behalf of the appellee. It is obvious therefore, in the light of the voluminous record, that there may not herein be a summary of the testimony of the witnesses who testified.

There is however another and cogent reason why there shall be no lengthy summary. That reason is that in the light of the stated controlling legal principles no evidence has been adduced which directly or by reasonable inference supports the contention that the will of Ruth B. Zorn dated July 27, 1953, was the result of undue influence by any party in interest or by any other person.

In order that the situation involved shall be understood, it is pointed out that Albert C. Zorn and Ruth B. Zorn were husband and wife. They had one child, Howard B. Zorn. On and prior to July 25, 1953, Albert C. Zorn was the owner of three quarter sections of land in Cheyenne County, Nebraska. On July 25, 1953, Albert C. Zorn conveyed this land by quitclaim deed to Ruth B. Zorn. On July 27, 1953, Ruth B. Zorn, apparently unaccompanied by anyone, went to Bridgeport, Nebraska, and to the office of Paul Rhodes, an attorney at law, who drafted the will which is the subject of this action. The will was signed in the presence of two

persons who signed as witnesses. These witnesses were not previously known by Ruth B. Zorn. The will was placed in the safe of the attorney where it remained until after the death of Ruth B. Zorn in 1957. After the will was executed and on the same day, Ruth B. Zorn went to the home of her brother in Dalton, Nebraska, where she received medical attention and treatment from a doctor. The arguments of the appellee suggest that this attention and treatment may have been before the execution of the will, but the suggestion, on the record, is untenable. Albert C. Zorn died October 13, 1954. It was known as early as the autumn of 1952 that he was suffering from an ailment which was destined to be fatal. At least from and after the will was executed Ruth B. Zorn spent a considerable amount of time in the homes of Ray Buchanan and Roy O. Buchanan, and in hospitals. She was not in good health but it does not appear necessary to set forth the details as to her condition. After the will was executed and until the time of her death she had close contacts with her two brothers as well as others who were related to her by blood or marriage.

In all of the evidence however from which this background has been drawn there is none, direct or circumstantial, the effect of which is to say that the appellants or anyone else, before the will was executed, sought to influence her in the making of this or another will. This is also true as of the date of making the will. It is further true that the evidence fails to disclose that any person or persons even knew that she contemplated the making of the will or that she had made it even up to the time of her death except the testatrix, the attorney who drafted it, and the two persons who signed it as witnesses. The only thing from which an inference may be drawn that anyone other than these four had any information of any kind or character as to its existence prior to her death is a statement by the attorney who drew the will that Ray

Buchanan and Roy O. Buchanan came to his office on or about the day of the death of Ruth B. Zorn. It was on that day that a petition for probate was prepared and signed by Roy O. Buchanan. No inquiry was made of this witness as to whether Roy O. Buchanan and Ray Buchanan came on account of prior knowledge of the existence of the will or on account of information disclosed by him that he had the will.

In the light of the stated controlling principles and this absence of evidence of undue influence the trial court erred in submitting the issue of undue influence to the jury for determination. The motion made by the appellants at the close of the evidence to withdraw the issue of undue influence from the jury or in the alternative to direct a verdict for the appellants should have been sustained. It follows that the court should have sustained the appellants' motion for judgment notwithstanding the verdict.

In Hamilton v. Omaha & C. B. St Ry. Co., 152 Neb. 328, 41 N. W. 2d 139, it is said: "If a motion for directed verdict made at the close of the evidence in a case should have been sustained for want of evidence to support a verdict in favor of the party against whom made, it is the duty of the court on motion for judgment notwithstanding the verdict timely made to sustain such motion to set aside the verdict and to render judgment pursuant to the motion for directed verdict." See, also, Stolting v. Everett, 155 Neb. 292, 51 N. W. 2d 603; Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

The brief of appellants contains numerous assignments of error in addition to the one considered, but in the light of the determination made on this one the others do not require discussion.

The judgment of the district court is reversed and the cause remanded to the district court with directions to render the judgment notwithstanding the verdict requested by the appellants, and in accordance with that

action to render judgment admitting the will to probate.
REVERSED AND REMANDED WITH DIRECTIONS.

JAMES F. KIRCHNER, APPELLANT AND CROSS-APPELLEE, V. CAROL R. GAST, APPELLEE AND CROSS-APPELLEE, METROPOLITAN UTILITIES DISTRICT OF OMAHA, INTERVENER-APPELLEE AND CROSS-APPELLANT.
100 N. W. 2d 65

Filed December 11, 1959. No. 34579.

1. **Parties.** A petition in intervention under the provisions of section 25-328, R. R. S. 1943, to be filed as a matter of right must be filed before the trial.
2. ———. An intervener against whom a judgment has been rendered must be accorded the rights which, under like circumstances, belong to any other unsuccessful suitor.
3. **Parties: Pleading.** Section 25-329, R. R. S. 1943, is applicable where an intervener has met the requirements of section 25-328, R. R. S. 1943, and has pleaded the required interest in the matter in litigation. It requires the issues presented by such an intervention to be decided when the issues presented by the plaintiff and defendant are determined. It does not apply to a decision of the preliminary question of the sufficiency of the petition in intervention.
4. **Parties.** The interest in a matter in litigation which will authorize a person to intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
5. ———. Every person is entitled to access to courts of justice without interference from persons who have no interest in the matters in litigation.
6. ———. To authorize a party to intervene the interest must be one arising from a claim to the subject matter of the action or some part thereof, or a lien upon the property or some part thereof.
7. ———. The matter in litigation as used in section 25-328, R. R. S. 1943, is the subject matter of the action, "the thing in controversy."
8. **Pleading.** Section 25-842, R. R. S. 1943, provides that every material allegation of new matter in an answer not controverted by a reply shall for the purpose of the action be taken as true,

yet a litigant will not be permitted to try his case in the district court as though a reply traversing the allegation in his answer were on file and insist in this court that no reply was filed.

9. ———. A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.

10. ———. The above rule applies only to statements in the pleadings upon which the case is tried. It has no application to statements contained in pleadings which have been superseded by amended pleadings.

11. **Evidence: Trial.** Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded.

12. ———: ———. A plaintiff may not recite upon oath one statement of facts in one judicial proceeding and then, to meet the exigencies of the occasion in the trial of a different suit, recite under oath an entirely different story.

13. **Witnesses: Trial.** An unexplained change in the evidence of a litigant not required by the exigencies pointed out in a previous trial is a matter of impeachment, credibility, and weight for the jury to determine.

14. **Evidence.** Extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of the facts deems them entitled.

15. **Negligence: Trial.** If it appears that a defendant has been guilty of gross negligence and a plaintiff has been guilty of slight negligence by comparison with that of the defendant the plaintiff may recover.

16. ———: ———. If a defendant has been guilty of gross negligence and a plaintiff has been guilty of negligence more than slight by comparison with that of the defendant the plaintiff may not recover.

