REPORTS OF CASES

DECIDED BETWEEN

MARCH 2, 1957 and JULY 5, 1957

IN THE

Supreme Court of Nebraska

JANUARY TERM 1957

VOLUME CLXIV

WALTER D. JAMES
OFFICIAL REPORTER

GANT PUBLISHING COMPANY
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1958

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, 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 T. English James M. Patton Carroll O. Stauffer L. Ross Newkirk Patrick W. Lynch Jackson B. Chase	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.	Frank J. Munday Edmund P. Nuss	Red Cloud Hastings
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley, and Wheeler.	Ernest G. Kroger William F. Spikes	Grand Island St. Paul
Twelfth	Buffalo, Custer, Logan, and Sherman.	Eldridge G. Reed	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, and McPherson.	Isaac J. Nisley John H. Kuns	North Platte Kimball
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow.	Victor Westermark	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha, and Rock.	Dayton R. Mounts	Atkinson
Sixteenth	Box Butte, Cherry, Dawes, Sheridan, and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill, and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

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TABLE OF CASES REPORTED

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1957

JOHN W. JAMES ET AL., APPELLEES, V. GEORGE H. McNAIR, APPELLEE, IMPLEADED WITH PAUL E. WIRTH ET AL., APPELLANTS.

81 N. W. 2d 813

Filed March 8, 1957. No. 34014.

1. **Adverse Possession.** The title to land becomes complete in the occupant by adverse possession when he and his grantors have maintained an actual, exclusive, open, and continuous possession thereof, claiming title to the same against all persons, for 10 years.
2. ———. The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted.
3. **Trusts.** Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others.
4. **Trusts: Attorney and Client.** The rules of equity which determine the consequences of acts performed by a fiduciary are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or authority or influence arises from any cause.
5. **Trusts: Principal and Agent.** A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the

implied terms of his confidential relation as one who is regularly employed and paid.

6. **Estoppel.** The general rule is that in order to create an estoppel it is essential that the party against whom the estoppel is claimed acted with knowledge of the facts and asserted particular rights inconsistent with those subsequently claimed, and that the party claiming estoppel, being without knowledge or means of knowledge of the facts, was influenced by and relied upon the conduct of the person sought to be estopped, and changed his position in reliance thereon or acted upon it to his injury or prejudice.
7. **Adverse Possession.** It is the established rule in this state that when a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly enclosed with their own.

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

Smith & Lebens and *O'Sullivan & O'Sullivan*, for appellants.

Edwin Moran and *Wellensiek & Morrissey*, for appellees.

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

WENKE, J.

This is an appeal from a judgment of the district court for Otoe County quieting and confirming in John W. James and Vantine A. James, appellees here and plaintiffs below, the fee simple title to certain lands in that county as against Paul E. Wirth, John R. Wirth, and Anton F. Wirth, appellants here and defendants below, on the basis of adverse possession.

The lands involved are described by metes and bounds and are principally located in Section 5, Township 9, Range 14 East of the 6th P. M., in Otoe County, although it includes some land in Sections 4, 8, and 9 of

the same township and range where they lie adjacent to or corner on Section 5.

After judgment had been rendered by the trial court in favor of the plaintiffs, the defendants above referred to filed a motion for new trial and took this appeal from the overruling thereof.

George H. McNair was made a party defendant but no service was ever obtained on him; consequently, the appellees asked for and were granted leave to dismiss the action as to him, and did so. We shall not again refer to McNair in this opinion.

The judgment rendered by the trial court, which dismissed appellants' cross-petition for want of equity, denied appellants any right in and to that part of these lands which they claimed by adverse possession and also under certain quitclaim deeds.

The first question raised relates to the sufficiency of the evidence adduced by appellees to sustain the trial court's decree in their favor, which is based on adverse possession. Adverse possession is complete when, as stated in Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458: " 'The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years.' Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494."

Since this is an equitable action it will be reviewed here de novo. However, in view of the record, which discloses that the trial court viewed the entire premises, we think the following principles have particular application:

" 'While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue,

consider the fact that the trial court observed the witnesses and their manner of testifying.' Gentry v. Burge, 129 Neb. 493, 261 N. W. 854." Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502.

"This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight." Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647.

The evidence is in irreconcilable conflict on many material matters. We have come to the conclusion that appellees' version of what happened is correct, so will set forth the facts accordingly as it would serve no useful purpose to set out appellants' evidence that is in conflict therewith. We can only say we think appellants, and some of their witnesses, were either mistaken as to what they testified to in regard to certain material matters or otherwise misrepresented the facts as they relate thereto.

In 1856 the United States government surveyed Section 5, which became a part of Otoe County. At that time the Missouri River cut across the section from northeast to southwest, and this created many irregular tracts which were identified as Government Lots. The area left in what would have been the south half of the northeast quarter was identified as Government Lot 6, the area left in what would have been the north half of the southwest quarter was identified as Government Lot 7, and the area left in what would have been the south half of the southwest quarter was identified as Government Lot 8. Section 5 apparently remained in this condition until 1911. Then the river started cutting toward the west. It continued to do so until about 1920. At that time it had washed away all of Section 5 except a small tract in the extreme northwest corner thereof and possibly a small area on the western edge of Government Lot 7 or the north half of the southwest quarter.

Insofar as the record shows, and is here material, at the

time this change in the course of the river took place George S. Upton owned Government Lot 7, Lot 4 in Government Lot 6, Lots 7, 8, and 10 in Government Lot 5, and Lot 6 in Government Lot 3; Charles Boardman apparently owned Government Lot 8; appellees' father owned a 20-acre tract in the northwest quarter, apparently being Lot 5 of Government Lot 3 or the north half of the northeast quarter of the northwest quarter; and Caleb Eaton's father owned land in the northeast quarter and, also, land in Cass County lying immediately adjacent thereto on the north. The latter was also washed away between 1911 and 1920.

Shortly after 1920 bars began to form in the river where this land had washed away. By 1928 the bars had formed considerable of an island, with the main channel of the river to the east thereof. However, a chute some 300 to 400 feet wide remained on the west side of the island or between it and the west bank. A considerable area had built back in between the west line of Section 5 and the west bank of this chute before the island formed.

In 1928 Caleb Eaton moved onto the north end of this island, occupying it as far south as the east-west center line of Section 5 if extended east across the chute to the river. He built a home on the island north of the section or county line. Medford James, no relation of the appellees, moved onto the island in 1929 and occupied land lying south of the east-west center line of Section 5 if extended east across the chute to the river. He built a cabin on the land he occupied in 1930 and moved his family into it in 1931, that being the first year he raised a crop. About 3 years later he built a 4-room tile house for his family. He occupied the island as far south as a division fence which he and Charles Boardman built about 1934. This is the present south line of the land claimed by appellees. Medford James cleared about 60 acres on the land he claimed, which extended east from the chute to the river and north from the

division fence, which he and Boardman built, to the half section line. He stayed on the land until he sold it in 1938. Appellees went on the island in 1931 and cut some cottonwoods for use as lumber. They did so in both 1931 and 1932. They occupied an area south of the tract their parents had owned before it washed away. In 1933 they started a garden on it. Later about 40 acres were fenced. They have always continued to occupy and farm it, being land east of the chute, west of the land occupied by Raymond Kinnison and Riley Eaton, and continuous south as far as the land occupied by Medford James. Raymond Kinnison, a nephew of Caleb Eaton, moved onto the island in 1932 and occupied a strip some 37 rods wide just north of that occupied by Medford James. He did so pursuant to an agreement with Caleb Eaton. Kinnison moved onto this land with his family in 1932 and cleared about 21 or 22 acres the following year. He continued to farm it until he sold it in 1938. At that time he had cleared about 56 acres thereof. Riley Eaton, a brother of Caleb Eaton, moved onto the land just north of Raymond Kinnison shortly after the latter came onto the island. Riley did so pursuant to an agreement with Caleb Eaton. He occupied a strip about 60 rods wide and claimed it from the chute east to the river. He continued to farm it until he sold it in 1941.

Due to the fact that he lost most or all of his crop in the years 1936, 1937, and 1938 as a result of floods, Medford James sold his interest in the land he was occupying to Edwin Moran, Wilber Fey, and appellee Vantine A. James. The deed was executed on August 10, 1938. On November 21, 1938, Raymond Kinnison sold his interest in the land he was occupying to the same grantees. Thereafter, on December 8, 1938, Edwin Moran conveyed his interest in the foregoing lands to appellee John W. James. Wilber Fey and appellee Vantine A. James, in the fall of 1938, put in a wheat crop on the lands they had acquired from Medford James

and Raymond Kinnison. However, it was destroyed by a flood in the spring of 1939. As a result Wilber Fey deeded his interest in the foregoing lands to appellees. The appellees also acquired the interest of Riley Eaton by deed executed April 10, 1941. The appellees put in wheat on the land they then owned in the fall of 1939, 1940, 1941, 1942, 1943, and 1944. However, due to floods, they never harvested a crop. It should here be stated that appellants worked for appellees on this island during some of these years, helping clear land, prepare it for crops, and put in crops. They were paid for doing it. During this time they made no claim of ownership but recognized that of appellees, in fact, they rented some of it from appellees in 1940 and 1941 and put in corn but only raised a crop in 1940.

As a result of these continued years of crop losses, due to floods, appellees, beginning with 1945, decided to let the cleared land grow back to weeds, willows, and other vegetation in the hope that it would cause silt to deposit thereon during flood stages of the river and thus build it up above the ordinary flood stage. To assist this plan they killed the willows on their lands in 1948 by spraying them, doing so in order to develop a denser growth of vegetation. Nothing further happened until 1951 when the appellants had a survey made and thereafter started to clear part of the island claimed by appellees. When, in 1952, they rented this cleared area to Wilber Fey and he informed appellees of that fact, the background for this litigation started. Appellees advised appellants of their claimed rights and when appellants would not respect them appellees instituted this action. It was started on December 11, 1954.

We said in Frank v. Smith, *supra*, that: " 'Where the water of a river gradually recedes, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor.' Topping v. Cohn, 71 Neb. 559, 99 N.

W. 372; followed in Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737." However, title to an island may be acquired by adverse possession. See, Briard v. Hashberger, 107 Neb. 199, 185 N. W. 430. In regard to what constitutes adverse possession we said in Lantry v. Parker, 37 Neb. 353, 55 N. W. 962: "The law does not require that possession shall be evidenced by a complete enclosure, nor by persons remaining continuously upon the land, and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be in its nature adapted." We think the evidence adduced by appellees discloses that they and their predecessors in title have, for more than 10 years, maintained such an actual, continued, open, and exclusive possession of the land they are now claiming that they are entitled to have their title thereto quieted and confirmed. In this respect we have not overlooked the fact that appellants, and their predecessors in title, paid taxes on part of this land over a period of years, as did appellees. Such payment, while indicative of a claim of ownership, does not overcome the actual ownership of appellees obtained by adverse possession. As to the effect thereof see Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331.

But appellants contend appellees are estopped from asserting the claim they here make because of their relationship to appellants in connection with the interests appellants acquired from Charles Boardman in 1940 and from the George S. Upton heirs in 1949. Their contention is based on the claim that when a client engages an attorney to transact some legal business for him the attorney cannot remain silent, when he has a duty to speak, and thereafter claim as his own properties which were the subject of his employment, for to permit him to do so would be a constructive fraud upon the client.

We have said in regard to the latter that:

" 'Constructive or legal fraud may be found from the relation of the parties to a transaction, or from circum-

stances and surroundings under which it takes place. The conscience is not necessarily affected by it, and it may exist without any fraudulent intent. * * *' Lake Hiawatha Park Assn. v. Knox County Agricultural Society, 28 Ohio App. 289, 162 N. E. 653." Johnson v. Radio Station WOW, 144 Neb. 406, 13 N. W. 2d 556.

In Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, we held: " 'Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.' 26 C. J. 1061."

We have often set forth the duty of an attorney to his client. In this respect the Canons of Professional Ethics of the American Bar Association have, by official adoption, become the canons of ethics for the bar of this state. See Rules of the Supreme Court, Integration of the Bar, Article X.

Canon 6 of the foregoing provides in part: "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel."

We held in Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839, quoting from Wright v. Smith, 23 N. J. Eq. 106, that: " 'Every man has a trust to whom a business is committed by another. Every man is a trustee whose office is to advise or to operate, not for himself, but for others.' " We then went on to say: "The rules of equity which determine the consequences of acts performed by a fiduciary are not restricted to attorney and client, nor to similar conventional relations, but extend to all cases, where, on one hand, confidence is properly reposed, and, on the other, knowledge or

authority or influence arises from any cause. * * * A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid."

However, as stated in Petraborg v. Zontelli, 217 Minn. 536, 15 N. W. 2d 174: "The relation between an attorney and his client is one of highest trust and confidence, requiring the attorney to observe the utmost good faith and not to allow his private interests to conflict with those of his client. In re Estate of Lee, 214 Minn. 448, 9 N. W. (2d) 245. But where an attorney upon his employment makes full and frank disclosure as to his interests in the property involved in the subject matter of the retainer and the client desires the services of the attorney despite such interest and with full knowledge thereof, the attorney, under such circumstances, has the right to deal as he chooses with his own property. It is only when he has not advised his client of all the facts concerning his interest in the subject matter of the retainer or litigation that the court will closely scrutinize the transaction so as not to permit him to take advantage of his professional relationship in dealing with his client." The same would be true of an agent. See, Schultz v. Bleckwehl, 135 Neb. 94, 280 N. W. 257; In re Estate of Wiley, 150 Neb. 898, 36 N. W. 2d 483. As stated in In re Estate of Wiley, *supra:* "A fiduciary seeking to profit by a transaction with the one who confided in him has the burden of showing that he communicated to the other, not only the fact of his interest in the transaction, but all information he had which it was important for the other to know in order to enable him to judge of the value of his property."

The general rule is that in order to create an estoppel it is essential that the party against whom the estoppel is claimed acted with knowledge of the facts and asserted particular rights inconsistent with those subse-

quently claimed, and that the party claiming estoppel, being without knowledge or means of knowledge of the facts, was influenced by and relied upon the conduct of the person sought to be estopped, and changed his position in reliance thereon or acted upon it to his injury or prejudice. Sedlak v. Duda, 144 Neb. 567, 13 N. W. 2d 892, 154 A. L. R. 490; State ex rel. Truax v. Burrows, 136 Neb. 691, 287 N. W. 178; Peters Trust Co. v. Cranmore, 114 Neb. 491, 208 N. W. 635; Walker v. Ehresman, 79 Neb. 775, 113 N. W. 218.

And in Olds v. Hitzemann, 220 Ind. 300, 42 N. E. 2d 35, it was stated that: " 'The rule requiring the attorney to establish the fairness and honesty of the transaction does not apply where the attorney has openly assumed an attitude hostile to the client, before the transaction was entered into, so that thereafter the parties are put at arm's length and the client could not possibly have been acting under the influence of the confidence which he had reposed in the attorney.' 7 C. J. S., § 127(b), Attorney and Client, p. 967."

The record discloses that when appellees and appellants were boys their families were neighbors living on farms located near Nebraska City and they grew up as close friends. Appellee Vantine A. James was licensed to practice law in this state in 1932 and thereafter did so at Nebraska City. As such he became appellants' legal adviser on many matters, they usually going to him for advice. On the other hand appellants did a great deal of work for appellees in many different places and of many different kinds, including the work hereinbefore referred to which appellants performed for appellees on the island.

In 1940 the appellants, by quitclaim deed from Charles and Rachael Boardman, husband and wife, dated April 23, 1940, acquired whatever interest the Boardmans then had in and to about the south 93 rods of the land which the appellees now claim to own on the island. Because of appellee Vantine A. James' connection with this mat-

ter appellants contend appellees are now estopped from making any claim thereto for, to permit them to do so under the circumstances shown by the record, would be a fraud upon appellants. In connection with discussing this transaction we shall refer to appellee Vantine A. James as James.