17. ———: ———. If a defendant has been guilty of negligence but which is less than gross and the plaintiff has been guilty of negligence in any degree the plaintiff may not recover.

18. ———: ———. In an action based on negligence to which the

comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed.

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

Charles E. Kirchner, for appellant.

Wear, Boland, Mullin & Walsh and *A. Lee Bloomingdale,* for appellee.

George C. Pardee, G. H. Seig, and *Harry A. Foulks, Jr.,* for intervener-appellee.

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

SIMMONS, C. J.

This is an intersection automobile damage case with this distinction: The two cars involved did not make contact. Defendant was driving south across an intersection. Plaintiff was driving east. Plaintiff's car passed around the rear of defendant's car. It then went at an angle across the intersection over a curb near the northeast corner and came in contact with a tree and a water hydrant. Plaintiff suffered personal injuries. The car was damaged. The water hydrant was damaged.

The car plaintiff was driving belonged to plaintiff's father. Plaintiff, alleging negligence of the defendant, sued in one cause of action for damages to his person, and in a second cause sued as assignee for damages to the car. Issues were made as between plaintiff and defendant.

The Metropolitan Utilities District, hereinafter called the District, intervened, alleging negligence of both the plaintiff and defendant and sought a recovery of the damages to its water hydrant. Issues were made as between plaintiff, defendant, and the District. The trial court on its own motion and on an oral motion of plaintiff gave the District leave to docket the pleadings as a

separate proceeding and dismissed the petition in intervention.

The action was then tried resulting in a directed verdict for defendant. Plaintiff appeals alleging error in the direction of a verdict against him. The District, as appellee, assigns error in the order of dismissal of its petition in intervention.

We affirm the judgment of the trial court.

Chronologically the issues here involved developed in the following manner:

The accident occurred on February 12, 1957. Plaintiff filed his petition on June 18, 1957. The defendant filed his answer on July 3, 1957. The District filed its petition in intervention on October 16, 1957. On November 12, 1957, the defendant answered the petition in intervention, joining issues and praying that the petition in intervention be dismissed.

On December 2, 1957, plaintiff filed his answer to the petition in intervention in which he answered generally and denied that the District had an interest in the matter entitling it to intervene. On December 12, 1957, the District filed its reply to both answers.

On December 5, 1958, the trial court, upon its own motion, and upon motion made by plaintiff, took up the matter in the plaintiff's answer to the petition in intervention. The court held that the District was not authorized to intervene in the action. The court granted the District leave to redocket the pleadings pertinent to the intervention as a separate action and if not done within 10 days the petition in intervention "will be dismissed without prejudice." The cause came on for trial December 8, 1958. On that day the District presented a motion to be allowed to participate in the trial. The motion was denied.

On December 10, 1958, the trial court sustained defendant's motion for a directed verdict.

On December 11, 1958, the District moved for judgment on the pleadings and the evidence.

On December 15, 1958, the District moved to vacate the dismissal order of its petition which it entitled a "Motion for New Trial." On the same day the court entered an order denying the District's motion for judgment.

On December 31, 1958, the court denied the motion of December 15, 1958.

In the meantime plaintiff had on December 11, 1958, filed a motion for a new trial which was overruled on December 15, 1958. On December 24, 1958, plaintiff gave notice of intent to appeal. The transcript was filed here on January 16, 1959.

As of July 20, 1959, the clerk of the district court certified that the District had not caused the pleadings pertinent to its intervention to be redocketed.

The District filed here its brief on cross-appeal. It presents its right to intervene under the provisions of section 25-328, R. R. S. 1943.

Defendant here challenges the District's right to cross-appeal under the provisions of sections 25-1912 and 25-1913, R. R. S. 1943. Defendant contends that the order of dismissal of the petition of intervention, if the cause was not redocketed, was a final order and this court could only get jurisdiction of that question by a separate notice of appeal; and that no appeal proceedings having been had from the order the question was finally determined.

The question is: Was the District a party to the action under the provisions of sections 25-1912 and 25-1913, R. R. S. 1943, and our rule 1 b, so as to give it the right of cross-appeal provided by our rule 1 d? The District intervened under the provisions of section 25-328, R. R. S. 1943.

Section 25-328, R. R. S. 1943, provides: "Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become

a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences."

A petition in intervention under the provisions of section 25-328, R. R. S. 1943, to be filed as a matter of right must be filed before the trial. State v. Farmers State Bank, 103 Neb. 194, 170 N. W. 901.

The District filed its petition in intervention within time. It was, however, subject to the condition that its petition demonstrate an interest in the matter being litigated within the provisions of the statute. Clearly the trial court held that the District had not met the condition above stated. The District contended that it had. It persisted in that contention as recited above. It kept itself in the action as a party until the question of the sufficiency of its petition, to demonstrate an interest in the matter being litigated between the plaintiff and defendant, was finally determined. That question it brings here. Under these circumstances the District becomes an appellee under the provisions of section 25-1913, R. R. S. 1943, with the right to cross-appeal here under the provisions of rule 1 d.

We held in State ex rel. Bugbee v. Holmes, 60 Neb. 39, 82 N. W. 109: "An intervener against whom a judgment has been rendered must be accorded the rights which, under like circumstances, belong to any other unsuccessful suitor."

Section 25-329, R. R. S. 1943, provides: "The court shall determine upon the intervention at the same time that the action is decided, and if the claim of the intervener is not sustained he shall pay all costs of the intervention."

The District contends that the trial court's decision was premature and that the trial court could not decide

the question of compliance with the condition applicable to section 25-328, R. R. S. 1943, until after trial and at the same time decision was had in the action between plaintiff and defendant.

The District relies on Montgomery v. Dresher, 97 Neb. 112, 149 N. W. 314. The syllabus point when read alone appears to sustain the position of the District. When read in connection with the opinion, the support disappears. It does not appear that the sufficiency of the intervener's petition to demonstrate the requisite interest in the litigation was determined. It does appear from the opinion that the trial court's findings showed an interest in the litigation which the intervener was entitled to have adjudicated "in the final determination of the action."

Clearly the District had not yet reached the point where it had been determined that it had an interest in the matter in litigation.

In Drainage Dist. No. 1 v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 582, we reviewed many rules regarding intervention and said this: "It may be conceded that the provisions of our Civil Code do not contemplate intervention by leave of court first obtained. It is ordinarily a matter of right, and not of permission. Nevertheless, the question whether pleadings or pleadings and proof establish that the party seeking to intervene has an actual interest in the subject of the controversy entitling him to participate therein to the extent of the interest possessed by him is a necessary preliminary question for the trial court's decision and is determinable when the action is finally decided." We relied on State ex rel. Bugbee v. Holmes, *supra*.

It appears in the above case that there had been no challenge to the sufficiency of the intervener's petition to show the requisite interest in the matter in litigation. The trial court found against the intervener and dismissed the petition in intervention after hearing upon the issues.

That is not this case. The language used in the quote relates to "pleadings or pleadings and proof," and refers to "a necessary preliminary question" for the trial court's determinaton which relates itself to the pleadings, and the clause "determinable when the action is finally decided" relates itself to the question of proof.

In State ex rel. Bugbee v. Holmes, *supra*, we referred to the statute and held: "This section does not contemplate intervention by leave of court. It gives, absolutely, to any person who can show by proper averments that he has an interest in the subject of the controversy, the right to become a party and to obtain an adjudication of his claims. The court has no authority to exclude from the case an intervener whose pleading discloses a direct interest in the matter of litigation; it must give judgment on the merits; it must decide in his favor or against him; and if against him, it must accord him the rights which belong to any other unsuccessful suitor."

Impliedly from that decision a court has authority to exclude from the case an intervener whose pleadings do not disclose a direct interest in the matter in litigation.

Noble v. City of Lincoln, 158 Neb. 457, 63 N. W. 2d 475, in effect decides this matter adverse to the contention of the District. There was in that case a petition in intervention. Its sufficiency was attacked by general demurrer. The trial court overruled the demurrer. We held that the demurrer should have been sustained because the petition in intervention did not allege facts showing a sufficient interest in the matter in litigation.

Obviously the sustaining of a demurrer would prevent the intervener from participating in the trial. Accordingly we hold that section 25-329, R. R. S. 1943, is applicable where an intervener has met the requirements of section 25-328, R. R. S. 1943, and has pleaded the required interest in the matter in litigation. It requires the issues presented by such an intervention to be decided when the issues presented by the plaintiff

and defendant are determined. It does not apply to a decision of the preliminary question of the sufficiency of the petition in intervention.

We go, then, to the question: Has the District by its petition shown a right to maintain its intervention in this action?

We have held: "The interest in a matter in litigation which will authorize a person to so intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. * * * Such an interest must be one arising from a claim to the subject matter of the action or some part thereof or a lien upon the money or property or some part thereof, as distinguished from an indirect, remote, or conjectural interest in the result of the suit which is not enough to permit intervention." Gilbert v. First Nat. Bank, 154 Neb. 404, 48 N. W. 2d 401. See, also, Noble v. City of Lincoln, *supra*.

" 'No rule is better settled or more essential to the rights of parties litigant than that every person is entitled to access to courts of justice without interference from persons who have no interest in the matters in litigation.' " Drainage Dist. No. 1 v. Kirkpatrick-Pettis Co., *supra*.

It does not appear that we have undertaken expressly to define the meaning of the phrase "matter in litigation" found in section 25-328, R. R. S. 1943. The statute gives us an indication of its meaning when it refers to "joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff." In the above there is a limitation of the matter in litigation to the claims of one or the other of the parties. The statute further authorizes intervention "by demanding anything adversely to both the plaintiff and defendant." This of course, is restricted to the scope of "matter in liti-

gation" and "claims" used earlier in the section. In fact we have so held: To authorize a party to intervene the interest must be one arising from a claim to the subject matter of the action or some part thereof, or a lien upon the property or some part thereof. Kansas & C. P. Ry. Co. v. Fitzgerald, 33 Neb. 137, 49 N. W. 1100. See, also, Latham v. Chicago, B. & Q. R. R. Co., 100 Neb. 173, 158 N. W. 923; Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482.

The matter in litigation as used in section 25-328, R. R. S. 1943, is the subject matter of the action, "the thing in controversy." Holmes v. Mason, 80 Neb. 448, 114 N. W. 606. What, then, are the claims at issue between plaintiff and defendant in this action? It is the "claim" of plaintiff that he is entitled to recover from the defendant damages for personal injuries and for property damage based on the alleged negligence of the defendant. Defendant makes no affirmative recovery claim but seeks a dismissal of plaintiff's petition. Briefly stated, the above sets out the matters in litigation between the parties.

The District makes no claim to any part of the damages claimed by the plaintiff. It does not resist the claim of the plaintiff against the defendant. Obviously the District has no interest in asserting or defending the claims of the plaintiff against the defendant. The District claims a different cause of action against both the plaintiff and defendant. It seeks to recover damages to its hydrant. Such a "claim" is not in anywise involved between the plaintiff and defendant.

Under the rules above stated we conclude that the trial court did not err in the rulings of which the District complains. As to the District's cross-appeal, the judgment of the trial court is affirmed.

We find nothing in Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889, nor in Hoffman v. Geiger, 134 Neb. 643, 279 N. W. 350, which is in conflict with this conclusion.

This brings us to the question presented by the plaintiff: Did the trial court err in sustaining defendant's motion for a directed verdict?

The parties here present contentions which need to be decided before stating the evidence.

The case was tried upon the petition of the plaintiff and the answer of the defendant, pleading negligence and contributory negligence. Defendant contends here, the plaintiff not having replied to the answer, that contributory negligence in a degree more than slight is conclusively admitted.

The applicable rule is: While section 134 of the code (now section 25-842, R. R. S. 1943) provides that every material allegation of new matter in an answer not controverted by a reply shall for the purpose of the action be taken as true, yet a litigant will not be permitted to try his case in the district court as though a reply traversing the allegation in his answer were on file and insist in this court that no reply was filed. Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251.

This rule has been consistently followed down to and including Dinkel v. Hagedorn, 156 Neb. 419, 56 N. W. 2d 464. We see no merit in the contention.

Plaintiff contends that the defendant, in his answer to the petitions in intervention of the District, made a judicial admission of negligence. Plaintiff did not offer the answer in evidence. He claims here that defendant's negligence was rendered indisputable. The rule as stated in Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173, is: "A party may at any and all times invoke the language of his opponent's pleading, on which a case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner."

We pointed out in In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923, that the above rule "applies only to statements in the pleadings upon which the

case is tried. It has no application to statements contained in pleadings which have been superseded by amended pleadings as in the case at bar." We have adhered to that holding. See, also, Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831; Lash v. Erisman, 167 Neb. 606, 94 N. W. 2d 32. It is patent that the case was not tried on the issues made in the proceedings in intervention. There is no merit to the contention.

Defendant took the deposition of the plaintiff before the trial. He used it for impeachment purposes at the trial. Plaintiff admitted contradictory statements with reference to speed at a point some distance before the event of the accident, the length of skid marks, and the use of or failure to use brakes.

Defendant contends that plaintiff is bound by the deposition testimony as a matter of law.

Defendant appeals to the rule stated in Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, as follows: "Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded. * * * A plaintiff may not recite upon oath one statement of facts in one judicial proceeding and then, to meet the exigencies of the occasion in the trial of a different suit, recite under oath an entirely different story." We there quoted from Gormley v. Peoples Cab, Inc., 142 Neb. 346, 6 N. W. 2d 78, wherein we said: "Such conduct cannot be tolerated to the extent, when it is clearly apparent, of requiring a trial judge to submit the credibility of such testimony to a jury, and of permitting a party to mock law and justice." That decision goes back to Peterson v. Omaha & C. B. St. Ry. Co., 134 Neb. 322, 278 N. W. 561, wherein we held: "Testimony of a witness on a vital point in a case, materially changed to obviate objections

pointed out by this court on a former appeal, without any sufficient explanation given, is discredited as a matter of law, and will be disregarded."