The record shows that in the early spring of 1940 Charles Boardman came to the office of James in Nebraska City; that he told James he wanted to sell him whatever land he owned on the island south of the division fence; that James advised appellants of Boardman's desire, appellants having previously expressed to James a desire to acquire some land on the island; that James told appellants he would step aside if they wanted it; that appellants and James went out and inspected the land, James showing appellants the division fence to which he advised appellants appellees claimed to own the land on the island; that both James and appellants, because of the nature of the terrain, were mistaken as to where the north line of the Boardman land was located and consequently none of them were aware of the fact that the description in the deed by which appellants subsequently acquired Boardmans' interest covered part of the land which the appellees claimed to own; that James closed the deal, taking the deed already referred to in the name of the appellants and paying the Boardmans the agreed consideration of $250; that James had the deed recorded; and that appellants repaid the consideration. From that time on until 1951 all parties recognized the line between their lands as this division fence which had been built by Medford James and Charles Boardman about 1934, although appellants contend they did not know of the mistake made until about 1952 when they were advised thereof by their then counsel. In Schultz v. Bleckwehl, *supra,* we said: " 'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent

by the other so to act.' Restatement, Agency, sec. 1."

We do not think the relationship of appellants and James in connection with this transaction was that of attorney and client but rather that of a gratuitous agent; however, the duty would be the same. We think James made a full and frank disclosure to the appellants as to the interests appellees claimed in the land involved, although there was a mutual mistake in relation to what area the description in the deed would cover. However, all parties recognized what they considered to be the other's rights in this area for over 10 years. Under such circumstances we do not think estoppel arises, nor do we think appellants were defrauded for they got exactly what they thought they were getting when they went out and looked at the land and saw where the division line was located.

"* * * it is the established rule in this state that, when a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own. Carnahan v. Cummings, ante p. 337; Krumm v. Pillard, 104 Neb. 335; Zweiner v. Vest, 96 Neb. 399; Andrews v. Hastings, 85 Neb. 548." Pfeifer v. Scottsbluff Mortgage & Loan Co., 105 Neb. 621, 181 N. W. 533. See, also, Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404.

As held in Purdum v. Sherman, *supra*: "Where one by mistake as to the true boundary line enters upon and takes possession of lands 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."

With reference to the 1947 deed, which appellants obtained from the Boardmans, we do not think either of

the appellees was connected with this transaction in such a manner as to create any fiduciary relationship between the parties. It is true that appellee Vantine A. James drew the contract and prepared the deed but he did not put a description in either instrument. When and by whom the description of the land conveyed thereby was put in the deed is not too clearly shown. It was apparently done by the party who closed the deal. Under the circumstances disclosed by the record, as they relate to this transaction, we do not think appellants gained any rights in and to the lands herein involved by reason thereof.

We have already referred to the land in Section 5 that was owned by George S. Upton prior to its being washed away. George S. Upton died on March 4, 1934, and his wife in 1944. During September and October of 1949 appellants bought from the heirs of George S. Upton whatever interests they had in and to this land. It is contended that appellee Vantine A. James handled this transaction for the appellants. We do not think the record shows that he did. However, let us assume that he did. We do not think that would help appellants. Prior to their purchasing the Uptons' interests the appellants advised appellee Vantine A. James of the fact they intended to do so, stating the Uptons claimed they owned lands east of the chute. On at least two occasions, prior to their purchase of the Uptons' interests, appellee Vantine A. James advised appellants that the Uptons had no rights east of the chute as that land belonged to appellees. Under this situation we do not think appellants are in a position to claim anything by estoppel by reason of their subsequent purchase. All they got was what the Uptons had and that was land west of the chute.

In view of what we have said we will not discuss such matters as the claimed settlement agreements of 1952 and 1953; admissions made by the appellants to employees of the Hart Construction Company; and appel-

lants' endeavors to purchase the land from appellees. To do so would serve no useful purpose. Our findings fully support the judgment of the trial court. It is therefore affirmed.

AFFIRMED.

CLIFTON BRYANT, APPELLANT, V. EDMOND E. GREENE, APPELLEE.
81 N. W. 2d 580

Filed March 8, 1957. No. 34032.

1. **Appeal and Error.** Where it appears that a judgment of affirmance was entered on the basis of there being no properly authenticated bill of exceptions, and it further appears that upon the filing of a supplemental transcript the bill was in fact properly obtained and settled, this court will, if timely application be made accompanied by a proper showing, vacate the judgment of affirmance and permit a correction of the defective record.
2. ———. 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.
3. **Release.** When the amount received for a release of liability is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with the other evidence and circumstances in the case, as tending to show that the party executing the release was overreached and that the minds of the parties never met in the consummation of a valid agreement.
4. **Release: Fraud.** Where a party suffered injuries clearly in excess of any that were contemplated by the parties when a settlement and release of liability were made, it is evidence that may properly be considered, along with the other evidence and circumstances in the case, in determining the question of fraud and misrepresentation in the procurement of the settlement and release.

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

Alfred A. Fiedler and *Ira Epstien*, for appellant.

Robinson, Hruska, Crawford, Garvey & Nye, for appellee.

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

CARTER, J.

Plaintiff brought this action to recover damages for personal injuries received when he was struck by the automobile of the defendant on a pedestrian cross walk in the city of Omaha. The trial court sustained a motion for a directed verdict at the close of plaintiff's evidence and the plaintiff appealed.

A former opinion in the case disposed of the appeal on the basis of a failure to procure a bill of exceptions properly authenticated as required by statute and the rules of this court. Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137. This court by order after a proper showing permitted the filing of a supplemental transcript establishing that an extension of time for the preparation of the bill of exceptions was actually procured and that the bill of exceptions was in fact a proper one for the consideration of this court. We hereby vacate the affirmance of the judgment heretofore entered and will now determine the appeal on the record presently before the court. The rule in such cases is: Where it appears that a judgment of affirmance was entered on the basis of there being no properly authenticated bill of exceptions, and it further appears upon the filing of a supplemental transcript that the bill was in fact properly obtained and settled, this court will, if timely application be made accompanied by a proper showing, vacate the judgment of affirmance and permit a correction of the defective record. See Dobesh v. Associated Asphalt Contractors, 137 Neb. 342, 289 N. W. 369.

The petition alleges that plaintiff, on May 27, 1954, while crossing a street intersection at Twenty-eighth and Q Streets in Omaha, was negligently struck and injured by defendant's car while he was operating his

automobile at that point. The answer alleges that the accident resulted from the negligence of the plaintiff and, further, that plaintiff had accepted a settlement of his claim and released the defendant from liability. The plaintiff in his reply alleged that the release was procured by misrepresentation and fraud, and that the purported settlement was inadequate as compensation for the injuries sustained.

Under the state of the record, the question of the negligence of the defendant and the contributory negligence of the plaintiff was a question for the jury. It is not contended otherwise and we shall not further consider this question. The issue here involved is whether or not the trial court correctly determined that there was insufficient evidence for the jury on the question of misrepresentation and fraud in the procurement of the settlement and written release.

The evidence shows that plaintiff was an employee in a meat packing plant. He left the plant about 4:20 p.m. He stopped at the northeast corner of the intersection of Twenty-eighth and Q streets and when the traffic light turned green, he started south across Q Street at the cross walk on the east side of the intersection. When he was within approximately 6 feet of the south curb of Q Street he was struck by defendant's automobile as it was making a right turn from Twenty-eighth Street onto Q Street. Defendant did not stop but reported to a policeman about 2 blocks away that he thought he had hit a pedestrian at about Twenty-eighth Street. The defendant was later arrested on the charge of leaving the scene of an accident contrary to the provisions of section 39-762, R. R. S. 1943. The plaintiff also stated that he was arrested and required to give bond. The basis of plaintiff's arrest is not shown by the record. Plaintiff testified that the accident occurred on a Thursday and that he lost 2 days' work before the settlement was made and the written release executed on June 12,

1954. He had also incurred hospital and medical expenses prior to that time.

On June 12, 1954, plaintiff went to the office of a representative of defendant's insurance carrier. Plaintiff's evidence is that he was informed that he would be reimbursed for the 2 days' pay which he had lost and for his hospital and medical expenses up to that time. He was given $34 for the 2 days' employment and he was required to endorse a check in the amount of $27.65 to the Nebraska Methodist Hospital for services rendered on May 28 and 29, 1954. Other hospital and medical bills were not paid at the time of trial.

Plaintiff was 26 years of age. He had finished his schooling at the age of 13 years and had worked since at common labor. He testified that he had never been arrested previously. He testified further that the representative of the insurance carrier told him that he was in trouble with a "bunch of cops," that he would be paid for the 2 days he lost from his work and all the hospital bills, and that he would not have to worry about going to jail. He said he asked about payment for his injuries and the representative of the insurance carrier said that "it would just only take care of the hospital bills and for the two days I missed work, $34."

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. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569.

Applying this rule, it appears that the representative of the insurance carrier represented to the plaintiff that all he was entitled to was compensation for 2 days' pay and the hospital bills that had been incurred. The representative of the insurance carrier in effect told him he had nothing coming for any injuries he had sustained.

The evidence also shows that the representative of the insurance carrier told plaintiff that he was in trouble with the police and that the payment of the amounts agreed upon would relieve him of his worry about going to jail. The record shows that plaintiff was concerned about his arrest and a fear that he might go to jail, matters that had no relation whatever to the insurance carrier's liability to him.

The evidence shows that plaintiff's injuries included an injury to his right hand, a severe contusion of the lumbar area of his back, and a bruising of his muscles and other soft tissues. The injuries sustained were greatly in excess of the amount of the settlement, in fact the settlement allowed nothing for these injuries. This is a fact properly to be considered in determining if the plaintiff had been overreached when he was induced to accept the settlement and sign the written release. The rule is: When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with the other evidence and circumstances shown, as tending to show unfair practice, that the party had been overreached, and that the minds of the parties had never met in the consummation of a valid agreement. Collins v. Hughes & Riddle, 134 Neb. 380, 278 N. W. 888; Baumann v. Hutchinson, 124 Neb. 188, 245 N. W. 596.

The plaintiff was a common laborer without experience in matters of this kind. The representative of the insurance carrier was experienced in this field and used his knowledge of the legal liabilities involved and plaintiff's fear of police entanglements to induce an unjust and unfair settlement and release. Plaintiff's injuries were so serious, according to the undisputed evidence, and so disproportionate to the amount actually paid as compensation therefor, as to clearly support an inference of fraud. It is clear also that plaintiff had suffered injuries clearly in excess of any that were contemplated by the parties when the settlement and release were made.

This is evidence which likewise may be considered, along with the other evidence and circumstances, even though it is more in the nature of mutual mistake, but which in proper cases has been held to be a valid ground for setting aside such a settlement. Simpson v. Omaha & C. B. St. Ry. Co., 107 Neb. 779, 186 N. W. 1001.

Upon a consideration of the evidence and the surrounding circumstances, together with the reasonable inferences to be drawn therefrom, we conclude that the evidence was sufficient for consideration by a jury to determine if the settlement and release were obtained by misrepresentation and fraud. The trial court was therefore in error in directing a verdict for the defendant at the close of plaintiff's case on this issue. The judgment is reversed and the cause remanded for a new trial in accordance with the views expressed in this opinion.

REVERSED AND REMANDED.

JULIA FIALA, BY MARY RERUCHA AND VICTORIA BRUNER, AS HER NEXT FRIENDS, ET AL., APPELLANTS, V JOHN G. TOMEK ET AL., APPELLEES.

81 N. W. 2d 691

Filed March 8, 1957. No. 34061.

1. **Equity.** An equity court obtaining jurisdiction of a cause for any purpose will retain it for all purposes and proceed to final determination of all matters in issue thus avoiding unnecessary litigation.
2. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
3. **Insane Persons.** Where a person is not actually insane, but is incapable, through age or weakness of mind, of conducting his affairs, a suit may be maintained in his behalf by his next

friend, and it is within the discretion of the court to allow a suit so instituted to proceed.

4. ———. In general, any proof that is material and relevant to the issue of sanity or competency may be admitted upon the trial of such issue.

5. ———. In the determination of the mental condition of a person, his conversation, acts, declarations, and conduct in general may be shown at the trial, upon the theory that such proof is frequently decisive upon the question of competency or incompetency.

6. ———. The physical condition of a person alleged to be incompetent may be considered only insofar as it affects his mental condition.

7. Actions. An action may be maintained by the next friend when the person in whose behalf the action is commenced is not insane but incapable of managing his affairs, has not been adjudged to be incompetent, and has no appointed guardian.

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

Russell A. Souchek and *E. A. Coufal,* for appellants.

Bryant & Christensen and *Tomek & Tomek,* 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 Butler County by Julia Fiala, a widow, by her next friends Mary Rerucha and Victoria Bruner, two of her daughters, and Mary Rerucha, Victoria Bruner, Martha Bruner, Helen Leet, and Lucile Fiala Wynn, her daughters, as plaintiffs, against the five sons of Julia Fiala, Frank Fiala, John Fiala, Raymond Fiala, Charles Fiala, and Joseph Fiala and their wives who need not be named. There are other parties made defendants who, for the purposes of this appeal, need not be considered. The purpose of the action was to have the court find and render judgment canceling the conveyance of the plaintiffs' interests in certain land located in Butler

County and to quiet title thereto in the plaintiffs; to have the court find and render judgment in favor of Julia Fiala to have an interest in the proceeds of the sale of certain land commensurate with her rights; and to require the defendant sons of Julia Fiala, as agents who shared in the rentals of all the land in question, to account for the same. The judgment of the trial court was generally in favor of the defendants, adjudging that the conveyance of plaintiffs' interests in certain lands described in the pleadings be not set aside or the title quieted in the plaintiffs, and that the accounting be reserved to be determined in the future, dependent upon the decision of this court as hereinafter appears. From the order overruling the motion for new trial, the plaintiffs have appealed to this court.

On November 8, 1955, the plaintiffs filed their second amended petition alleging in substance that the plaintiff, Julia Fiala, by reason of old age, weakness of mind, and undue and undeserved credulity and reliance upon her sons, was incapable, unassisted and independently, of conducting her own affairs and by reason of her condition was liable to be deceived or imposed upon by deceiving, artful, or designing persons and could not properly take care of and manage herself and her property; that this action was therefore brought by Mary Rerucha and Victoria Bruner as the next friends of Julia Fiala; and that no guardian had been appointed for Julia Fiala. The pleadings admitted that prior to his death in 1936, Frank J. Fiala and Julia Fiala were husband and wife, and during their marriage relationship there was born to them ten children, all of whom have been previously named.

The pleadings also admitted that Frank J. Fiala died intestate owning certain lands located in Butler County which are described in the petition; that Julia Fiala was vested with the homestead right for the term of her life in certain described land; that she was entitled to an undivided one-third interest in all the land; and that

the children were entitled each to a one-fifteenth interest in all the land.

The pleadings admit the execution of a life lease pleaded in the plaintiffs' second amended petition, recorded in book 4 of the lease and contract record in the office of the county clerk of Butler County. The pleadings further admit that there was a sale of a part of the land, and a stipulation was entered into relative to that transaction.

The plaintiffs' second amended petition alleged that after the death of her husband and prior to November 6, 1936, the sons of Julia Fiala conceived the plan and purpose of obtaining a conveyance of the interests of the daughters for a nominal consideration, and obtaining a conveyance of the interest of Julia Fiala by fraudulently representing to her and her daughters that the sons would farm the lands of which Frank J. Fiala died seized, raise crops thereon, and pay to Julia Fiala annually two-fifths of all the crops raised to be delivered by them to market, and the customary cash rent for the pasture and hay land; that the sons then and at that time did not intend to fulfill such promise but planned and intended to allow to her from the proceeds of such crops a meager and inadequate amount for the necessaries of life and to use and appropriate the remainder, other than necessary to pay taxes, to their own use; and that Julia Fiala relied upon and believed in such representations. It was further alleged that on November 6, 1936, Julia Fiala, on the basis of said fraudulent representations, executed a conveyance of said lands of which Frank J. Fiala died seized to the ten children in equal shares; that pursuant to said plan and purpose, the sons procured a conveyance from their sisters for a nominal and insubstantial consideration, but before the sons obtained the same the daughters insisted the obligation of the sons to provide and pay said income be set up in written form, and to that end they required an agreement of the daughters and the sons be executed

and delivered to the mother providing for her receiving said income, and to that end there was executed by the sons and their wives and by the daughters a life lease; and that after the life lease had been prepared and delivered to the mother, on January 27, 1936, the daughters, for a consideration, conveyed their interests, subject to the life lease agreement, to the sons of Julia Fiala in equal shares.