There have been several subsequent decisions dealing with the same matter. In Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640, we held: "An unexplained change in the evidence of a litigant not required by the exigencies pointed out in a previous trial is a matter of impeachment, credibility, and weight for the jury to determine."

In Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751, we held: "We are not in accord with defendant's contention as to the applicability of such cases to the instant case. The applicable rule is that extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of the facts deems them entitled."

In Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507, we had a case where defendant took plaintiff's deposition and used it, as here, on cross-examination for impeachment purposes. We referred back to Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518. We held that the testimony involved was in the area of extrajudicial admissions to be considered by the jury.

Those cases where we have held the statements to be judicial admissions have been where it is patent that the witness deliberately changed his testimony to meet the necessities of the case, and where the change has been unexplained, or is unexplainable on any rational basis. We have then held it to be a matter of law, but otherwise it is a question of credibility for the trier of facts. We hold that the testimony here involved is one of credibility for the jury. On a motion

for a directed verdict, as here, those questions are resolved in favor of the plaintiff.

Plaintiff, by argument only, contends there was error in the rejection of certain evidence offered by him. There is no reference to it in the assignments of error. Rule 8a2(4) of the rules of this court provides: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned." This rests upon section 25-1919, R. R. S. 1943.

The tenders of evidence involved are not such as require that they be considered as plain errors not assigned.

We now reach the consideration of plaintiff's contention that the evidence as to defendant's negligence presented a jury question.

We state the evidence under the rule that a motion for a directed verdict admits the truth of all competent evidence favorable to the party against whom the motion is directed; that every controverted fact must be resolved in his favor; and that he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

This accident happened at the intersection of Underwood Avenue and the east branch of Happy Hollow Boulevard. Underwood Avenue runs east and west and is 40 feet wide at this point. Happy Hollow Boulevard runs slightly southwest of a true north and south line and at this point north of Underwood Avenue is 30 feet wide. There is a stop sign at the northwest corner of the intersection and facing Happy Hollow Boulevard. The accident happened about 5:45 p.m. on February 12, 1957. The weather was clear, the sun was shining, and the streets were free from snow or ice. Defendant was driving south on Happy Hollow Boulevard.

Plaintiff saw defendant 3 or 4 car lengths north of the intersection. Defendant's speed was then 15 to 20 miles per hour. Plaintiff kept the defendant in his field of vision. Defendant slowed down to a speed of 5 to 10 miles per hour at the stop sign. At the time defendant reached the crossing of the eastbound lane his speed was 15 to 20 miles per hour. Defendant drove on out of the intersection and stopped southwest of it. The defendant was looking straight ahead and "in a kind of an easterly direction." This, however, was when plaintiff set his brakes and defendant's car was 40 or 50 feet ahead of him.

In the meantime plaintiff was driving east on Underwood Avenue. Plaintiff was driving at about 25 miles per hour as he approached the intersection. His car was equipped with power steering and power brakes. Although he had observed the approach of the defendant from the distance stated and had kept him in his field of vision, plaintiff did not apply his brakes until defendant crossed the center line of Underwood Avenue. He then "noticed the danger." His car was then 40 to 50 feet west of the defendant's car. He applied his brakes hard enough to slide his tires and skidded in a straight line 30 to 35 feet. He supposed he could stop his car in 50 feet going at 25 miles per hour, and was sure he could stop his car in 100 feet.

Plaintiff after skidding as above stated, released his brakes, which had never been set solidly, made an abrupt turn to the left, and avoided hitting the defendant's car. These "turning marks" were 15 to 20 feet long, and darker on the right side. Plaintiff's eyewitness testified that plaintiff was "half out of control" from the time his car made the swerve. The testimony is not denied. Plaintiff's car then straightened out its course and "went on towards the northeast corner" of the intersection at a speed of 15 to 20 miles per hour. Plaintiff "possibly" put on his brakes again before going over the curb. In any event plaintiff's car went

up and over the curb and in endeavoring to go between a tree on its left and a hydrant on its right it hit both. This was not the end of the movement of the car, but as plaintiff testified he did not remember what happened after his car struck the tree, we do not detail its further movement except to say that it went on east and struck a parked car with sufficient force to materially damage both cars.

Plaintiff alleged negligence of the defendant as the proximate cause of personal injury and the damage to personal property in the following particulars: (1) In failing to observe the stop sign when entering Underwood Avenue; (2) in failing to keep a proper lookout for automobiles on Underwood Avenue; (3) in failing to yield the right-of-way; (4) in failing to sound his horn or otherwise warn plaintiff of defendant's approach; (5) in driving at a rate of speed greater than was reasonable and proper; and (6) in failing to have and keep his car under proper control.

Defendant denying negligence alleged negligence and contributory negligence of plaintiff in the following particulars as the proximate cause of the damages claimed: (1) In driving at an excessive and unlawful speed; (2) in failing to have his automobile under control; (3) in failing to accord the defendant the right-of-way; (4) in failing to seasonably apply his brakes; (5) in failing to keep a proper lookout for traffic; and (6) in operating his car on the north or left side of the avenue.

Section 25-1151, R. R. S. 1943, is involved here. We need not determine the issue of proximate cause. In Hickman v. Parks Construction Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040, we held: "The following are elements of application of the comparative negligence rule: If it appears that a defendant has been guilty of gross negligence and a plaintiff has been guilty of slight negligence by comparison with that of the defendant the plaintiff may recover. If a defendant

has been guilty of gross negligence and a plaintiff has been guilty of negligence more than slight by comparison with that of the defendant the plaintiff may not recover. If a defendant has been guilty of negligence but which is less than gross and the plaintiff has been guilty of negligence in any degree the plaintiff may not recover."

Even if we were to hold, which we do not, that the defendant was guilty of gross negligence, it is obvious that plaintiff was guilty of negligence more than slight by comparison.

We held in Rogers v. Shepherd, 159 Neb. 292, 66 N. W. 2d 815, that: "In an action based on negligence to which the comparative negligence rule has application wherein the evidence shows beyond reasonable dispute that the plaintiff's negligence was more than slight in comparison with that of the defendant the action should be dismissed or verdict directed."

Putting aside contradictions and inconsistencies, and considering plaintiff's version of this accident in its most favorable light to him, we think it beyond reasonable dispute that plaintiff was guilty of negligence more than slight under the above rule. The trial court did not err in sustaining the motion.

The judgment of the trial court is affirmed.

AFFIRMED.

CARIL ANN FUGATE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
99 N. W. 2d 868

Filed December 11, 1959. No. 34590.