The plaintiffs further alleged that the son Frank V. Fiala farmed the lands in Section 29 from the year 1937 through the year 1952; that the land was productive and Frank V. Fiala realized and raised good crops thereon, sold a portion that he elected to allot to his mother as her share of the crop, and deposited the proceeds to her credit in a bank; and that in the period he farmed the land from 1942 until 1952, he represented to his mother that he had deposited the proceeds of her full share of the crop and the cash rental but, as a matter of fact, he did not account for the full share of the crop she was entitled to receive. The petition further alleged that Frank V. Fiala used the funds he deposited in his mother's account for his own purposes in buying material for and constructing building improvements and other improvements to his benefit and to the benefit of the owners of the land; and that the average yearly fund, for the years 1942 to 1952 inclusive, to maintain a home and provide for the support and maintenance of the mother did not exceed $300.

The petition also contained an allegation that the sons John, Joseph, and Charles farmed the land in Section 33 for the years 1942 to 1952, inclusive, and agreed to pay a crop rental of two-fifths of the crops raised on the land delivered at the market and cash rental for the pasture and hay land; that they failed to pay cash rent, and accounted for only a portion of the crops which under the terms of the tenancy were to be delivered at the market for their mother; that they drew funds from their mother's account for their own use; that their

mother left all of the accounting and withdrawal of funds to her sons which enabled them by fraud, deceit, and misrepresentation to keep her uninformed as to the nature of the transactions; that the terms and conditions of the life lease had been broken and violated by the defendants; and that the plaintiffs were entitled to the cancellation of the said deeds executed by them pursuant to the lease and contract, and restoration to them of the land conveyed by them to defendants, or to the proceeds of the sale of the land.

The plaintiffs prayed that the conveyance of their interests in all of the real estate be canceled as to the land in Section 29, and title thereto be quieted in them; that Julia Fiala be decreed to have an interest in the proceeds of the sale of the land in Section 33 commensurate with her rights in said premises; and that the sons who shared the rentals as above alleged be required to account for the same.

The defendant sons and their wives, except Joseph and his wife, in their separate answer to the second amended petition alleged that all the matters of rentals and management of the lands described in plaintiffs' second amended petition occurred and arose prior to March 1, 1949, and any right to rentals and accounting due, or alleged to be due, Julia Fiala prior to said date were barred by the statute of limitations; that more than 4 years had elapsed since the accrual of the cause, or causes, of action, if any, of Julia Fiala; that more than 5 years had elapsed since the recording of the deed, and the cause of action, if any, accruing to Julia Fiala to cancel the deed was barred by the statute of limitations; and that Julia Fiala had filed a dismissal of the above-entitled action, and no further proceedings should he had in the cause and the action should stand dismissed. They prayed that the dismissal of Julia Fiala, as filed, be sustained; that plaintiffs' second amended petition be dismissed; and that said defendants recover their costs expended.

The plaintiffs' reply contained a general denial of all matters pleaded in the answers except those therein admitting certain allegations of the plaintiffs' second amended petition; alleged that a motion filed by the defendants to dismiss these proceedings by reason of the dismissal filed by Julia Fiala was overruled by the district court and without prejudice to said ruling and without waiving the same alleged that the dismissal of Julia Fiala was obtained by the defendants, or some of them, by fraud and misrepresentation; and renewed the prayer of the petition for cancellation of the instrument and for an accounting against the defendants.

The record discloses that Frank V. Fiala was called as a witness by the plaintiffs with reference to the issue involving an accounting. His examination proceeded with a few questions when counsel for the defendants interposed an objection on the part of all the defendants except Joseph Fiala and his wife to the following effect: That no further proceedings in the matter be had for the reason that the same stands dismissed of record in this court. The court said: "I think I will take that motion under advisement and determine that along with the matters of the case, unless it appears I can rule on it at an earlier time. I think there has been no showing or evidence in connection that there was a dismissal and there was a motion to have the dismissal disregarded or dismissed and there has been no evidence one way or the other on that, as I recall."

Defendants' counsel then made a motion on behalf of the same defendants that no further proceedings be had in the matter for the reason that the action was brought by Mrs. Bruner and Mrs. Rerucha in behalf of Julia Fiala, they being daughters and merely heirs apparent, and the action was not brought by the real party in interest. This motion was taken under advisement by the court.

After a few more questions were propounded to the witness, the defendants objected to the line of question-

ing having to do with the accounting for the same reasons as heretofore stated. There was some discussion between counsel for plaintiffs and the court. The court stated: "Well, if this evidence is going to an accounting I think it is coming at the wrong time; and objection is sustained. * * * if the case has been properly dismissed by the party entitled, or, if she is the real party in interest and competent to bring the action and has not brought it herself, those questions might dispose of the case without even going into the accounting; * * *."

After the court ruled, one of counsel for the plaintiffs made an extended statement which included this declaration: "Well, at the present time I want to show, with the case now at issue on the cancellation as well as the accounting, I want to show the fact that this gentleman (Frank V. Fiala) was during this period of time an agent and managed and cared for the affairs of the real party in interest."

The court responded that he wanted counsel to have an opportunity to present his case in full, everything that was in the petition, if he would get at it in the proper order. The right of the daughters to bring the action as next friends was raised by motion. The court said he felt the motion was good. The court said: "I overruled the motion and now it is your duty to prove that these daughters have the right to bring this action as the next friend of the mother. They are not the real parties in interest and under the statute the action must be brought by the real party in interest. Now it's possible * * * you can make a showing in the evidence that they are authorized to bring this action as next friend of the mother; * * *." The case proceeded to trial, and at the close of the evidence counsel for the defendants made a motion in behalf of the same defendants to dismiss the second amended petition and reply filed therein. The reasons therefor are contained in the trial court's order

dated April 12, 1956, which will be referred to later in the opinion.

The court, on December 22, 1955, rendered the following order: "Trial resumed at 9:30 A. M. pursuant to adjournment. Plaintiff introduces additional evidence and rests as to the phase of the case being tried which is the right of the named next friends to bring the action for Julia Fiala. Defendants adduce evidence on the phase of the case now being tried and rest. Defendants move for a dismissal on grounds stated in record. The motion is argued by counsel for both sides. At 3:45 P.M. the motion is sustained but jurisdiction is retained to try the issues in the case which have not been tried in case this decision is later reversed by the Supreme Court."

The plaintiffs filed a motion for new trial, and upon due consideration thereof, the court entered an order reinstating the case for trial. This order was made April 12, 1956, as follows:

"Pursuant to a suggestion by the Court this cause proceeded to trial upon questions raised by the pleadings other than the question of accounting. At the end of the evidence upon the issues so tried the defendants moved for a dismissal of plaintiffs' petition on the grounds, first, that the action was not brought by the real party in interest and that there was an insufficient showing to sustain the right of the two daughters of Julia Fiala to bring the action as her next friend; second, that there is a presumption that Julia Fiala was competent to execute the dismissal of the suit received in evidence as Exhibit 2; and third, that in view of Exhibit 6, by which Joseph Fiala and Frank Fiala were appointed agents to collect the rents for Julia Fiala, the case could not be maintained in any event except as against the agents for an accounting as to rents collected or for failure to collect rents.

"The motion was sustained and the case dismissed. A motion for new trial was filed, argued and submitted.

"In considering the motion for a new trial the evi-

dence has been reviewed and the Court finds that:

"1. Julia Fiala is not insane, but she is of advanced age and there is evidence of her lack of ability at this time to adequately represent herself. * * * The Court was in error in dismissing the action completely, and it should be reinstated to the extent hereinafter provided.

"2. Upon the evidence in the record it appears that Exhibit 2 (the dismissal of the action) was executed by Julia Fiala under a mistake of fact and it should not be recognized as a valid dismissal of the action.

"3. There is no evidence of fraud in the execution and delivery of the deeds, Exhibits 8 and 9, and the life lease, Exhibit 10. On the contrary, it appears that these instruments recognized and carried into effect a plan that had been proposed by Frank J. Fiala before his death whereby the sons would get the real estate and those daughters then unmarried would receive furniture and furnishings or money in lieu thereof to equal the value of the furniture and furnishings which had been given to the other daughters upon their marriage. It was a plan customary among such families. It was worked out with the advice and assistance of a competent attorney, who appears to have represented all the parties as a family, and it was approved by all of them. Had the plan not been acceptable it would undoubtedly have been questioned before the passage of seventeen years. All of the children, both sons and daughters, had a duty and a responsibility so far as Exhibits 8, 9 and 10 are concerned to see that Julia Fiala received the rents and profits from the land during her lifetime. By Exhibit Number 6 the duty of managing the land, collecting rents, paying taxes, paying insurance on the buildings and keeping them in repair devolved upon Joseph Fiala and Frank Fiala. The issue as to whether or not they have fulfilled their duties as agents and collected and accounted for all rents and profits should now be tried. * * * There is no basis under the pleadings and the evidence for cancelling (sic) the deeds, Exhibits

8 and 9. Such a cancellation would result in a loss for the other sons because of the dereliction, if any, on the part of Joseph Fiala and Frank Fiala. The remedy of Julia Fiala is adequate without requiring any forfeiture of title.

"4. Martha Bruner, Helen Leet, Lucile Fiala Wynn, Mary Rerucha and Victoria Bruner, as individuals, have no interest in the subject matter of the suit except as prospective heirs of Julia Fiala, which gives them no standing as plaintiffs herein. They have at all times mentioned in the pleadings been of full legal age and competent * * *. The petition insofar as it claims any rights in their behalf should stand dismissed."

The court then ordered that the motion for new trial be in part sustained and in part reversed; that the former dismissal of the case stand as to all parties except Julia Fiala, by Mary Rerucha and Victoria Bruner, as her next friends, as plaintiff, and Frank Fiala and Joseph Fiala, as defendants, for an accounting of their acts and doings as agents; and that the case be reinstated for trial for that purpose.

Exhibit No. 6, made July 3, 1937, appointed Frank Fiala and Joseph Fiala as agents to manage the land, collect the rents, pay the taxes, and keep the buildings in a good state of repair.

Exhibit No. 8 is a quitclaim deed between Julia Fiala, widow, and her sons and daughters whereby she conveys her interest in the land described therein to them, acknowledged December 6, 1936.

Exhibit No. 9 is a quitclaim deed made January 25, 1937, by the sisters and the husbands of those who were married at the time, to their brothers, share and share alike, as tenants in common, wherein the sisters conveyed their interests in the land described therein for and in consideration of $500 to Martha Fiala, $500 to Lucile Fiala, $500 to Helen Leet, $1 to Mary Rerucha, and $1 to Victoria Bruner, to them duly paid and receipts acknowledged. This deed carried the following

provision: "It is agreed and understood by the parties hereto that the property hereinbefore described is subject to a certain life use to Julia Fiala * * *."

Exhibit No. 10 is a life lease made December 6, 1936, by the sons and daughters of Julia Fiala and the husbands and wives of those who were married at the time, providing for payment to Julia Fiala of the life income from the real estate conveyed by her to her sons and daughters. This instrument provided that in case any of the conditions were broken by the sons and daughters, the conveyance made to them should be void and Julia Fiala should have the full rights in the real estate as though the conveyance had not been made.

The plaintiffs assign as error the overruling of the plaintiffs' motion for new trial filed April 23, 1956, on the ground that said motion was filed out of time.

The trial court rendered its judgment on April 12, 1956. The motion for new trial was filed on April 23, 1956. The day the judgment was entered is excluded. The tenth day fell on Sunday, and it is excluded. The motion for new trial was filed on the eleventh day, which was Monday. The motion was filed in time. See Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265.

Some contention is made by the plaintiffs that the order of the trial court of December 22, 1955, and its order of April 12, 1956, are contradictory with reference to the issues tried by the trial court. The final order of the trial court entered April 12, 1956, clearly indicates that all of the issues joined by the pleadings were tried and determined by the trial court, with the exception of the issue of the accounting. Regardless of the orders or the judgment rendered by the trial court, the cause is here for trial de novo. The following are applicable.

An equity court obtaining jurisdiction of a cause for any purpose will retain it for all purposes and proceed to final determination of all matters in issue thus avoiding unnecessary litigation. See, Schreiner v. Witte, 143

Neb. 109, 8 N. W. 2d 831; Dennis v. Omaha Nat. Bank, 153 Neb. 865, 46 N. W. 2d 606, 27 A. L. R. 2d 674; Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333; Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

Actions in equity, on appeal to this court, are triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

We conclude that there is no merit to the plaintiffs' contention with reference to the contradiction in the orders of the trial court claimed by them as above set forth.

This brings us to the questions as to whether or not the dismissal of the action filed by Julia Fiala should be sustained, and did the trial court err in determining that Julia Fiala, as the real party in interest, was not competent to bring the action in her own behalf and was properly represented by two of her daughters as next friends.

In addition, we will consider the evidence in connection with the assignment of error made by the plaintiffs that the trial court erred in failing to cancel the conveyance as pleaded in the plaintiffs' second amended petition.

Before setting forth the evidence on the issue of the competency of Julia Fiala to bring this action as the real party in interest in her own right, we deem it necessary to set forth the following authorities with reference to such issue.

As stated in 28 Am. Jur., Insane and Other Incompetent Persons, § 104, p. 738: "The decisions are generally agreed, moreover, that in all cases where a person is not actually insane, but is incapable, through age or

weakness of mind, of conducting his affairs, suits may be maintained in his behalf by his next friend, and that it is within the discretion of the court to allow a suit so instituted to proceed; it may order a stay of proceedings to await the due appointment of a general guardian, or order the same discontinued, as it sees fit." See, also, Henry v. Edde, 148 Kan. 70, 79 P. 2d 888; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; Annotation, 64 L. R. A. 533.

In 28 Am. Jur., Insane and Other Incompetent Persons, § 124, p. 754, it is stated: "In general, any proof that is material and relevant to the issue of sanity or competency may be admitted upon the trial of such issue; * * *. The tendency of most courts before whom an issue of sanity or competency is presented for determination is to permit a relatively wide latitude in admission of proof of insanity or incompetency." See cases cited under note 17.

"It is well settled that in the determination of the mental condition of a person, his conversation, acts, declarations, and conduct in general may be shown at the trial, upon the theory that such proof is frequently decisive upon the question of sanity and insanity." 28 Am. Jur., Insane and Other Incompetent Persons, § 132, p. 759.

In 28 Am. Jur., Insane and Other Incompetent Persons, § 138, p. 764, it is said: "* * * the physical condition of a person alleged to be incompetent may be considered only in so far as it affects his mental condition." See, also, Annotations, 17 A. L. R. 1074, 113 A. L. R. 356.

There is no statute in this state which forbids commencement of an action by an incompetent by his next friend when incompetency has not been adjudged and no guardian has been appointed. The authorities are quite uniform that such an action may be maintained when the person in whose behalf the action is commenced is not insane but incapable of managing his affairs, has not been adjudged to be incompetent, and has no appointed guardian.

The record discloses that Julia Fiala gave birth to 11 children during her marriage relationship with Frank J. Fiala who died in November 1936. One of the children died; the other ten, five sons and five daughters, all grew to adulthood and married. At the time of trial Julia Fiala was nearly 80 years old. She testified that Mrs. Bruner, one of her daughters, purchased her groceries during the time she lived in David City, which was probably from 1938. Sometimes her sons Frank or Raymond brought groceries to her, but not often. She never bought them herself, nor did she pay for anything during the time she resided in David City. Her husband, during his lifetime, attended to all business matters. She could understand what a dollar or fifty cents was, but was not able to recognize the denomination of currency. From her testimony it appears also that she was unable to read and comprehend the meaning of the English language and was not too well versed in the Bohemian language. She was unaware of the fact that she had $4,000 on deposit in the Brainard bank.

Victoria Bruner, a daughter of Julia Fiala, testified that she lived in David City, was 58 years old, and lived with her parents on the home farm until she was married in 1916. After the birth of her fourth child, Julia Fiala became partially paralyzed from which she has never fully recovered. Julia Fiala did not understand the value of money, except perhaps she knew the value of a dime or a nickel, and never transacted any business. The father of this witness was in business in Brainard from 1910 to 1922. Her mother never directed the farm work or told the children what to do around the farm.

Lucile C. Wynn, another daughter of Julia Fiala, testified that she was 54 years old and was the fourth child born to Julia Fiala. She lived on the home place until she was 22 years old, and had charge of the home until she left. Her mother was very nervous and often criticized and scolded the children without cause. The children would then appeal to their father for an under-

standing, and he would listen to their complaints and render them advice as to what to do under the circumstances. Due to her physical condition, Julia Fiala was unable to express herself, and her sentences were incomplete. She did not advise the daughters in the preparation of food or sewing. The oldest daughter and her father always bought the food, and her father and her sister advised her in the preparation of the food.

Mary Rerucha, a daughter, testifed that she was 62 years old and she took part in the management of the home because her mother was weak and had to be helped. She helped with the work as soon as she was old enough to do anything. Her mother had headaches which occurred at intervals and which have since persisted. She stayed at home until she was 26 years of age in 1920, when she married. There was considerable sewing to be done because of the large family, and they made most of their clothes. The sewing was done by the girls. Her father usually ordered the groceries. When she was old enough, he gave her the money to purchase them, and as she grew older she had the responsibility of the cooking. Her father taught the children their prayers and the Bohemian language. Her mother never took any part in the management of the farms. Frank was her mother's agent after her father died.

Alois Rerucha, a son-in-law of Julia Fiala, testified that Julia Fiala does not read, she just looks at the pictures in the paper; that she has had no experience in the management of farms and does not understand business; and that at the time this litigation was started, she was not fully capable of managing her business.

The record shows that prior to his death, Frank J. Fiala had been talking about a plan as to the manner of settling his estate. He wanted his sons to have the land, and his daughters to have $500 each, or the equivalent in personal property. The reason his plan for settlement was not made in accordance with his wishes was because Raymond, the youngest son, was not yet

21 years of age. He was within 2 months of his twenty-first birthday when his father was killed. A few days after Frank J. Fiala passed away, Alois, after obtaining advice from the family, engaged the services of attorneys to come to the family home and advise the family with reference to the settlement to be made to conform to the father's plan. Thereafter all of the sons and daughters met at the home of their mother. There was some discussion among members of the family with reference to the settlement and suggestions made by the attorneys. As a result the mother and all of the children agreed to the settlement as heretofore stated.

The evidence discloses that Julia Fiala is incapable of understanding how to transact business or to understand business transactions. She is unacquainted with the denominations of currency and the value of money; she is not capable of reading and writing the English language to the extent of making any kind of an analysis by herself with reference to her rights; nor, for that matter, is she sufficiently able to comprehend in the Bohemian language business transactions that might affect her rights. In addition, her physical condition, which to some extent affects her mentality, is one of the factors in considering her responsibility to transact business.

We conclude that the trial court was correct in determining that Julia Fiala should be represented by her next friends, two of her daughters.

We fail to find any evidence of fraud on the part of any of the defendants with reference to the settlement made by the mother, Julia Fiala, and her sons and daughters regarding the estate of the husband and father, Frank J. Fiala, deceased. All of the parties to the settlement approved it. It would appear that had the plan and the settlement made in accordance therewith not been acceptable to the mother or her sons and daughters, all having an interest therein, it would undoubtedly and without question have been questioned before the pas-

sage of at least 17 years or more by some one of them. In addition, all of the children, both the sons and daughters, had a duty and a responsibility insofar as exhibits Nos. 8, 9, and 10 are concerned, to see that their mother received the rents and profits from the land during her lifetime.

We conclude that the trial court did not commit error in finding that there was no evidence of fraud in the execution and delivery of the deeds as shown by exhibits Nos. 8 and 9 and the life lease as shown by exhibit No. 10.

We should add that while the decree of the district court might indicate that the daughters of Julia Fiala at no time were parties having an interest in the subject matter in litigation, they in fact did have such an interest for had they succeeded in obtaining judgment canceling the conveyance as prayed for in the plaintiffs' second amended petition, they then would have been entitled to their respective interests in the land owned by their father at the time of his death, since he had died intestate. Having failed to prove fraud, as stated by the trial court in its decree, the daughters have no interest in the subject matter of the action.

The issue with reference to an accounting as to whether or not Joseph Fiala or Frank V. Fiala have fulfilled their duties as agents as set forth in exhibit No. 6, and collected and accounted for all the rents and profits was reserved for future determination by the trial court.

For the reasons given in this opinion, the plaintiffs having failed to prove fraud as heretofore set forth, the judgment of the trial court is affirmed.

AFFIRMED.

ALLSTATE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. SEBASTIAN ENZOLERA, APPELLANT.
81 N. W. 2d 588

Filed March 8, 1957. No. 34079.

1. Larceny. Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft.
2. Automobiles. The subsequent purchaser for value of an automobile who obtains a certificate of title, based upon a previous valid title thereto and compliance with statutory requirements, obtains title and ownership superior to that of a prior purchaser.
3. ———. A purchaser for value of an automobile who obtains a certificate of title based upon a previous false or fraudulently obtained title obtains no title as against a previous purchaser and holder of a valid certificate of title to the automobile.

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

Louis T. Carnazzo, Joseph A. Troia, and *Paul J. Garrotto,* for appellant.

Mecham, Stoehr, Rickerson & Sodoro, for appellee.

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

YEAGER, J.

This is an action in replevin by Allstate Insurance Company, a corporation, plaintiff and appellee, against Sebastian Enzolera, defendant and appellant. The case was tried to the court, a jury having been duly waived. The judgment was in favor of the plaintiff and against the defendant. A motion for new trial was duly filed and by the court overruled. From the judgment and the order overruling the motion for new trial the defendant has appealed. The assignments of error are that the judgment is contrary to law; that the judgment is contrary to the evidence; and that the evidence is insufficient to sustain the allegations of plaintiff's petition.

In order to properly understand the matters pre-

sented for review on this appeal it appears necessary to review the background of the controversy. In doing so an effort will be made to respect the chronology of events as they occurred.

The first step in this chronology is a certificate of title to a Chevrolet automobile bearing number 0234946F54Y issued by the Department of Highways, Division of Motor Vehicles, of the State of Delaware, to one James V. Matha on February 8, 1954. This certificate is in evidence without any challenge as to its authenticity or as to foundation for its admission. This is true as to all other exhibits in the bill of exceptions. The basis upon which the certificate was issued does not appear. No facts have been disclosed showing, or from which a legal inference could flow, that any irregularity was involved in the issuance of the certificate.

Thereafter James V. Matha, on March 11, 1954, in San Diego, California, sold the automobile to one Fred Richter for $1,950. The transfer was made to Richter on the basis of the Delaware certificate of title. Matha signed in blank a form of assignment on the back of the certificate. He also gave Richter a bill of sale. He also signed in blank his registration card from the State of Delaware. At the same time on the basis of these documents Richter made application for a certificate of ownership and for a registration card from the Department of Motor Vehicles of the State of California. The application was accepted and the certificate and card were issued. They were not issued on that date but were issued on March 29, 1954. In the presentations of the parties no significance is attached to this delay.

On March 21, 1954, the automobile was stolen from the garage of Richter in San Diego, California. On discovery of the theft Richter notified the agent of the plaintiff herein. The plaintiff was his insurance carrier. This particular automobile had not been directly insured but by the terms of a policy of insurance on another automobile theft insurance attached to this one.

The insurance was paid to Richter by the plaintiff and Richter transferred his title to plaintiff. Apparently thereafter, on or about April 29, 1954, the plaintiff obtained an assignment of the certificate of ownership from Richter and thereafter on May 11, 1954, received a certificate of title from the State of California.

On April 5, 1954, James V. Matha obtained a Nebraska certificate of title from the county clerk of Otoe County, Nebraska. This certificate was issued to him on the basis of a duplicate copy of a certificate which had been issued to him by the clerk of courts of Portage County, Ohio, on February 23, 1954. By recital on the face of the certificate it appears that the original had been issued to him on February 5, 1954.

On April 6, 1954, James V. Matha sold the automobile to the defendant and on the basis of the certificate which Matha had obtained from the county clerk of Otoe County, the defendant obtained a certificate of title from the county clerk of Sarpy County, Nebraska.

On the facts as outlined and the law, the plaintiff contends that Richter had title and the right to possession of the automobile at the time it was stolen and that as successor to those rights the plaintiff is entitled to recover it. It urges that nothing has taken place which has in any wise impaired that right.

On the other hand the defendant insists that he is an innocent purchaser for value and that on the evidence and law he is entitled to be adjudged the true owner and title holder of the automobile.

On the record made it must be assumed that, there being no evidence to the contrary, Richter became the owner of the automobile with an unimpaired title thereto and that thereafter while he was the owner of the same it was stolen from him. He obtained his possession and title pursuant to a certificate of title issued to Matha in the State of Delaware which insofar as the record is concerned was regular in form and substance. Also there is no evidence that it was not issued on proper

authority. On the basis of this certificate, assigned to Richter by Matha, and the purchase of the automobile, Richter was duly issued a certificate of title and a registration certificate by proper authority in the State of California. The regularity of the issuance of this certificate under the laws of California is not brought into question. The sufficiency of the transfer of the Delaware certificate within the meaning of the laws of that state is raised, but it is not pointed out how that did or could impair the right of Richter to obtain in good faith a certificate of title in California under the laws of California to an automobile, the title to which was not at that time in any wise impaired.

In the light of these facts and well-established principles of law neither the thief nor anyone taking through him took or could take any title to the automobile. Richter remained the owner with the right to recover possession of it wherever found, subject however to the right of a transferee to take it instead, in case Richter had transferred his title and interest. It should be said here that the defendant does not contend herein that the right of Richter to recover, if he had such right, has not passed to the plaintiff.

The rule applicable is the following, as stated in State ex rel. Sorensen v. Nebraska State Savings Bank, 127 Neb. 262, 255 N. W. 52: "Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft." See, also, Snyder v. Lincoln, 150 Neb. 580, 35 N. W. 2d 483. This case was before the court again in 153 Neb. 611, 45 N. W. 2d 749, and 156 Neb. 190, 55 N. W. 2d 614, but there was no departure from the foregoing pronouncement.

The defendant urges that this rule is not controlling in the case at bar. In effect he urges that the certificate of title provisions of the Nebraska Motor Vehicle Act and the decisions of this court protect him against the claims of the plaintiff.

Section 60-105, R. S. Supp., 1955, provides in part: "No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle, * * * sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this act."

In interpretation and application of section 60-105, R. R. S. 1943, which contained the same substance as this provision, the following was said in Loyal's Auto Exchange, Inc. v. Munch, 153 Neb. 628, 45 N. W. 2d 913: "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. His title and ownership are superior to any rights which the first purchaser may have."

The defendant herein, as pointed out, obtained a Nebraska certificate of title to this automobile and on the basis of this statute and this interpretation he insists that his title is secure. His insistence however is without merit.

It is to be observed that the recognition required by the statutory provision and the decision is a certificate "duly" issued. This term implies, we think, that the issuance must be based upon a proper background of authority. If there could be any doubt as to this it has been removed by the later decisions of this court.

In Snyder v. Lincoln, 156 Neb. 190, 55 N. W. 2d 614, in explanation in part of what was said in Loyal's Auto Exchange, Inc. v. Munch, *supra,* it was said: "We did not say that the possession of a certificate of title was an absolute muniment of title. A thief with a certificate of title to a stolen automobile does not divest the owner of his right to take it wherever he can find it. A certificate of title is essential to convey the title to an automobile, but it is not conclusive of ownership. It is simply the exclusive method provided by statute for the trans-

fer of title to a motor vehicle. It conveys no greater interest than the grantor actually possesses." See, also, Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361; Burns v. Commonwealth Trailer Sales, 163 Neb. 308, 79 N. W. 2d 563.

It is clear that Matha did not obtain his certificate of title in the manner provided by statute. Section 60-106, R. R. S. 1943, as amended by the laws of 1953, contains the provision applicable in the present instance, as follows: "If a certificate of title has not previously been issued for such motor vehicle in this state, such application, * * * shall be accompanied by * * * a certificate of title, a court order issued by a court of record, * * * or an assigned registration certificate, if the law of the other state from which such motor vehicle was brought into this state does not have a certificate of title law. The county clerk shall retain the evidence of title presented by the applicant and on which the certificate of title is issued." Within the meaning of this statute Matha, at the time he obtained his Nebraska certificate, had no valid indicia of a right to receive a certificate of title under the laws of Nebraska.

As has been pointed out this automobile was registered on the basis of a document which came from Ohio. The State of Ohio at the time had a certificate of title law, but the document presented by Matha was not a certificate of title. As shown on its face it was a duplicate issued 18 days after a certificate which, so far as known here, was proper and in due form.

Apparently a true certificate of title issued pursuant to the Ohio statutes may be relied upon as evidence of title and of the right and power to convey an automobile. Significantly though this is not true of a duplicate certificate.

Section 4505.08, Page's Ohio Revised Code Annotated, provides for the issuance of certificates of title. It contains no restrictions upon the title represented by the certificate. Section 4505.12 provides for the issuance

of duplicate certificates in the event originals are lost or destroyed. This section contains the following: "Said certified copy and all subsequent certificates of title issued in the chain of title originated by said certified copy shall be plainly marked across their faces 'duplicate copy,' and any subsequent purchaser of said motor vehicle in the chain of title originating through such certified copy acquires only such rights in such motor vehicle as the original holder of said certified copy himself had."

Permission for the issuance of duplicate certificates and transfer of automobiles based thereon in this state is also found in the statutes of this state. § 60-112, R. R. S. 1943. The Nebraska statutes do not put a purchaser who buys an automobile and takes through a duplicate certificate on notice of possible impairment of title in the same manner as is done under the Ohio statute, but such purchaser is not left without warning. Section 60-112, R. R. S. 1943, with respect to purchases pursuant to duplicate certificates, contains the following: "Any purchaser of such motor vehicle may at the time of such purchase require the seller of the same to indemnify him and all subsequent purchasers of such motor vehicle against loss which he or they may suffer by reason of any claim or claims presented upon the original certificate."

It becomes apparent therefore that neither under Ohio nor Nebraska statutes could the defendant contend that he obtained the paramount title to the automobile in question. He took it subject to the valid title which, as disclosed by the evidence, was, at the time he obtained it, in Richter. This being true, and it being made to appear that title was duly transferred to the plaintiff, the judgment of the district court should be and is affirmed.

AFFIRMED.

ELDON FARR, APPELLEE, V. CAMBRIDGE CO-OPERATIVE OIL COMPANY, A CORPORATION, APPELLANT.
81 N. W. 2d 597

Filed March 8, 1957. No. 34082.

1. **Master and Servant: Torts.** The relation of master and servant does not generally render the master liable for the torts of his servant, unless connected with his duties as such servant or within the scope of his employment.
2. ———: ———. If such servant does an act merely to frighten a third person or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor.
3. ———: ———. A master is under a duty to exercise reasonable care so to control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the servant is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or is using a chattel of the master, and the master knows or has reason to know that he has the ability to control his servant, and knows or should know of the necessity and opportunity for exercising such control.

APPEAL from the district court for Furnas County: VICTOR WESTERMARK, JUDGE. *Reversed and remanded with directions.*

Aten & Chadderdon, for appellant.

Morrison, Lyons & Starrett, for appellee.

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

CHAPPELL, J.

Plaintiff, Eldon Farr, brought this action against defendant, Cambridge Co-Operative Oil Company, a domestic corporation, seeking to recover damages for alleged personal injuries. Plaintiff predicated his right of recovery upon allegations that two named employees of defendant negligently and in disregard of plaintiff's safety set off an explosion while on duty and in fur-

therance of defendant's business; that defendant's managers, having knowledge of the facts while acting for and on behalf of defendant, negligently permitted the practice to continue; and that the permitting of such explosion on or about defendant's premises constituted an actionable nuisance which was the proximate cause of painful injuries in and around plaintiff's ears and partial loss of his hearing. In that connection, plaintiff relied upon the alleged negligence of defendant, and his nuisance theory was not an issue in the trial court. Thus, it was not presented or argued in this court.

Insofar as important here, defendant's answer denied generally; denied specifically that the alleged acts of its employees were within the scope of their employment or in the furtherance of defendant's business; and denied specifically that defendant or its management had any knowledge of the circumstances alleged, or that its management suffered or permitted the practice to continue as alleged. Plaintiff's reply was a general denial.

The cause was tried to a jury whereat defendant's motions for directed verdict or dismissal, made at conclusion of plaintiff's evidence and again at conclusion of all the evidence, upon the ground of insufficiency of the evidence to support a verdict in favor of plaintiff, were overruled. After submission of the cause to the jury, it returned a verdict for plaintiff and judgment was rendered thereon. Subsequently defendant's motion for judgment notwithstanding the verdict or in the alternative for new trial, was overruled. Therefrom defendant appealed to this court, assigning among other alleged errors that the trial court erroneously failed to sustain defendant's motion for judgment notwithstanding the verdict. We sustain that assignment, which disposes of all others.