1. **Criminal Law: New Trial.** Under the provisions of section 29-2101, R. R. S. 1943, a new trial may be granted in a criminal case for any of the reasons enumerated therein, including misconduct of the jury, which affect materially the substantial rights of the defendant.

2. ———: ———. It is provided by section 29-2308, R. R. S. 1943, that no judgment shall be set aside, or a new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.
3. **Criminal Law: Juries.** As a general rule a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial rights of the accused were materially affected by the fact that the juror served in the case.
4. ———: ———. Where it appears that a juror made a one-dollar bet on the penalty that would be imposed on the defendant before he was sworn as a juror, which was unknown to the defendant until after the verdict, and his actions as a juror were wholly inconsistent with his interest in the result of the bet, it cannot be said that defendant was prejudiced by his serving on the jury.
5. **Appeal and Error.** An objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial.
6. **Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence of anything of which a verbal description by a witness is competent and relevant.
7. **Criminal Law: Evidence.** It is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.
8. ———: ———. The receiving, over objection, of evidence of an immaterial fact constitutes no ground for a reversal, unless it is shown that such evidence is prejudicial to the complaining party.
9. ———: ———. The correctness of a trial court's ruling on the admission of evidence must be determined by the record before it at the time the ruling was made. Such ruling presents a question of law which cannot be presented to the trial court by motion for a new trial through the medium of affidavits.
10. **New Trial: Appeal and Error.** The granting or refusing of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion.

ERROR to the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

John McArthur and *Merril R. Reller,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

CARTER, J.

This is an error proceeding from a verdict and judgment of the district court for Lancaster County on an information charging murder in the first degree on two counts. The first count charges that petitioner in error, who will be hereafter designated as the defendant, did unlawfully, feloniously, purposely and of her own deliberate and premeditated malice, kill Robert William Jensen. The second count charges that defendant did unlawfully, feloniously, and purposely in the perpetration of a robbery, kill Robert William Jensen. The jury returned a verdict of guilty of murder in the first degree on count two of the information and fixed the penalty at life imprisonment. After denying a motion for a new trial the trial court sentenced the defendant to imprisonment in the State Reformatory for Women at York, Nebraska, for the period of her natural life. From this verdict and judgment the defendant prosecutes error to this court.

The defendant assigns error in two respects: First, that the court erred in refusing to set aside the verdict and award the defendant a new trial on a showing that a juror made a pretrial bet that defendant would receive the death penalty, and second, that the court erred in receiving in evidence exhibits Nos. 42, 43, 44, 45, 46, 47, and 48.

As to the first assignment of error, the evidence that juror H. A. Walenta made a bet with Richard Weilage

that Caril Ann Fugate would get the electric chair was properly before the trial court in the form of affidavits in support of defendant's motion for a new trial. The facts disclosed by the affidavits are substantially as follows:

Richard Weilage stated that on Saturday, October 25, 1958, he was hunting pheasants with Walenta near Geneva, Nebraska, it being prior to the selection of a jury in the Fugate case. It was, however, after radio and television broadcasts concerning the murders alleged to have been committed by Charles Starkweather and Caril Ann Fugate. Weilage said he made a statement to Walenta to the following effect: "I'll bet a dollar she won't get the electric chair." Walenta replied: "I'll bet she does." The record shows that the bet was made. Weilage says the "bet" remark was a spontaneous passing remark similar to many others made by him and Walenta over the years which had never been considered seriously and none of which had ever been paid. Weilage said he never mentioned the matter to Walenta until after the trial was concluded, at which time Walenta agreed to pay it.

Walenta said that he made the bet as stated by Weilage at a time when he did not know that he would be called as a juror in the Fugate case. He said he testified on voir dire examination that he had expressed an opinion as to the guilt or innocence of Caril Ann Fugate based on news media which had come to his attention. He said he testified that he had no information from anyone connected with the case, that it would require no evidence to remove the opinion he had held, and that he could decide the case fairly and impartially upon the evidence adduced at the trial and the law as given by the court. He said further that he had completely forgotten the bet until he was reminded of it by a third person after the trial was over. He said further that he heard the case with an open mind and decided the case solely upon the evidence and the instructions of

the court, and that the bet played no part in the result.

Harold Jones stated that he heard of the bet and after the trial was over undertook to "kid" Walenta about losing the bet. He said when he mentioned it to Walenta on the day following the trial Walenta said: "I don't even remember how I bet," and that it was obvious Walenta had forgotten the bet until he mentioned it to him.

The foreman of the jury, T. C. Eichelberger, stated that Walenta had testified on voir dire that he had expressed an opinion as to the guilt or innocence of Caril Ann Fugate which was based solely on news media, that it would not take evidence to remove such opinion, and that he could and would enter upon the trial of the case with a free, open, and unbiased mind. Eichelberger further stated that at no time during the deliberations of the jury did any member request that the death penalty be included in the jury verdict, and that Walenta never mentioned the death penalty or requested that it be imposed.

The evidence contained in the affidavits is not conflicting in any respect and appears to be an honest reflection of the facts pertaining to the bet. It is plain that the bet was made on the nature of the penalty to be assessed, both participants assuming that a conviction would be had. It is shown that Walenta testified concerning his pretrial opinion that went to the guilt or innocence of the defendant which was based solely on news reports. He was not challenged for cause because of that opinion. We point out also that the evidence shows without dispute that the conduct of Walenta as a juror was wholly in conflict with the bet which he had made before he knew he would be called as a juror in the Fugate case. It is the contention of the defendant that a verdict in a criminal case is ipso facto nullified when it is subsequently discovered that a juror had made a bet as to the penalty that would be assessed. It is the contention of the State that the verdict should not

be disturbed under such circumstances in the absence of a showing of prejudice to the defendant.

It is a part of our fundamental law that the right of trial by jury shall remain inviolate. Art. I, § 6, Constitution of Nebraska. It is further provided that in all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature of the accusation, to meet the witnesses against him face to face, to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. Art. I, § 11, Constitution of Nebraska. Under the statutory law of this state a prospective juror who has formed or expressed an opinion as to the guilt or innocence of the accused is subject to challenge for cause unless he falls within the proviso of section 29-2006, R. R. S. 1943, relating to pretrial opinions of jurors. Juror Walenta was clearly a qualified juror under the foregoing section of the statutes so far as his pretrial opinion was concerned and no contention is made to the contrary.