In that connection, defendant relied upon the general rule stated in Crane v. Whitcomb, 160 Neb. 527, 70 N. W. 2d 496, and cases cited therein, that: "The relation

of master and servant does not render the master liable for the torts of the servant, unless connected with his duties as such servant or within the scope of his employment."

Concededly, the acts and conduct of defendant's employees, hereinafter recited, were not connected with their duties as servants of defendant or in the furtherance of defendant's business, or within the scope of their employment. Also, as stated in 57 C. J. S., Master and Servant, § 574 (c), p. 327, citing authorities: "If the servant does an act merely to frighten a third person * * * or to perpetrate a joke on a third person, and the act is entirely disconnected from the purpose of the employment, the master generally is not liable therefor."

However, such rules do not solve the problem presented if plaintiff, by a preponderance of competent evidence, has established his rights to recover under a related exception hereinafter set forth. In that connection, as stated in Restatement, Torts, § 317, p. 860: "A master is under a duty to exercise reasonable care so to control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control." Such statement was construed and applied in Ford v. Grand Union Co., 268 N. Y. 243, 197 N. E. 266, and Dincher v. Great Atlantic & Pacific Tea Co., 356 Pa. 151, 51 A. 2d 710, citing numerous authorities. The latter case also cites numerous other related authorities in a note appended thereto.

We have examined the record in the light of the aforecited authorities, together with the rule that: "A mo-

tion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence." Crane v. Whitcomb, *supra*.

It is undisputed that on November 29, 1954, between 4 and 5 p. m., plaintiff, a farmer customer of defendant, drove his Chevrolet truck up to the pumps at defendant's motor vehicle gasoline and repair service station to have it serviced. He ordered gasoline for his truck, went into the men's rest room, and shut the door. While plaintiff was therein two employees of defendant then on duty decided to have some fun and play a joke or prank upon plaintiff. Thus, they went over into defendant's wash, grease, and repair room where they took a firecracker, about 2 inches long and thick as a pencil, out of a drawer in an old school desk standing about midway along the south wall. In that connection, firecrackers were not sold or handled by defendant as any part of its business. One of defendant's employees lit the firecracker while the other held it and then either placed it in or dropped it in front of the rest room grated ventilator sitting upright on the floor. There the firecracker exploded, as a result of which plaintiff claimed to have received personal injuries and damages.

The record discloses that the drawers in the desk from which the firecracker was taken contained complete sets of tools for special types of work and two or three firecrackers. There is no evidence that such desk was ever used by the manager. It is not shown when such firecrackers were placed therein, but it is clear that W. E. Jones, defendant's manager since January 1, 1953, did his work in the office and never knew that any fire-

crackers were in the desk or that any had been exploded by defendant's employees at or about the premises. He was not at the station at the time of the explosion on November 29, 1954, and knew nothing about it until 5 or 6 days afterward. At that time he inquired of his employees about it, and upon learning the facts, disposed of the remaining firecrackers and made it plain to defendant's employees that there should be no more such actions.

A man who had been employed by defendant during 1949 and 1950 as a station attendant, and during 1952, 1953, and until July 5, 1954, as a propane truck driver when he was discharged by defendant's manager, testified as a witness for plaintiff. He testified substantially as follows: That while he was so employed, Ervin Bennett, Keith Golden, Burgess Fultz, Don Sickles, and W. E. Jones had respectively been managers for defendant. He testified that during such years of employment he had shot off some firecrackers himself and saw certain employees of defendant shoot off fair-sized firecrackers at least four times in defendant's workroom or outside defendant's station. He could not remember either the year or the time of year when this was done. He did not know who brought the firecrackers there or when that was done, but knew that they were in that desk or elsewhere in the workroom and some remained in the desk when he left. He once brought some small firecrackers upon the premises. He testified that as far as he knew no manager was ever there when firecrackers were taken out of the desk or when they were exploded, but they might have been. He testified that former managers Fultz and Bennett had directed defendant's employees not to bring to or explode any firecrackers on or about the station, and they obeyed; but he shot one off in the workroom sometime during 1954.

We find no competent evidence adduced by such witness from which it could be reasonably concluded that

any manager of defendant ever knew or should have known that firecrackers were upon defendant's premises or that any had been previously exploded on or about defendant's premises by its employees. Plaintiff's contention otherwise is based entirely upon hearsay, speculation, and conjecture.

Another witness for plaintiff testified that once when he was in the rest room at defendant's station he heard an explosion which sounded like a shotgun. He testified that two named employees of defendant were around the station at that time although he did not see the firecracker or the explosion itself, but heard afterward that it was caused by a firecracker. He did not know who caused the explosion, and was not certain when it occurred, but thought it was in November 1953. He was certain that it did not happen in 1952 or 1954. The fact is, however, that one such employee named by him testified while a witness for plaintiff that he was not there at the time of such claimed explosion and knew nothing about it. Concededly, he never was employed by defendant until after August 1, 1954.

When such employee was called as a witness for defendant he testified that he lit the firecracker on November 29, 1954, but had never seen other firecrackers exploded in or about the station, and did not know who put firecrackers in the desk. After the explosion of November 29, 1954, occurred and manager Jones learned about it 5 or 6 days later, he reprimanded the witness and made it pretty plain to defendant's employees that it must never happen again.

Another witness for defendant testified that he had been employed at defendant's station full time from November 1945 to June 10, 1955, and heard but did not see the explosion on November 29, 1954. He never found any firecrackers around the station, but knew that there were some in the desk. He never heard or saw any explosion of firecrackers there except once when two of defendant's employees exploded one while he was

in the rest room some 4 or 5 years ago. He knew that several years before a buzz bomb had been placed in another employee's car out in defendant's car parking lot.

Another witness for defendant had been employed at the station for more than 3 years. He kept some firecrackers in the desk in the workroom. He admitted that another employee got the firecracker out of the desk and he held it while it was lit by the other employee, after which he dropped it in front of the rest room ventilator on November 29, 1954. Defendant's employees were friendly with plaintiff and had joked with him upon other occasions when he had been there. There is no evidence that the two who caused the explosion had any intention of harming him. The witness had exploded a firecracker only once 2 or 3 weeks before November 29, 1954, at the same place when another man was in the rest room and while the manager was away, and they all had a good laugh about it. He had heard that one firecracker had been so exploded sometime before he came there to work 3 years ago. The explosion on November 29, 1954, was the only one manager Jones ever knew about, and upon subsequently learning of it he made it plain that it should never occur again.

In the light of such evidence, it is conclusive that defendant's employees had no intention to harm plaintiff, and the explosion occurred upon the premises in possession of defendant but without using any chattel of defendant. It could be reasonably concluded that defendant's two employees so conducted themselves outside the scope of their employment by exploding a firecracker in or about a gasoline service station as to create an unreasonable risk of bodily harm to plaintiff. However, under the evidence adduced plaintiff was not injured by any facility or property of defendant. It could not be reasonably concluded with regard to the conduct involved that defendant's manager Jones timely

knew or had any reason to know, or that any previous manager of defendant timely knew or had any reason to know, that they had the ability to control defendant's employees, or that they knew or should have known of the necessity and opportunity for exercising such control.

In Ford v. Grand Union Co., *supra*, speaking of the duty of a master to control his servants on his business premises, it is said: "The duty, if any, is certainly not absolute. The owner of property not inherently dangerous, who does not knowingly permit others to put the property to a dangerous use, is not subject to any absolute duty to prevent unauthorized persons from putting it to a dangerous use. Here there must be at least notice that a dangerous use is threatened, and perhaps acquiescence in such use. Again, where there is no notice that an employee is in the habit of acting in a manner dangerous to others, there is no duty to control the actions of the employee outside the scope of his employment. Such limitations, at least, are dictated by fundamental principles of tort liability. Without them there would be no room for the doctrine that a person is responsible only for the result of his own fault or the fault of his servants, acting within the scope of their employment.

"In some cases, nevertheless, the possessor of property used for business has been held liable for failure to control his servants, though acting outside the scope of their employment, or other persons permitted to come upon or use such property. It is to be noted, however, that even in these cases, the courts held that the duty was not absolute, but relative. It arises only where, from the nature of the authorized use of property or from a course of conduct of visitors or of employees employed upon or in connection with the property, the possessor has notice that the use of his property, by persons acting without his authority but whom he could control, may cause danger to members of the general public. When such duty exists, it is limited to the exercise of skill and

care commensurate to the danger which may reasonably be anticipated. * * * Where danger cannot reasonably be anticipated there is no duty to guard against it; after knowledge or notice of danger is present there must be reasonable opportunity to guard against the danger. Here no want of care by the defendant is shown, for at the moment when duty arose, opportunity to use care disappeared." See, also, Dincher v. Great Atlantic & Pacific Tea Co., *supra*. Such statement and authorities heretofore cited are applicable and controlling here.

We conclude that the evidence was insufficient to support a verdict for plaintiff and judgment thereon. Therefore, the judgment should be and hereby is reversed and the cause is remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict and dismiss plaintiff's action. All costs are taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

LEROY HOLLIDAY, APPELLANT, V. EDWIN L. PATCHEN, APPELLEE.
81 N. W. 2d 593

Filed March 8, 1957. No. 34096.

1. **Trial: Appeal and Error.** When a trial court sustains a motion for judgment notwithstanding the verdict, the party against whom it is sustained is entitled on appeal 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. **Automobiles: Trial.** If the evidence is undisputed, or such that but one conclusion could reasonably be reached, whether or not a person riding in a motor vehicle is a guest is a matter of law for the court.
3. **Automobiles: Negligence.** Gross negligence within the meaning of the motor vehicle guest statute is great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty.
4. ———: ———. For a guest to recover damages from a host

for injuries received while riding in an automobile operated by the host, he must prove by a preponderance of the evidence the gross negligence relied upon, and that it was the proximate cause of the accident.

5. **Negligence.** When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of whether or not they support a finding of gross negligence is one of law.
6. **Automobiles: Negligence.** The operation of an automobile at a rate of speed prohibited by law is not in itself gross negligence.
7. ———: ———. Momentary inattention in the operation of a motor vehicle does not ordinarily amount to gross negligence. This is true even where such inattention is voluntary and in no manner induced by a distracting influence.
8. ———: ———. A warning of imminent danger to a host by a guest riding in an automobile operated by such host must be made in time to afford the host a reasonable opportunity to avoid the accident, if such warning is to operate to the benefit of the guest.
9. **Trial.** Where the record shows that a motion for a directed verdict should have been sustained at the close of the evidence, it is proper for the trial court to sustain a motion for judgment notwithstanding the verdict in favor of the party entitled to the directed verdict.

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

Sam S. Diedrichs, for appellant.

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

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

CARTER, J.

This is an action by the plaintiff, LeRoy Holliday, against the defendant, Edwin L. Patchen, to recover for personal injuries sustained by the plaintiff while he was a guest in the defendant's automobile. The jury returned a verdict for the plaintiff for $11,654.64. The trial court thereafter sustained defendant's motion for a judgment notwithstanding the verdict. The plaintiff appeals.

The accident occurred on January 7, 1954, on a county road between Dickens and North Platte in Lincoln County, after dark at about 7 p.m. The road was graveled and dry. The accident happened near a bridge, the defendant's automobile going off the road and turning over after crossing the bridge. The bridge was 24 feet wide and 8 feet in length. The center of the bridge was from 12 to 18 inches higher than the road on either end of it. The evidence shows that the road turned to the left at the east end of the bridge, but as one approached it from the west the road appeared to continue on straight east. The road turned left at the east end of the bridge around a ditch or slough, and returned to the section line a short distance beyond the east end of the bridge. The curve could not be observed until one was close to the bridge, which resulted in the illusion that the road continued on due east. Defendant was not familiar with the road upon which he was driving and did not know about the curve at the east end of the bridge.

The defendant lived on a farm a few miles south of North Platte. The plaintiff, during the forenoon of January 7, 1954, was assisting defendant in pouring a cement floor in the basement of his farmhouse. The plaintiff came to work with one Bud McKillip in the latter's pickup truck, the plaintiff doing the driving. McKillip was incapacitated and was not able to operate a motor vehicle. An understanding was reached whereby plaintiff and defendant would take McKillip and his pickup truck to McKillip's home in Hayes Center during the afternoon and return in the defendant's automobile. They were returning from this trip at the time the accident occurred. The defendant was driving and plaintiff was occupying the right front seat. Two small children of the defendant were riding in the rear seat. There is a dispute in the evidence as to when it got dark. Both parties testified, however, that it was dark at the time of the accident and that the headlights were burning at

that time. Plaintiff testified that the dimmed headlights were being used because a defective switch prevented the use of the bright lights. Plaintiff stated that the range of the lights was about 30 feet; the defendant said 40 to 50 yards. There is no evidence of any complaint being made by the plaintiff because of the lights.

The road west of the bridge where the accident occurred was straight and level. Plaintiff testified that they approached the bridge at a speed of 60 or 70 miles per hour. The defendant said it was 45 to 50 miles per hour. The two small children in the rear seat had become tired and fussy. As they approached the bridge, defendant turned to quiet them, keeping one hand on the steering wheel. As he turned back he saw the curve for the first time. He failed to make the turn, the car skidding approximately 90 feet and rolling over into the ditch on the south side of the road.

In determining the correctness of the trial court's order sustaining the motion of defendant for a judgment notwithstanding the verdict, the plaintiff 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. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. We shall consider the evidence in accordance with this rule.

The evidence shows that McKillip was a friend of the plaintiff of long standing. The trip to Hayes Center, during which the accident occurred, was an accommodation to and for the benefit of McKillip. The defendant received no benefit other than to accommodate the plaintiff's friend McKillip. There is no evidence disputing this fact. The plaintiff was therefore a guest of the defendant at the time of the accident and the trial court properly so held as a matter of law. Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593; Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

The evidence most favorably considered in plaintiff's favor reveals the following situation: Plaintiff was rid-

ing with the defendant as his guest. Defendant was driving east on a graveled county road which was straight and level at a speed of 60 to 70 miles per hour. It was after dark and defendant was using his dimmed lights. No complaints as to defendant's driving were made during this portion of the trip, except that plaintiff said the road was crooked and that defendant would have to drive slower. As the defendant's automobile approached the bridge, the road appeared to continue on in a due easterly direction. Shortly before crossing the bridge, defendant turned in the seat to quiet the two small children, taking one hand from the steering wheel. As he turned back he discovered the curve just beyond the bridge which he had not previously seen because of the height of the bridge as compared with the road at each end of it. The plaintiff shouted a warning just as they entered upon the bridge. Defendant's car skidded into the south ditch and rolled over when he failed to negotiate the turn. Does such a state of facts raise a question of gross negligence? We think not.

For a guest to recover damages from a host for injuries received while riding in an automobile operated by the host he must prove by a preponderance of the evidence the gross negligence relied upon and that it was the proximate cause of the accident. When the evidence is resolved most favorably toward the existence of gross negligence and the facts thus determined, the question of its existence is one of law for the court. Calvert v. Miller, 163 Neb. 501, 80 N. W. 2d 123.

Gross negligence within the meaning of the motor vehicle guest statute has been defined by this court as great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716. The violation of traffic regulations concerning the speed and manner of operating a motor vehicle on the highway is not negligence of any kind or degree as a matter of law, but it is a fact to be

considered with other evidence in the case in deciding an issue of negligence. Born v. Estate of Matzner, *supra*. It appears therefore that the primary question to be determined in the present case is whether or not the defendant's momentary inattention to his driving when he turned to quiet his children, together with the other evidence and circumstances shown by the record, is sufficient to raise a question of gross negligence for the jury's consideration. We think the result is controlled by the following decisions of this court: Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571, where the host driver's attention was momentarily diverted when he reached for his 10-month-old grandchild who had fallen from the front seat to the floor of the car; Johnson v. Jastram, 155 Neb. 376, 52 N. W. 2d 245, where the host driver momentarily removed his right hand from the steering wheel and his eyes from the road to strike at a wasp upon his person; Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, where the host's operator momentarily had one hand off of the steering wheel while eating lunch; Black v. Neill, 134 Neb. 764, 279 N. W. 471, where the host driver turned his head to the left and pointed out a tree which had blown down upon a porch; and Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214, where the driver of the automobile momentarily took one hand from the wheel and her eyes from the road while reaching for a sandwich from an occupant of the rear seat. Gross negligence was held not to exist in any of the foregoing decisions. Under the holding of these cases we conclude that the defendant in the present case was not guilty of gross negligence in momentarily taking one hand from the steering wheel in turning to quiet his two minor children who were riding in the rear seat. The rule is summarized in Johnson v. Jastram, *supra*, as follows: "This court has repeatedly held that momentary inattention such as is described in the evidence in this case does not amount to gross negligence. This is true even where the inattention is purely

voluntary and is in nowise induced or contributed to by a distracting influence."

The plaintiff contends that warnings given which were not heeded by the defendant were sufficient to warrant the submission of gross negligence to the jury. There is evidence of a warning as to a sharp curve at the base of a high hill on the road between Hayes Center and Dickens. The record is clear that defendant heeded the warning and slowed down materially, and made the turn in complete safety. This is not evidence of gross negligence. If anything, it is evidence that defendant used due care by heeding the warning of the guest.

Plaintiff testified that he warned the defendant of the curve as they aproached the bridge and he was able to observe the curve. The evidence shows that it was then too late to avoid the accident. The rule is: A warning given in ample time to permit the host a reasonable opportunity to avoid an accident may be sufficient to raise an issue of fact as to gross negligence. But where a warning is given at such a time as not to afford the host a reasonable opportunity to avoid the accident, it cannot have any such effect. Kiser v. Christensen, 163 Neb. 155, 78 N. W. 2d 823.

We conclude that there was no evidence in the present case that the defendant was heedless of the safety of those riding with him, or that he was guilty of negligence of a very high degree, or that his conduct indicated the absence of slight care. The trial court should have sustained defendant's motion to direct a verdict for him at the close of the evidence. Consequently the trial court properly sustained defendant's motion for a judgment notwithstanding the verdict.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, A CORPORATION, APPELLANT.
81 N. W. 2d 584

Filed March 8, 1957. No. 34097.

Mandamus. It is only where there is no room for controversy as to the right, and where from the facts set forth in the affidavit on which an application for a peremptory writ of mandamus is based the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice.

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

Neely, Otis & Neely, for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

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

YEAGER, J.

This is an action wherein the State of Nebraska on relation of Clarence S. Beck, Attorney General, plaintiff and appellee, filed a petition in the district court for Thurston County, Nebraska, wherein a peremptory writ of mandamus was prayed against the Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation, defendant and appellant. The pertinent substance of the petition and of the prayer will be set out later herein.

The peremptory writ was allowed. From the allowance of the writ the defendant has appealed to this court. It contends that the writ was issued without legal grounds or authority. Assignments of error which it contends are grounds for reversal are four in number. The statement of them or such of them as require consideration will be made hereinafter at the time they are considered.

By the petition it was alleged that the Nebraska State Railway Commission, which will hereinafter be referred to as the commission, a constitutional body with power to regulate rates and service and with general control of common carriers, on April 8, 1908, adopted General Order No. 11 which provides that no carrier operating local freight or passenger trains between stations in Nebraska shall discontinue any such train service or change time schedules until application has been made to the commission and its permission received to make such change; that on January 27, 1908, the commission legally adopted General Order No. 6 which provides that no carrier operating local freight or passenger trains between stations in Nebraska shall remove or abandon any switches or spurs in use in this state without the consent of the commission; that on April 26, 1950, an order was issued by the commission permitting the defendant, a common carrier operating a line of railway between Sioux City, Iowa, and Omaha, Nebraska, and intermediate and adjacent points in Nebraska, to operate triweekly mixed train service between Omaha and Sioux City; that the schedule provides for alternate daily service as follows: Departure from Sioux City on one day at 8:30 a.m. and arrival in Omaha at 6:30 p.m., and from Omaha the next day at 7:30 a.m. with arrival at Sioux City at 5 p.m.; that this service was discontinued on or about July 18, 1950, and since that time there has been no resumption of that service; that permission has never been granted for the discontinuance of the service by the commission; that since that time triweekly service has been maintained only from Omaha to and from Pender, Nebraska; that the character of service southward from Sioux City, if any, is not known; that the reason for the discontinuance of service north from Pender was damage by flood to a railroad bridge located about 1½ miles north of Pender which the defendant was required to keep in repair and to repair and make usable in case of damage thereto;

that after July 18, 1950, demand was made for restoration of the service with which demand the defendant has never complied; that in May 1956 the defendant substituted biweekly for triweekly service between Omaha and Pender without permission from the commission; that the defendant had refused and neglected to make necessary repairs to the bridge referred to and to restore the service, contrary to the exactions of General Order No. 11; and that the defendant has violated General Order No. 6 in regard to abandonment of switches. No particulars as to abandonment of switches are set forth in the petition.

The prayer of the petition is for a peremptory writ of mandamus requiring the defendant to operate said line of railroad in accordance with the order of the commission entered on April 26, 1950, until such time as it shall obtain permission of the commission to discontinue or change the service; to further require it to do and perform any and all acts necessary to furnish such service; and for such other and further relief as may be just and equitable.

On June 8, 1956, the cause came on for hearing on the petition and affidavit of the Attorney General without notice of any kind to the defendant and the following order was entered by the court:

"IT IS THEREFORE CONSIDERED, ORDERED AND DECREED BY THE COURT that a peremptory writ of mandamus forthwith issue, requiring the defendant to operate trains #15 and #16 between Omaha, Nebraska, and South Sioux City, Nebraska, on a through and continuous line of railroad as set out in the order of the Nebraska State Railway Commission entered April 26, 1950, in application number 17924, and to reinstate the same service that existed under its line of railroad between Omaha and South Sioux City prior to July 18, 1950. It is further ordered that the defendant shall within a reasonable time make any needed repairs necessary to carry out the provisions of this order.

"It is further ordered that such service shall be conducted by the defendant until such time as it complies with General Order No. 11 of the Nebraska Railway Commission and receives permission to discontinue any of such services."

The first error assigned as ground for reversal is that: "The trial court erred in issuing a peremptory writ of mandamus without notice to the defendant or an opportunity to be heard."

Two types of writs of mandamus are recognized and defined by the statutes of this state. They are peremptory and alternative. § 25-2158, R. R. S. 1943. The one of primary concern in this case is the peremptory writ. As to the peremptory writ, section 25-2159, R. R. S. 1943, contains the following: "When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued; * * *."

As to the alternative writ, section 25-2158, R. R. S. 1943, contains the following: "The alternative writ must state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately upon the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court whence the writ issued, at a specified time and place, why he has not done so; * * *."

This court in varying terms but with a single meaning and purpose has clearly set forth the necessary conditions antecedent to the right and power of courts, within the meaning of the statute, to issue writs of mandamus without notice and without affording defendants an opportunity to resist the issuance of a peremptory writ of mandamus. From this there has never been a departure.

In a syllabus point in Horton v. State ex rel. Hayden,

60 Neb. 701, 84 N. W. 87, it was said: "No person can be deprived of his property or other valuable right by the exercise of judicial or other governmental power, without notice to such person and reasonable opportunity to be heard in his defense."

In State ex rel. Niles v. Weston, 67 Neb. 175, 93 N. W. 182, it was said: "The rule is that before the court is warranted in granting a mandamus it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce, and that nothing essential to that right will be taken by intendment."

In State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N. W. 1016, it was said: "It is only where there is no room for controversy as to the right, and where from the nature of the facts set forth in the affidavit the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice."

In that opinion it was also said relative to a situation where a peremptory writ is sought but the right to its issuance is not clear: "Under these provisions an alternative writ, and not a peremptory writ, should be issued in the first case, or, if a peremptory writ is applied for, a notice to show cause why it should not issue should be given and a hearing had before its issuance."

In State ex rel. Platte Valley Irr. Dist. v. Cochran, 139 Neb. 324, 297 N. W. 587, it was said: "When it does not clearly appear that a valid excuse cannot be given, a court has no power to issue a peremptory writ of mandamus without notice, and a writ so issued is void."

In Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N. W. 2d 803, which was a case wherein a peremptory writ of mandamus was issued without notice, this court, in reviewing with approval the cases which have been cited herein and others of like import, said: "Before the court is warranted in granting a peremptory

writ of mandamus, it must be made to appear that the relator had a clear legal right to the performance by the respondent of the duty which it is sought to enforce, and that nothing essential to that right will be taken by intendment."

We think an all inclusive summary of these pronouncements is the following: It is only where there is no room for controversy as to the right, and where from the facts set forth in the affidavit on which an application for a peremptory writ of mandamus is based the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice.

The defendant by the first assignment of error insists that the issuance of the writ in this case was contrary to this principle and that the writ is therefore void. It insists that the petition and affidavit do not preclude the existence of a valid excuse or excuses for the failure of the defendant to perform that which the plaintiff seeks to compel. In fact it points in its brief to questions of law and of fact which it contends require consideration and determination before the court could decide upon the propriety of the issuance of a writ of mandamus.

The questions suggested are: Were General Orders Nos. 6 and 11 violated as alleged? Did the destruction of the defendant's track and bridge by floodwaters in 1950 constitute a violation of General Order No. 11? Can a railway company change a freight schedule without violating General Order No. 11? Is the plaintiff entitled to a writ of mandamus to compel the restoration of through service on the Pender line after a lapse of 6 years? Did the railway company "abandon" switches along the Pender line in violation of General Order No. 6?

Clearly two questions of fact were suggested concerning which it could not be said that there was no room for controversy or which could be determined on the basis of judicial knowledge. They were that of

whether or not General Orders Nos. 6 and 11 had been violated and that of whether or not there had been an abandonment of switches.

Obviously a possible legal controversy existed as to obligation of the defendant to restore the bridge in the light of the fact that its condition resulted from natural causes; as to whether or not the statute of limitations had any application in view of the facts alleged as to the period of the existence of the condition on which the application was based; and as to whether or not the court had any power of adjudication as to schedules. Also it is obvious that there was a possible legal and factual controversy as to whether or not abandonment had been authorized by the Interstate Commerce Commission and the effect thereof if abandonment had been so granted. This last is true in the light of the rule, concerning which there appears to be no dispute, that abandonments authorized by the Interstate Commerce Commission are binding on the states.

As pointed out in the cases cited, the question to be considered in determining whether or not a peremptory writ of mandamus should issue is not that of whether there are or were facts which would operate to defeat the relief sought by the plaintiff, but rather that of whether or not speculatively there was room or basis for controversy.

Speculation is permissible in this connection, as has been made clear by the opinion in State ex rel. Platte Valley Irr. Dist. v. Cochran, *supra*. That case was one where the propriety of the issuance of a peremptory writ of mandamus, without notice, to require release of water for irrigation was under consideration. After stating the legal principle this court, by way of illustration of its purport and effect, said: "We think the allegations of the affidavit and petition admit of controversy. In the first place, relator's appropriation can be taken only from the natural flow of the stream during the irrigation season. It is altogether possible that the

waters behind the public power company's diversion dam were accumulated during the nonirrigation season, in which relator would have no right by virtue of his appropriation. It is likewise possible that a usable quantity of water might not reach relator's headgate, even if the water were released in accordance with the writ. Other persons, not parties to the suit, might well have interests superior to those of relator, which respondents are obligated to protect. In such cases, where it is impossible for the district court to have knowledge that no valid excuse could be given for not performing the alleged duty, no power exists to issue a peremptory writ without the respondent having been notified of the pending proceedings."

The plaintiff contends substantially that the defendant may not be heard to complain that the writ was issued without notice since it had the right to move in the district court to have it set aside and to have a hearing there on its motion. The reliance in this respect rests upon State ex rel. Spillman v. Chicago & N. W. Ry. Co., 112 Neb. 176, 198 N. W. 670. This case does not support the contention.

In that case a peremptory writ of mandamus was issued without notice in an original action in this court. By recital in the opinion in that case it appears that the propriety of the issuance of the writ was attacked by motion and that evidence was submitted, the order modified, and the motion to vacate the peremptory order was overruled. There is nothing in the opinion the effect of which is to say that the defendant in a case wherein a peremptory writ of mandamus has been issued without notice waives the right of appeal from the issuance of the writ by failure to seek to have it set aside by the court which issued it.

The conclusion reached in the light of these observations is that, as contended by defendant, the court erred in issuing the peremptory writ of mandamus without

notice. This conclusion renders unnecessary a consideration of the other assignments of error.

It follows that the judgment of the district court should be and it is reversed.

REVERSED.

SALVATORE CARUSO, APPELLANT, V. WALTER MOY ET AL., APPELLEES.

81 N. W. 2d 826

Filed March 15, 1957. No. 34055.

1. **Cancellation of Instruments: Fraud.** Equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate or the equitable relief by way of cancellation is more complete.
2. **Contracts.** The rescission of a contract must be in toto and the parties must be placed in status quo as far as the circumstances will permit.
3. ———. It is a general and well-established rule that there can be no rescission of a contract unless the parties can be placed in status quo, or substantially so.
4. **Contracts: Fraud.** Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract.
5. **Equity.** The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case.

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

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

Hotz & Hotz, for appellees.

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

WENKE, J.

This is an appeal from the district court for Douglas County. Salvatore Caruso brought an action in the district court against Walter Moy and Anna Moy for the purpose of having declared void a contract for the purchase of a restaurant by him from the Moys on the ground that the Moys induced him to enter into the contract by fraud. The trial court denied plaintiff the relief he prayed for, that is, that the defendants be required to return to him all money he had paid defendants on the purchase price, and dismissed his petition. His motion for new trial having been overruled, plaintiff took this appeal therefrom.

This is an action in equity for the rescission of a contract for the sale of a restaurant business. The action, being equitable in character, is triable de novo. See, § 25-1925, R. R. S. 1943; Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131. We shall apply the usual principles applicable in such cases. These principles have been stated by this court so often that no useful purpose would be served by restating them.

On October 13, 1954, appellant entered into an agreement with appellee Walter Moy, whom we shall hereinafter refer to as Moy, for the purchase of a restaurant owned by Moy located at 2219 Military Avenue in the city of Omaha known as the "Ming Toy Cafe." The building in which it was located was owned by Mrs. Frank Tribulato. The restaurant was of a family type, with a dining room capacity for about 175 patrons, and served American-Chinese foods. Appellees had been successfully operating it for some 12 years.

The consideration for the purchase of the restaurant was $18,000. Appellant paid $8,000 of this amount in cash at the time of purchase, obligated himself for $8,768 thereof by giving an installment note to Moy secured

by a chattel mortgage upon the furniture and fixtures in the restaurant, and for the rest assumed and agreed to pay the balance of $1,232 owing on the air-conditioner in the restaurant. The latter was payable at the rate of $56 per month. In addition to the foregoing purchase price appellant assumed the lease obligation for the premises in which the restaurant was located, which was $300 per month. The lease appellee Moy had on the premises was for 5 years and expired on June 16, 1957. Appellant went into immediate possession. He thereafter operated the business as an American-Italian restaurant. He did so until November 1, 1955, when he was closed by the Omaha-Douglas County Health Department. However prior thereto he had started this suit, doing so on August 9, 1955.

The fraud complained of by appellant is set forth in his petition as follows:

"III In order to induce plaintiff to purchase said business and lease said premises, defendants and each of them represented to the plaintiff that the said restaurant was in good condition, and particularly represented to the plaintiff that the condition of the said restaurant was satisfactory to the Omaha-Douglas County Health Department. In this connection defendants displayed to the plaintiff a current operating permit from the said Department, and certified that the restaurant was satisfactory as recited therein.

"IV The said representations were in fact false as said defendants well knew; the said restaurant was not in good condition and defendants had, in August of 1954, by the said Health Department, been advised that the said permit would not be renewed in 1955 unless extensive repairs and replacements were made therein, and had enumerated among other, the following deficiencies to defendants: 1. The dishwashing system had an inadequate hot water supply. 2. The stove had an unsatisfactory venting system. 3. The kitchen floor was of unsatisfactory material. 4. The kitchen walls and

ceiling were improperly painted. 5. The air conditioner drained into the men's restroom rendering said room unsatisfactory. 6. The kitchen lighting and ventilation were unsatisfactory. In addition to the foregoing the plumbing and water pipes in said restaurant were old and rusty with numerous leaks and required extensive repairs and the roof leaked water onto the stove.

"V All of said defects and the prospective cancellation of the said permit were known to the defendants, and each of them, at the time they induced plaintiff to purchase said business and lease said premises. Defendants fraudulently refrained from disclosing said defects to the plaintiff but made the false representations aforesaid to the plaintiff to induce him to purchase and lease said property. Had plaintiff known of said defects or the falsity of defendants' representations he would not have purchased said restaurant and he relied upon the truthfulness and completeness of the defendants' false representations and was thereby induced to purchase the said business and lease said premises."