It is provided by section 29-2101, R. R. S. 1943, that a new trial may be granted for any of the reasons enumerated therein, including the misconduct of the jury, which affect materially the substantial rights of the defendant. It is apparent that the asserted ground for a new trial must affect adversely the substantial rights of the defendant, or, in other words, it must be shown that defendant was prejudiced thereby. By section 29-2308, R. R. S. 1943, this court is directed to disregard error without prejudice as follows: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

The defendant contends that prejudice inheres in the verdict sufficient to nullify it by proof of betting by a prospective juror. Defendant cites the following authorities from other states: State v. Warm, 92 Vt. 447, 105 A. 244, 2 A. L. R. 811; Essex v. McPherson, 64 Ill. 349; Seaton v. Swem, 58 Iowa 41, 11 N. W. 726; Cluverius v. The Commonwealth, 81 Va. 787. In the Warm case the juror bet the cigars that the defendant would be found guilty, which he was. In the McPherson case the juror bet a necktie that defendant would receive a favorable verdict, which he did. In the Swem case the juror made a bet on the result of an election. Subsequently he sat as a juror in the contest of the election. The verdict was in favor of the party upon whose success the juror had wagered. In the Cluverius case the juror had been accepted as a juror in a murder case, when the prosecution discovered before the actual commencement of the trial proper that the juror had made a bet of a cigar that the defendant would not be convicted. The prosecution belatedly challenged the juror and the trial court excused the juror. It was contended on appeal that it was error to excuse the juror, an assignment that was not sustained.

We point out that in each of the foregoing cases the bet made by the juror was in accordance with the verdict in which he had participated. The present case is distinguishable from those cases in that Walenta acted as a juror completely contrary to his interest in the one-dollar bet.

The correct rule to be applied is: As a general rule a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the substantial rights of the accused were materially affected by the fact that the juror served in the case. Stouse v. State, 6 Okl. Cr. 415, 119 P. 271; Henderson v. State, 95 Okl.

Cr. 342, 246 P. 2d 393; State v. McDonald, 9 W. Va. 456; State v. Williams, 14 W. Va. 851. In the McDonald case the court said: "But it is a part of the rule, established by the courts of Virginia before our separation, that it must appear, that 'his, (Chamberlain's,) serving on the jury, caused injustice to be done to the prisoner.' The prisoner chose to submit this matter to the circuit court on such evidence as he had furnished in his affidavits, which do not tend to show that he did suffer any actual injustice; and has brought his case here on exceptions, without furnishing any evidence by which this Court can see that such was the result, we must hold the ruling of the circuit court to be correct on the question."

In the present case the defendant submitted the matter on affidavits which show that the defendant suffered no injustice or prejudice. It cannot be said that Walenta was influenced by any financial interest resulting from the bet since the verdict was contrary to any financial interest he had in it. It is evident that the bet was based on the opinion he had formed from news reports to which he testified on voir dire examination, and in which he stated that he could lay aside his opinion and try the case as a fair and impartial juror. His qualifications as a juror were acceptable to the defense since he was not challenged for cause. It appears rather conclusive that Walenta did lay aside his pretrial opinion and try the case on the law and the evidence, as he on oath promised to do, and had in fact forgotten or disregarded the bet when he qualified and served on the jury. We think the trial court properly found from the evidence submitted that the substantial rights of defendant were not affected by Walenta serving on the jury.

The evidence shows that defendant was an accomplice of one Charles Starkweather in the killing of Robert William Jensen. The evidence also shows that Starkweather killed 10 other persons, in the killing of 9 of which defendant was a participant during a series of

events continuing through a period of several days. The evidence of defendant's guilt is conclusive and we fail to see how any fair and impartial jury could arrive at any different result. The defendant does not even contend that the evidence is insufficient to sustain the verdict of the jury. The conclusiveness of the evidence supports the view that defendant had a fair and impartial trial and that the service of Walenta as a juror under the circumstances shown did not result in any injustice to the defendant. We find nothing in the record to show that the constitutional rights of defendant were not fully protected.

The defendant contends that the trial court erred in admitting exhibits Nos. 42, 43, 44, 45, 46, 47, and 48 in evidence on rebuttal. The exhibits were photographs of various rooms in Caril Ann Fugate's home. All but three of the photographs were taken on January 27, 1958, and the remaining on the following day. The evidence shows that Robert William Jensen was murdered on January 27, 1958. It is shown by the evidence that the defendant and Charles Starkweather lived in defendant's home for several days immediately prior to the Jensen murder, and after the killing of defendant's mother, step-father, and half-sister. The photographs were offered to refute the testimony of defendant's grandmother, Pansy Street, who had testified for defendant as to the condition of the home at or near the time defendant and Starkweather left it.

The defendant objected to the admission of the photographs in evidence for the reason that the foundation was insufficient and that they were not binding on the defendant. No objection was made that the admission of the photographs constituted improper rebuttal. It is fundamental that error may not be predicated on a ground not preserved by a proper objection. The rule is stated in Havlicek v. State, 101 Neb. 782, 165 N. W. 251, as follows: "It is the duty of counsel to make his objections so specific that the court may understand

the point intended to be raised, and, unless prejudicially erroneous on the point presented, the admission of the evidence to which objection is offered will not be held prejudicially erroneous for some reason which counsel did not suggest at the trial." See, also, Turpit v. State, 154 Neb. 385, 48 N. W. 2d 83.

The photographer testified that the photographs correctly represented the existing conditions in the home at the time they were taken. The foundation was sufficient for their admission into evidence. In any event, it is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting. Pribyl v. State, 165 Neb. 691, 87 N. W. 2d 201; Parker v. State, 164 Neb. 614, 83 N. W. 2d 347. The photographs admitted do not appear material to the issues in the case. The admission of such evidence, even if erroneous, does not constitute prejudicial error in the absence of a showing of prejudice. None is here shown. Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649; Carrall v. State, 53 Neb. 431, 73 N. W. 939.

On the hearing on the motion for a new trial the defendant offered in evidence the affidavits of Pansy Street and Robert VonBusch for the purpose of showing a want of foundation for the questioned photographs. There is no showing that this evidence was not available to the defendant at the trial. In fact, the record discloses that both of these witnesses testified for the defendant at the trial. It is fundamental that a defendant may not withhold evidence known to him at his trial and subsequently use it as a basis for a new trial. The correctness of a trial court's ruling on the admission of evidence must be determined by the record before it at the time the ruling was made. Such a ruling presents a question of law which canont be presented to the trial court by motion for a new trial through the medium of affidavits. Huempfner v. Bailly, 36 S. D. 533, 156 N. W. 78. In any event, as we have heretofore stated, the affidavits pertained to an immaterial issue and do not sup-

port any theory on which defendant can properly assert a right to a new trial.

The granting or refusal of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. Baskins v. State, 139 Neb. 803, 299 N. W. 188. The evidence abundantly supports the judgment of the trial court in denying the defendant a new trial. The judgment of the district court in denying a new trial is in all respects correct and it is affirmed.

AFFIRMED.

TONY J. VRANA ET AL., APPELLEES, V. ARLIE ARLENE STUART ET AL., APPELLANTS.
99 N. W. 2d 770

Filed December 11, 1959. No. 34670.