We said in Russo v. Williams, *supra:* "A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated. Rayburn v. Norton, 117 Or. 328, 243 P. 560."

As stated in 55 Am. Jur., Vendor and Purchaser, § 593, p. 986, and cited in Russo v. Williams, *supra,* with approval: "* * * equity may decree cancellation or rescission of a contract for fraud or misrepresentation constituting an inducement to its execution, especially when the legal remedy is inadequate, or the equitable relief by way of cancellation is more complete."

"Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence." Russo v. Williams, *supra.*

"The general rule that fraud is not presumed, but must

be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction." Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374.

"To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby." Russo v. Williams, *supra.*

"Where fraud or misrepresentation is material with reference to a transaction subsequently entered into by a person deceived thereby, it is assumed in the absence of facts showing the contrary that it was induced by the fraud or misrepresentations." Pasko v. Trela, 153 Neb. 759, 46 N. W. 2d 139.

"Fraud may consist in words, acts, or the suppression of material facts with the intent to mislead and deceive." Pasko v. Trela, *supra.*

As said in Restatement, Contracts, § 470, p. 890, and cited in Pasko v. Trela, *supra,* with approval: "(1) 'Misrepresentation' in the Restatement of this Subject means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts."

" 'One of the essential elements of fraud practiced by means of false representations is that the representation must be concerning a matter material to the contract.' Linch v. Carlson, *supra* (156 Neb. 308, 56 N. W. 2d 101)." Russo v. Williams, *supra.*

As said in Restatement, Contracts, § 470, p. 890, and

cited in Pasko v. Trela, *supra,* with approval: "(2) Where a misrepresentation would be likely to affect the conduct of a reasonable man with reference to a transaction with another person, the misrepresentation is material, except as this definition is qualified by the rules stated in § 474." The qualification has no application here.

As stated in 23 Am. Jur., Fraud and Deceit, § 144, p. 945, and cited with approval in Pasko v. Trela, *supra:* "The mere fact that one makes an independent investigation or examination, or consults with others, does not necessarily show that he relies on his own judgment or on the information so gained, rather than on the representations of the other party, nor does it give rise to a presumption of law to that effect. If, under the circumstances, he is unable to learn the truth from such examination or investigation or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief, all other ingredients of liability being present. It is well settled that where the representee makes only a partial investigation, relies in part upon the representations, and is deceived by such representations to his injury, he may maintain an action for such deceit or secure appropriate equitable relief. Furthermore, no right is affected by an investigation which confirms the representations."

However, "The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit." Bennett v. Emerald Service, Inc., 157 Neb. 176, 59 N. W. 2d 171.

We shall, for the purpose of what is hereinafter said, assume the allegations of appellant's petition are true and that, under the principles hereinbefore stated, they would constitute valid grounds for rescission. However, it should be understood we do not so hold. The question is, can appellant maintain such an action under the circumstances established by the evidence adduced?

Basically, as stated in Russo v. Williams, *supra*: " 'It

is a general and well-established rule that there can be no rescission of a contract unless the parties can be placed in statu quo or substantially so.' Perry v. Meyer, 110 Neb. 347, 193 N. W. 717." See, also, Bennett v. Emerald Service, Inc., *supra.*

We said in Russo v. Williams, *supra:*

" 'Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract.' Platner v. Ellingwood, 123 Neb. 719, 243 N. W. 896. See, also, Sipola v. Winship, *supra* (74 N. H. 240, 66 A. 962); Rayburn v. Norton, *supra;* Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469.

" 'If the purchaser has knowledge of the grounds upon which he is entitled to rescind, an unreasonable delay upon his part, especially if accompanied by such change of circumstances as makes it impracticable for him to place the vendor in statu quo, or by such acts or conduct on the part of the purchaser as constitute waiver, prevents him from exercising his right to rescind. Even where time is not of the essence of the contract, a purchaser may still lose his right to rescind by delaying action to a time, which under the circumstances, is unreasonable.' 66 C. J., Vendor and Purchaser, § 476, p. 824.

" 'The question whether laches exists in a particular case depends upon its own peculiar circumstances and is addressed to the sound discretion of the court, the question of the unreasonableness of the delay depending largely upon the nature of the property in the particular case.' 66 C. J., Vendor and Purchaser, § 477, p. 825."

And in Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469: "* * * he who rescinds

must act promptly. Immediately upon learning the facts he should announce to his adversary that he does not intend to be bound by the terms of the agreement made, and tender back what he has received under it. To maintain rescission at law, he must do this at or prior to the time of the commencement of his action. Due allegation of his acts of rescission should be made in the petition."

While we think appellant's petition was deficient, and did not state a cause of action in rescission, we shall here consider it as if it did as the case was apparently tried on that theory. Appellant adduced evidence to the effect that on August 13, 1954, the appellees were advised by an inspector of the Omaha-Douglas County Health Department that they would have to make certain changes in their restaurant, consisting of putting in a new floor in the kitchen, installing adequate new dishwashing facilities, and installing a new ventilating system in the kitchen, if their restaurant was to be permitted to continue to operate; that appellees did not comply with these requirements but advertised and sold the restaurant to appellant without advising him thereof; that on June 20, 1955, appellant was advised of these requirements by the health department but did not know the appellees had also been so advised until July 1955; and that he brought this action on August 9, 1955. Although he brought this action on August 9, 1955, the record does not establish the fact that he ever tendered the restaurant to appellees or either of them. In fact the record shows he continued to operate the restaurant after he brought the action and refused to turn it over to appellees after it was closed on November 1, 1955, by the health department, keeping possession thereof until November 15, 1955, to which date appellant had paid the rent. Appellant then took the keys to the restaurant to appellees' home and gave them to Moy saying, "I finished, I give you keys." Under this situation we do not think appellant is entitled to a re-

scission because he held and operated the restaurant for too long a period after he knew of what he now claimed was fraud. He should not only have brought the action but should have tendered the restaurant to appellees Moy. No place in his petition nor in his evidence does he say that he ever did so.

There is another reason why rescission should not be allowed. Appellant took over the restaurant as a prosperous and going enterprise dealing in American-Chinese foods. He changed the bill of fare to American-Italian, made some substantial changes in the restaurant itself, and called it "Caruso's." He and his family, completely inexperienced, tried to run it. Due to poor housekeeping and many other causes the business gradually fell off until in October 1955, the last month it was operated, it was less than half of what it had formerly been. The record establishes that the appellees could not be placed in status quo, in fact, when they obtained possession on November 15, 1955, the business had been closed for over 2 weeks and the fixtures and furnishings therein were in poor condition. To require appellees, under such circumstances, to take back the restaurant and return to appellant all payments they had received from him would permit the appellant to perpetrate a fraud on them for appellant kept possession thereof just as long as he could, long after he knew of what he now claims was fraud. He did this by getting extensions of time from the health department in which to meet its requirements, although apparently never intending to comply therewith. Finally the health department realized that fact and thereafter refused to extend the time and, as of November 1, 1955, closed the restaurant.

Appellant seems to think he should be entitled to recover because he was permitted to amend his petition at the time of the trial to the effect that, "All of said property and premises have been returned to defendant." We have already stated when and the conditions under which Moy accepted the keys to the restaurant. At

that time it was closed, the condition of the premises was bad and needed care, the time of the year required the premises to be heated in order to protect the fixtures and furnishings from being damaged by freezing, and the appellees were personally liable on the lease and conditional sales contract covering the air-conditioning. Under this situation and these conditions the appellees had a perfect right to take possession of the property in order to protect their interests, as the chattel mortgage provided they could, and go in and open up the business.

Appellant endeavored to show, on a hearing relating to a second motion for new trial, that appellees had, subsequent to trial, made the changes required by the health department. In view of what we have held we do not think that fact material. Whether or not appellant has a good cause of action at law for damages we do not here decide. However, considering the nature of the items required, and the cost of installing them, we think appellant had and has an adequate remedy at law if he has actually been defrauded and damaged thereby. It is not a factual situation such as was presented in Russo v. Williams, *supra,* where we came to the conclusion the facts entitled the appellants therein to some form of relief in that action.

In view of the foregoing we have come to the conclusion that the judgment of the trial court should be affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

IN RE REDISTRICTING OF SCHOOL DISTRICTS NOS. 11, 26, 33, 37, 28, 106, AND 137, LINCOLN COUNTY, NEBRASKA. GAYLORD CLAUSEN ET AL., APPELLANTS AND CROSS-APPELLEES, V. SCHOOL DISTRICT NO. 33, LINCOLN COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH SCHOOL DISTRICT NO. 37, LINCOLN COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

IN RE REDISTRICTING OF SCHOOL DISTRICTS NOS. 11, 26, 33, 37, 28, 106, AND 137, LINCOLN COUNTY, NEBRASKA. ORSON COVILLE, APPELLANT AND CROSS-APPELLEE, V. SCHOOL DISTRICT NO. 37, LINCOLN COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

81 N. W. 2d 822

Filed March 15, 1957. Nos. 34101, 34110.

1. **Appeal and Error: Parties.** The real party in interest in a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of districts in the case of changes affecting a city, village, or Class III school district is the school board or board of education of the district affected.
2. ———: ———. The real parties in interest in a proceeding in error to reverse the action of the county superintendent in creating a new district or changing the boundaries of districts in case of changes affecting districts other than city, village, or Class III school districts are the petitioners who signed the petitions for change of boundaries or new district creation.
3. ———: ———. In a proceeding in error the summons must be served upon the real party or parties in interest or the attorney of record of the defendant or defendants in error, unless the issuance or service is waived in writing by the attorney or the defendants.
4. ———: ———. In a proceeding in error all necessary parties must be made parties to the proceeding.
5. ———: ———. All parties in a joint judgment are necessary parties to a proceeding in error brought to reverse such judgment.
6. ———: ———. The failure to make all parties who may be affected by the modification or reversal of a judgment in a proceeding to review the cause by petition in error is ground for dismissal of the petition.
7. ———: ———. One necessary party who has been properly served with summons in a proceeding in error may properly

move for dismissal of the petition for failure to make others parties to the proceeding.

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

Halligan & Mullikin and *Sam S. Diedrichs,* for appellants.

Baskins & Baskins, for appellee.

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

YEAGER, J.

A knowledge of the background for the proceedings leading up to the appeal which is before this court is essential to an understanding and determination of the issues involved.

On February 17, 1956, pursuant to the provisions of section 79-402, R. S. Supp., 1955, a petition containing the names of more than 55 percent of the legal voters of school district No. 33 in Lincoln County, Nebraska, was filed with the county superintendent requesting the creation of a new district or a change of boundaries so that this district and school district No. 37 should be bounded as one district. The following named districts, on the dates set opposite the names, filed like but separate petitions: School district No. 137, February 17, 1956; school district No. 11, February 20, 1956; school district No. 26, February 21, 1956; school district No. 106, February 21, 1956; and school district No. 38, February 24, 1956.

On February 25, 1956, six petitions by the school board of school district No. 37, pursuant also to the provisions of section 79-402, R. S. Supp., 1955, were filed with the county superintendent requesting the creation of a new district or a change of boundaries so that school districts Nos. 33, 137, 11, 26, 106, and 38 would be included in school district No. 37. The petitions applied separately and independently to the other six districts.

Following the filing of the six petitions, on February 28, 1956, the county superintendent directed the issuance of notice and set March 14, 1956, at 10 a.m., as the date of hearing.

On March 14, 1956, Orson Coville, also named as Orson Covell, filed objections to the hearing and to consolidation of school districts Nos. 11 and 33 with school district No. 37. In his objections he recites that he is a legal voter in school district No. 11 and that his objections are made on his own behalf and on behalf of other voters similarly situated. His prayer relates to school district No. 11.

On the same date Gaylord Clausen and Frank McConnell filed like objections to the consolidation. These were, according to recital, made by them as qualified voters and electors of school district No. 33.

Also on the same date Lynn McConnell and Melvin Bayne as chairman and secretary of the school board of school district No. 33 filed objections to the consolidation.

On April 16, 1956, the county superintendent entered an order sustaining the various petitions by which the boundaries of school district No. 37 were extended to include the other six districts.

Thereafter on May 15, 1956, the objectors above named in the capacities described filed jointly a petition in the district court for Lincoln County, Nebraska, the object and purpose of which was to have vacated and set aside the order of redistricting and consolidation rendered by the county superintendent. At the same time a praecipe for summons in error as follows was filed: "You are hereby requested to issue Summons in Error in the above entitled cause returnable as provided by law."

A summons was issued to the sheriff commanding service upon the seven school districts. Summons was not issued for any other parties. The summons was served upon Charles W. Baskins, attorney for school district No. 37. As to each of the others, it was served on

the chairman of the board. Service was made on May 15, 1956.

On May 21, 1956, school district No. 37 filed a motion to dismiss the petition in error for the reason that no summons was issued for or served upon the real parties in interest in school districts Nos. 11, 26, 33, 38, 106, and 137, who were the persons who had in these districts filed the petitions for consolidation.

The court found that the real parties in interest insofar as the proceeding in error was concerned were the petitioners in school district No. 11 and in school district No. 33. Accordingly the motion was sustained and the petition in error was dismissed.

From this order as it relates to school district No. 33, Gaylord Clausen, Frank McConnell, Melvin Bayne, and Lynn McConnell have taken an appeal to this court. This appeal is docketed in this court under the number 34101. These named parties are the appellants in this case.

From the same order as it relates to school district No. 11, Orson Coville has taken an appeal. This appeal is docketed under the number 34110. Orson Coville is appellant in this case. The issues in the two appeals are in no wise different. In this light one opinion will be written in disposition of the two appeals. The seven school districts were the defendants in the petition in error in the district court in consequence of which they are appellees here in the two cases. An attempt was made to make school district No. 33 an appellant herein but this was ineffective for reasons which will become apparent later herein. Although all of the districts are nominally appellees the dismissal was based on the conclusion that the petitioners of school districts Nos. 11 and 33 were the real parties in interest. In view of this these two districts and school district No. 37 will be treated hereinafter for the purpose of consideration of the case as appellees.

At this point it should be said that as to school dis-

trict No. 37 the school board was the proper petitioner, it being within the designation of a city or village school district, and accordingly was a proper defendant in error in the district court. Also it was properly served with summons in the proceeding in the district court. The summons was served upon the attorney for the district. As to the petition for creation of new districts from other districts or change in boundaries of such districts, the following appears in section 79-402, R. S. Supp., 1955: "Provided, changes affecting cities, villages, or Class III school districts may be made upon the petition of the school board or board of education of the district or districts affected."

By inference, although not directly, section 25-1904, R. R. S. 1943, indicates that service of summons in an error proceeding may be served on the attorney of record. It provides: "The summons * * * shall, * * * be issued * * * to the sheriff of any county in which the defendant in error or his attorney of record may be; * * *. The defendant in error, or his attorney, may waive in writing the issuing or service of the summons." In any event neither party appears to contend that school district No. 37 was not properly before the district court as a defendant in the error proceeding.

The motion to dismiss was one proper to be made by school district No. 37, a defendant properly served with summons. Hendrickson v. Sullivan, 28 Neb. 790, 44 N. W. 1135, was a case wherein a proceeding in error came to this court to reverse a finding in favor of two joint defendants. Service of summons was had against but one. Motion to dismiss was made by the one served. The motion was sustained.

Under the decisions of this court it becomes clear that in a proceeding in error in a court to review the decisions of an inferior tribunal all necessary parties must be made parties and served with summons, unless as has been pointed out this has been waived. In Hendrickson v. Sullivan, *supra*, it was said: "All the parties in a joint

judgment are necessary parties to proceedings in error brought to reverse such judgment, and must be made so, as either plaintiffs or defendants in error."

In Barkley v. Schaaf, 110 Neb. 223, 193 N. W. 267, it was said: "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." This statement was quoted with approval in Castek v. Tully, 127 Neb. 657, 256 N. W. 506, and Donisthorpe v. Vavra, 134 Neb. 157, 278 N. W. 151.

These pronouncements were made in proceedings in error from the district court to the Supreme Court but the rule is not different in a proceeding in error from an inferior tribunal to the district court. In the case of In re Estate of Berg, 139 Neb. 99, 296 N. W. 460, it was said: "All parties interested in a matter heard before the county court in the exercise of probate jurisdiction, who may be affected by the modification or reversal of a final order of said court, must be made parties in a proceeding to review said matter by error proceedings in the district court." See, also, Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; § 25-1901, R. R. S. 1943.