1. **Adverse Possession.** A claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
2. ———. If one by mistake as to the boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
3. ———. The fact that a person never actually claimed to own a disputed tract of land and that his use and possession of it was based on a mistaken belief as to the boundary line of the tract is not a controlling factor in determining whether or not his possession was adverse.
4. ———. The possession of the occupant is not less adverse because he took and had possession of it innocently and through mistake. It is the visible and exclusive possession with intention to possess the land occupied under the belief that it belongs to him that constitutes its adverse character.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *Affirmed.*

Richards, Yost & Schafersman and *William G. Line*, for appellants.

Kerrigan, Flory & Miller, for appellees.

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

CARTER, J.

This is an action to quiet title to a strip of land 8 feet in width, the same being the east 8 feet of Lot 7, Block 205, city of Fremont, Nebraska. Title is claimed by adverse possession for more than 10 consecutive years prior to the filing of the petition. The defendants denied generally the allegations of the petition and filed a cross-petition praying that the title to the disputed land be quieted in them. The trial court found for the plaintiffs and defendants have appealed.

The evidence shows that the plaintiffs became the owners of the west 58 feet of Lot 7, by contract of sale on December 4, 1945, and acquired the title thereto by warranty deed on December 29, 1951. They went into possession of the property on December 18, 1945. The defendants have been the record title owners of Lot 8 and the east 8 feet of Lot 7, by warranty deed dated December 13, 1945. They were in possession of the property as tenants for several years prior thereto. This action was commenced on September 11, 1957. The burden is upon the plaintiffs to establish adverse possession of the disputed property for a continuous period commencing on or before September 11, 1947, the 10-year statutory period required for adverse possession to ripen into title.

It is conceded for all practical purposes that plaintiffs adversely held the 8-foot strip from 1949 to 1957. The issue therefore is narrowed to the question as to whether or not the plaintiffs adversely held the disputed property in 1947, 1948, and 1949.

The evidence shows that plaintiffs moved into the

residence on the west 58 feet of Lot 7 in 1945. The residence was located approximately 2 feet from the west line of the 8-foot strip. They made use of the strip in getting coal, wood, and cobs into their basement by driving over the curb in the street south of the property to a basement window on the east side of the house. Plaintiffs parked trucks almost continuously on the south part of the strip. From 1946 to 1956, Tony J. Vrana used the north part of the strip as a garden and at the request of defendants plowed their garden. In doing so, a ridge of ground on the east line of the disputed strip was assumed by both parties to be the line between their respective properties. In 1949, the defendants planted a hedge on this ridge, they again assuming that this was the division line. Plaintiffs made constant use of the north part of the strip by placing machinery, lumber, and scrap iron thereon when it was not used as a garden. A mulberry tree was located on the north end of the strip which plaintiffs removed to make room for the garage building they moved on the disputed strip in 1949. It is clear from the evidence that the use of the strip was not permissive, and that defendants as well as the plaintiffs regarded it as a part of plaintiffs' property. The use of the disputed property by plaintiffs was that of an owner and not that of an occasional trespasser.

The defendants acquiesced in plaintiffs' use of the disputed strip of land from the time plaintiffs moved onto the adjoining lot in 1945. Mrs. Arlie Arlene Stuart testified that she caused the hedge to be planted on the ridge to conceal the unsightliness of plaintiffs' property and to prevent further encroachment on her property by the plaintiffs. Defendants never protested the use of the 8-foot strip until they served a notice to vacate a few days before this action was commenced. It is apparent from the evidence that all parties to the action thought the division line between plaintiffs' and defendants' property was the east line of Lot 7 as

staked on the ground, which line corresponded substantially with the location of the hedge and the use made of the property by the plaintiffs.

The disposition of the case is controlled by the following rules: "A claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years." Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331. "If one by mistake as to the boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession." Konop v. Knobel, 167 Neb. 318, 92 N. W. 2d 714. "The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held rather than an intention to hold in accordance with his deed that is controlling. The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto." Purdum v. Sherman, *supra*.

The evidence of the plaintiffs, considered in the light of the foregoing rules, establishes a use showing actual, open, exclusive, and continuous possession under claim of ownership for more than the statutory period of 10 years. It is therefore sufficient to sustain a claim of title by adverse possession. The trial court having arrived at a like conclusion, the judgment is affirmed.

AFFIRMED.

CARIL ANN FUGATE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
99 N. W. 2d 874

Filed December 11, 1959. No. 34681.

1. **Constitutional Law: Criminal Law.** The use of false evidence or the suppression of material evidence in a criminal case, which is within the knowledge of the prosecution, ordinarily constitutes a denial of due process of law when it is material to the guilt or innocence of the accused or to the penalty to be imposed.
2. ———: ———. The due process principle that a prosecutor may not knowingly use false testimony or suppress material evidence to obtain a conviction does not ordinarily cease to apply merely because it goes only to the credibility of a witness.
3. **Criminal Law: Witnesses.** A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial.
4. **Criminal Law: Evidence.** The granting or refusing of a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion.

ERROR to the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

John McArthur and *Merril R. Reller,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

CARTER, J.

This is a petition in error by the defendant Caril Ann Fugate seeking a review of an order of the district court for Lancaster County denying a new trial on the ground of newly discovered evidence. A previous petition in error based on errors alleged to have occurred at the trial was before the court in Fugate v. State, *ante* p. 420, 99 N. W. 2d 868. The record of the

trial in that case was received in evidence in the proceeding presently before the court, together with the affidavits received and testimony taken at the hearing on the motion for a new trial on the ground of newly discovered evidence.

It is contended that the new evidence discovered after the trial shows that the State knowingly used perjured testimony in the prosecution of Caril Ann Fugate for first degree murder. The applicable rule is: The use of false testimony or the suppression of evidence in a criminal case, which is within the knowledge of the prosecution, ordinarily constitutes a denial of due process of law when it is material to the guilt or innocence of the accused or to the penalty to be imposed. Such rule ordinarily applies where the suppression of evidence or the use of false evidence goes only to the credibility of the witness. Napue v. Illinois, 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217; Alcorta v. Texas, 355 U. S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9; Pyle v. Kansas, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 214; People v. Savvides, 1 N. Y. 2d 554, 136 N. E. 2d 853.

The evidence in support of the motion for a new trial rests primarily on the affidavits of Otto Glaser and Jeff Wheeler who were at the time of the events about which they testified inmates of the penitentiary. The substance of their affidavits is as follows: Affiants were occupants of room 4 in the hospital ward of the penitentiary from October 14, 1958, until after the trial of Caril Ann Fugate. Charles Starkweather, under sentence of death for the murder of Robert William Jensen, was held in room 5, the room immediately adjacent to that occupied by affiants. Immediately after October 14, 1958, Starkweather was treated the same as other prisoners in that he did not have access to newspapers, radio, and television. He was limited in cigarettes and restricted in favors extended, the same as other prisoners. About the time of the trial of Caril Ann Fugate, Starkweather was granted numerous special

favors. He was permitted to receive a daily newspaper and received cartons of cigarettes and candy. He had as many as 5 cartons of cigarettes of different brands and different kinds of candy. He was permitted to listen to the radio and watch television. He ordered and received coffee at will and was permitted to bathe whenever he desired instead of twice a week as the rules permitted. Affiants state that about a week before the trial of Caril Ann Fugate was commenced, three persons who were unknown to them were in constant attendance at the door of Starkweather's room. They assert that one or more of these three persons were present constantly every day, even during meal periods. They overheard these persons say that a great deal depended on him at the trial; that there were certain things he must not say and other things he must say. One of said persons told Starkweather that he would not get the electric chair if he said exactly what he was told to say in the Fugate case and that the county attorney was a man of his word and would see to it that he would not get the chair. They state that Starkweather said he almost killed Caril Ann Fugate in the Bartlett, Meyer, and Ward homes, and that he intended to kill her in Wyoming, all of which was because of her attempts to escape. They state further that the three unknown persons had a spirited quarrel with Starkweather about his testimony with reference to the killing of Robert William Jensen and that they insisted he must testify as he was told and the county attorney would then save him from execution. They state also that the three unknown persons attempted to inflame Starkweather against Caril Ann Fugate by quoting her as saying that he was bow-legged and liked to play cops and robbers and cowboys, that he could not dance, and that she thought him insane. They state that Starkweather was pleased at defendant's conviction for first degree murder and that he was disappointed only that she did not get the death sentence.

The evidence of special favors to Starkweather was corroborated to some extent by one Rigsbee, who was an inmate at the time, and by one Hefner, a former employee at the penitentiary who had been discharged.

The state filed counteraffidavits. Charles Starkweather stated by affidavit that he was visited regularly by his parents and other relatives three or four times a week and that he was assigned visiting hours other than those generally assigned. He stated that a guard was constantly outside the door to his room. He was denied requests for newspapers, radio, and television until after his conviction, after which they were made accessible to him. He stated that he was visited twice by the county attorney and he agreed to testify in the Fugate case on both occasions. He denied that any promises of leniency were made to him, or that promises of favors were made or granted to him. He stated that the county attorney asked him to tell the truth and not to volunteer any statements on direct examination as to any of the killings except that of Robert William Jensen. He stated that he received a daily newspaper after the Fugate trial as a result of arrangements made by a newspaper reporter. He further stated that he received candy and cigarettes from his parents in small quantities except for one carton of cigarettes that he received for Christmas. He stated that he received coffee the same as other prisoners and had bathing privileges twice a week the same as other inmates. He denied talking with anyone outside his door concerning the Fugate trial or the testimony that he would give. He said further that the county attorney made no promises of leniency but affirmatively told him he should not expect to gain any benefit from appearing as a witness. He stated that he told the guard he was sorry for the defendant when he heard of the verdict by radio, a fact corroborated by the guard's affidavit. He denied the alleged conversations with Glaser and Wheeler, and the three unknown per-

sons. He stated that he was promised no benefit for testifying by the county attorney or any other person. He stated further that he applied to the Board of Pardons for a commutation of his death sentence and that the county attorney made no appearance before the board.

The warden of the penitentiary stated by affidavit that Starkweather, prior to his conviction, was kept in a locked room with a barred door and a guard posted outside, and that after his conviction regular privileges were accorded him when they were first requested by an interested newspaper reporter. He asserted that no special favors were granted to Starkweather and that no request was ever made by the county attorney for anyone connected with the penitentiary to grant such or to discuss with Starkweather the evidence he would give at the Fugate trial.

The warden's affidavit is corroborated by the affidavits of the deputy warden, the associate warden, the newspaper reporter, and a guard who was posted outside Starkweather's room. The county attorney also corroborated many of the statements made by Starkweather and the other affiants produced by the State. He positively denied making any promises of any kind to Starkweather and advised him only to tell the truth and to confine himself on direct examination to the details of the Jensen murder. He stated that the granting of access to newspapers, radio, and television was done wholly without his knowledge. He specifically denied that he promised Starkweather he would be saved from execution if he testified in the Fugate case, or that he ever made such a statement to any person whomsoever. He stated also that no request was made by him or any member of his staff that Starkweather's sentence be commuted, or that clemency be granted.

Upon this evidence the defendant contends that the prosecution knowingly used the false testimony of

the witness Starkweather and that the defendant has been denied due process of law as a result thereof.

The evidence discloses that the witness Starkweather had made conflicting statements regarding the numerous killings he had committed, all of which were known to the defense at the trial. There is no evidence in this record that the prosecution used any evidence known to be false. The evidence of the county attorney and the witness Starkweather is to the effect that the county attorney advised Starkweather to tell the truth and to confine his evidence on direct examination to the killing of Robert William Jensen for whose murder the defendant was on trial. The duty is imposed upon a prosecutor to produce all evidence tending to establish the guilt or innocence of the accused. Starkweather had been convicted of first degree murder for the killing of Robert William Jensen and clearly had knowledge of the facts concerning the crime. The record, however, does not show even remotely that the prosecutor used Starkweather with any knowledge that he would testify falsely. It was known, of course, as a result of Starkweather's trial, that the testimony of Starkweather, whatever it might be, could be impeached by conflicting statements which he had made orally and in writing. But his credibility as a witness and the weight to be given his evidence was for the jury. The use of the witness Starkweather under the circumstances shown does not constitute a use of testimony known to be false by the prosecution, and it is not within the cited rule.

It is urged that the evidence of Glaser and Wheeler shows the use of false testimony and the suppression of adverse evidence on the part of the prosecution. These two witnesses testified that three persons during all hours of the day for several days coerced Starkweather into testifying falsely. They were unable to name or describe any of the three persons. The evidence is that the room occupied by Starkweather was guarded

at all times by a guard posted outside his door. The officers of the penitentiary deny that the acts occurred to which these witnesses testified. The witness Starkweather also denied that they occurred. The evidence of these two witnesses appears incredulous when it is considered that it allegedly occurred without the knowledge of officials or employees in a carefully guarded penitentiary with a prisoner condemned to death and closely watched for that reason. In any event, there is not the semblance of evidence that the prosecution had any information concerning the acts or doings of the three unknown persons.

We fail to find any evidence in the record which in any manner justifies the assertion that the county attorney in calling Starkweather as a witness knowingly used false evidence, or suppressed evidence in the case. The alleged evidence, if it was admissible for any purpose, was admissible only to impeach the credibility of Starkweather. It is the rule that a new trial will not be granted on the ground of newly discovered evidence when the only effect of the evidence is to impeach or discredit a witness. Baskins v. State, 139 Neb. 803, 299 N. W. 188.

The granting or refusal of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. Lee v. State, 124 Neb. 165, 245 N. W. 445; Baskins v. State, *supra*. The trial court in the instant case, in the exercise of such discretion, concluded that no basis existed for granting a new trial. We fail to see how the trial court could have properly arrived at any different conclusion. The judgment of the trial court in denying a new trial on the ground of newly discovered evidence is therefore affirmed.

AFFIRMED.