In this light it becomes necessary to ascertain who were the necessary parties to the error proceeding in the district court. Reference for this purpose must first be had to the wording of section 79-402, R. S. Supp., 1955, to the extent that it applies to school districts Nos. 11 and 33, as follows: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected."

It is to be observed that in this no power to effect the purpose contemplated is conferred upon or vested in the school district as an entity or any of its officers. The power contemplated to effect these purposes is conferred solely and alone upon the qualified voters by petition. Attention has not been called to any other provision or

provisions, and we have found none, which give the district or any of its officers any control over the power and authority thus conferred upon the voters.

Chapter 79, subdivision I, section 4, Comp. St. 1887, contains the following: "The county superintendent shall not refuse to change the boundary line of any district, or to organize a new district when he shall be asked to do so by a petition from each school district affected, signed by two-thirds of all the legal voters in such district." The foregoing quotation from section 79-402, R. S. Supp., 1955, has by amendatory action of the Legislature evolved from this provision of the statutes of 1887.

As to this provision of the statutes of 1887 in relation to parties to a proceeding to change boundaries or organize a new district, this court in Cowles v. School District, 23 Neb. 655, 37 N. W. 493, said: "The laws of this state, as well by policy as by letter, have left the control of the boundaries of school districts, primarily, with the legal voters of each district respectively. * * * After the first or original organization of a new county into one or more school districts, no new district can be formed, old one altered, or the boundaries of any altered, without the movement therefor originating with the legal voters thereof, and their will to that effect being expressed by petition of the strength prescribed by statute. These are matters with which the school district, as a corporation, or quasi corporation, has been vested with neither power nor duty, nor has any district officer, board, or school meeting; but they rest with the voters in their capacity of petitioners, and with them alone. These voters have not complained."

These conclusions were adopted as properly interpretative of the statutes in the respects under consideration as they existed in 1950 in State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626. In these respects the statutes were not different in 1956. See, also, School District v. Wheeler, 25 Neb. 199, 41 N. W. 143; School

District No. 67 v. School District No. 24, 55 Neb. 716, 76 N. W. 420.

It becomes clear therefore that the petitioners in school districts Nos. 11 and 33 were the real parties in interest and necessary parties to a proceeding to review the action of the county superintendent in ordering the change of boundaries and consolidating the two districts with school district No. 37, and since it appears that they were not made parties and that service of summons was not had upon them, the motion to dismiss the petition in error was properly sustained. The order of the district court dismissing the petition in error is therefore affirmed.

AFFIRMED.

IN RE APPLICATION OF FERGUSON TRUCKING CO., INC. FERGUSON TRUCKING COMPANY, INC., APPELLEE, V. ROGERS TRUCK LINE ET AL., APPELLANTS, WILBUR F. GETTEL, INTERVENER-APPELLANT.

81 N. W. 2d 915

Filed March 22, 1957. No. 34063.

1. **Public Service Commissions.** Rule 4.6 of the Rules of Practice and Procedure before the Nebraska State Railway Commission applies generally to applications, made to the commission as such, for a continuance prior to the beginning of a hearing. It is not applicable to ordinary motions for continuances during a hearing before an examiner.
2. ———. An order of the Nebraska State Railway Commission, making ultimate findings of fact in the language of the statutes, is not void because of the failure of the commission to make basic findings of fact in the order upon which the ultimate facts rest.
3. ———. Courts are without authority to interfere with the findings and orders of the Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily.
4. **Motor Carriers.** By section 75-223, R. S. Supp., 1955, a common carrier is defined as any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over

regular or irregular routes, upon the highways of this state.

5. **Carriers.** At common law, so far as its vocation is concerned, a common carrier is one which holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately.
6. ———. Carriage for all persons indiscriminately is implicit in the statutory definition of a common carrier.
7. **Public Service Commissions: Motor Carriers.** The declared policy of section 75-222, R. R. S. 1943, is to regulate transportation in the public interest, and to promote efficient service without undue preferences or advantages, and unfair or destructive competitive practices. The declared policy does not condemn competition. It does condemn unfair or destructive competitive practices.
8. **Public Service Commissions: Public Utilities.** This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the jurisdiction of the railway commission over the subject matter and a determination of whether or not the order made by the railway commission is reasonable as distinguished from arbitrary action. The policy or wisdom of its action cannot be reviewed by the courts where the foregoing requirements to lawful action are found to exist.

APPEAL from the Nebraska State Railway Commission: *Affirmed.*

Martin, Davis & Mattoon and *J. Max Harding,* for appellants.

Robert S. Stauffer, for appellees.

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

SIMMONS, C. J.

This is an appeal from the Nebraska State Railway Commission, hereinafter referred to as the commission. The commission granted a certificate of convenience and necessity to Ferguson Trucking Company, a corporation, hereinafter called applicant. A number of certificate holders protested the granting of the certificate. Only a part of them offered evidence before the examiner. They will be referred to as the protestants or by

name. Protestants' assignments of error will be set out as they are determined herein.

We affirm the order of the commission.

The authority granted the applicant was for:

"SERVICE AUTHORIZED: (1) Machinery, equipment, materials and supplies used in connection with the discovery, development, production, refining, manufacture, processing, storage, transmission, and distribution of natural gas and petroleum and their products and by-products; and (2) Machinery, materials, equipment and supplies used in or in connection with the construction, operation, repair, servicing, maintenance and dismantling of pipe lines, including the stringing and picking up thereof.

"ROUTE OR TERRITORY AUTHORIZED:

Between points and places within the state of Nebraska over irregular routes. * * *."

The application of Ferguson Trucking Co., Inc., was filed February 24, 1955. Protests were filed by Peake, Inc., Charles D. Doher, Wheeler Transport Service, Inc., Rogers Truck Line, L. E. Whitlock Truck Service, Inc., Burel F. Kinney, Walter A. Joy, Lewis Coombes, Joy and Coombes, and Herbert L. Johnson.

The matter was set for hearing before an examiner at Sidney, Nebraska, on April 15, 1955. Appearances were made for protestants Rogers, Whitlock, Kinney, Joy, Coombes, and Johnson. Also an appearance was made for Wilbur F. Gettel "as intervener in opposition." The transcript shows no pleading by or in behalf of Gettel.

On April 16, 1955, the second day of the hearing, applicant moved for a continuance to a future date to be fixed by the commission.

Protestants resisted on the basis of noncompliance with rule 4.6 of the commission. There was considerable argument about additional absent witnesses for the applicant, protestants offering evidence out of order, and matters of that kind. Finally the examiner continued the hearing on his own motion. The hearing was later

set for July 21, 1955. The hearing proceeded at that time.

Protestants assign the order of continuance as prejudicial error. They contend that it is in violation of rule 4.6 of the Nebraska State Railway Commission. That rule is: "Any party who desires a continuance shall, immediately upon receipt of notice of the hearing, or as soon thereafter as facts requiring such continuance come to his knowledge, notify the Commission in writing of said desire, stating in detail the reasons why such continuance is necessary. Any such party may be required to submit affidavits in support of such request. The Commission, in passing upon a request for a continuance, shall consider whether such request was promptly made. For good cause shown, the Commission may grant such a continuance and may at any time order a continuance on its own motion. Only under exceptional circumstances will requests for continuance of a hearing be considered unless submitted at least seven days prior to the hearing date."

We think it patent that the rule applies generally to applications made to the commission, as such, for a continuance prior to the beginning of a hearing. We find nothing in the rule that makes it applicable to ordinary motions for continuances during a hearing before an examiner.

We find nothing in the record that would sustain a finding of prejudice to the protestants based upon the continuance granted. Protestants argue that due to the rapid fluctuation of the oil industry that the evidence submitted at the first hearing was of no value when the record was finally completed. The evidence which they state was of "no value" was that of the applicant. On July 21, 1955, at the request of counsel for some of the protestants and by agreement with counsel for the applicants and other protestants, the matter was again continued. Hearings were again had on August 15 and 16, 1955. No claim of prejudice is shown because

of that continuance. We find no merit in the assignment.

Section 75-230, R. R. S. 1943, provides as follows: "Subject to section 75-237, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing and able properly to perform the service proposed, and to conform to the provisions of sections 75-222 to 75-250 and the requirements, rules and regulations of the State Railway Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

Section 75-225, R. R. S. 1943, provides that an examiner is authorized to hold hearings, administer oaths, and make recommendations.

The examiner reported to the commission that, in his opinion, the applicant was fit, willing, and able to properly perform the proposed service. He further reported that the applicant had failed to prove that a present or future public need exists for the proposed service and recommended that the application be denied. This recommendation was based on his finding that neither the present nor future public convenience and necessity required the service. Applicant filed exceptions to the examiner's report specifically directed to the finding as to public convenience and necessity, and asked that the examiner's report be overruled and that the application be granted.

The commission considered the matter and held: "The conclusions of the Commission differ from those of the Examiner in his report and recommendation. It is the opinion of the Commission that the evidence adduced at the hearing on the subject application substantiates a finding that the services of presently authorized oil field equipment carriers are not adequate to fulfill the

transportation requirements of an expanding oil and gas industry in Nebraska. The Commission is of the opinion that the present and future public convenience and necessity require the service proposed by the instant application."

The commission then found that the present and future public convenience and necessity required the proposed service and that the applicant was fit, willing, and able properly to perform the proposed service. It ordered the issuance of the certificate.

Motions for reconsideration were filed by protestants and overruled.

The commission findings as to both the fit, willing, and able qualifications of the applicant, and as to public convenience and necessity, are challenged here.

Both findings of the commission are substantially in the language of the statute.

In In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, we held that the failure of the commission to find a willful failure to comply with the provisions of the act rendered the order irregular and void. The order involved was set aside. The requirement of "willful failure" was specified in the act (now section 75-238, R. R. S. 1943).

We are now asked to extend the effect of that decision so as to require a finding of basic facts in the order as a foundation for the finding of the ultimate fact required by the statute. Because of the absence of a finding of basic facts we are urged to hold the commission's order to be void.

The contentions of the protestants in that regard are best set out in Saginaw Broadcasting Co. v. Federal Communications Comm., 96 F. 2d 554.

There the court held: "In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes at least four parts: (1) evidence must be taken and

weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

The court then held: "* * * findings of fact, to be sufficient to support an order, must include what have been above described as the basic facts, from which the ultimate facts in the terms of the statutory criterion are inferred."

The court in reaching this conclusion relied on a number of decisions of the United States Courts which are discussed somewhat at length in the opinion. The court also referred to "decisions of state courts" which supported its conclusion. The decision cited and quoted from is Kewanee & Galva Ry. Co. v. Illinois Commerce Comm., 340 Ill. 266, 172 N. E. 706.

However, in the recent case of Antioch Milling Co. v. Public Service Co., 4 Ill. 2d 200, 123 N. E. 2d 302, the Supreme Court of Illinois held that the decision above cited was "based on an express statutory command" and refused to set aside an order where specific findings of fact were not made, there being no statute requiring such findings.

We find no statute in Nebraska that makes such a requirement as protestants urge upon us. Protestants cite none. In 146 A. L. R. 209 and following, is a note which indicates something of the confusion of issues that would follow the adoption of such a rule.

In Saginaw Broadcasting Co. v. Federal Communications Comm., *supra,* the court held: "When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the

absence of findings of fact the reviewing tribunal can determine neither of these things. * * * a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but must require also findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow."

We have found no such difficulty in our review of the records on appeal from the commission. We decline to undertake to place such a requirement on the commission.

Protestants assign error in the finding of the commission that applicant was fit, willing, and able to perform the service in that it was made "without knowing who owned or controlled said applicant corporation." This information was not furnished by applicant in the authorized form provided by the commission. The application did have attached to it a certified copy of its articles of incorporation. The articles recite the authorized capital stock of the corporation, the amount of the capital stock with which it shall commence business, and that its president had subscribed for 2,248 shares and named the other two incorporators as shareholders, each of whom had subscribed for one share of stock. The sufficiency of the application was not challenged by protestants in their pleadings.

Applicant's president testified that he held all but two shares of the outstanding stock; that the stockholders and directors had not changed since the organization of the corporation; that he was then negotiating a sale of a minority of the stock; and that if the sale were completed the directors and officers of the corporation would not be changed. This testimony stands unchallenged. The assignment is without merit.

This brings us to protestants' assignments of error directed to the sufficiency of the evidence to sustain the commission's order. The rule is: "Courts are without authority to interfere with the findings and orders of the

Nebraska State Railway Commission except where it exceeds its jurisdiction or acts arbitrarily." Johnson v. Peake, 163 Neb. 18, 77 N. W. 2d 670.

The challenge is directed to three alleged insufficiencies of the evidence: (1) That there was no showing that the proposed service of applicant would serve a useful purpose responsive to a public demand or need; (2) that the applicant failed to prove that the alleged need could not be served as well by existing carriers; and (3) that no consideration was given to the effect of the grant of the application upon the services of existing carriers.

We state the evidence which was before the commission, and consider and determine each of these matters.

The certificate granted the applicant involves the movement of heavy commodities and equipment used in the oil industry, and particularly that of drilling and production. Some of the commodities so involved can be moved by standard light and heavy duty equipment. Other commodities require specially built equipment designed to move large and quite heavy articles. It involves also the movement of oil drilling rigs and accessory supplies and articles. The movement of an oil rig from one location to another does not involve merely the loading, hauling, and unloading of the heavy equipment. It seems that the carrier is expected to supply and does supply personnel and some of the machinery on trucks that is used in tearing down, loading, and reerecting a rig at a new location. It is a specialized service requiring expensive equipment and trained personnel. It not only involves trained employees, but employees that are reasonably compatible and able to work with shipper employees. It is a type of common carrier service that requires prompt service to the shipper. Because of the fact that a drilling contractor never is certain when he may strike oil or a dry well, he accordingly is often unable to determine in advance the exact time when shipper service will be required. Likewise, due

to meeting lease requirements as to starting of drilling time, contractors are often required to dismantle, move, and set up rigs in a quite expeditious time. Delays in any event are expensive. The evidence is that it costs a drill operator from $600 to $1,000 a day for the time a rig is not in operation while moving from location to location. The evidence also is that from 12 to as high as 20 of these trucks of all descriptions are necessary to expeditiously move a big rig at one time.

Several of the major oil companies are now operating in the Cheyenne, Kimball, and Banner County area. The oil production is an expanding business in those counties. Applicant's evidence is that several of these companies had requested that it secure a certificate so that it could serve them in Nebraska as it had in other states.

The applicant is a New Mexico corporation. It holds interstate authority in eight states. It maintains a terminal at Fort Morgan, Colorado. It proposes to locate a terminal at Kimball, Nebraska, and has new and proper equipment available for Nebraska use. There is no question about the ability of applicant to serve the Nebraska shippers based on financial worth, equipment, and trained employees. Several shippers testified to satisfactory service that they have had from applicant in other states and as to their desire that it be granted a Nebraska certificate.

Three of the protestants offered testimony in opposition to the granting of the certificate.

Joy has headquarters at Falls City in southeastern Nebraska. He has four regular employees and four trailers which he owns. He testified that he had on lease six other tractors and trailers but that he had never seen them. He testified that during the hearing he had verbally leased a terminal at Kimball but had never seen the leased property. It is obvious that he cannot furnish the specialized extensive equipment service which shippers have a right to expect.

Whitlock maintains a terminal at Sterling, Colorado.

He has rendered satisfactory carrier service in Nebraska. His witness frankly stated that there is not enough business in Nebraska to justify the expense of establishing a terminal in this state. Sterling is over 30 miles from Sidney and 85 miles from Kimball, Nebraska. Obviously he does not presently propose to put himself in a position to render the full, prompt, and efficient service that the shippers require. He brings his own situation fairly within the scope of our holding in Dalton v. Kinney, 160 Neb. 516, 70 N. W. 2d 464.

The other and principal protestant is Rogers. The testimony shows that he has his headquarters and terminal at Sidney with yards at Kimball and Harrisburg. It appears that Rogers has the equipment, the resources, the experience, and trained employees required to move the large rigs in a satisfactory manner. Rogers' testimony is that in slack periods as much as 40 percent of his equipment is idle and that in peak periods sometimes 10 to 15 percent of his equipment is idle.

Shippers testified as to extensive, expensive delays in Rogers' service caused by the fact that the required equipment was in use for others. Rogers' evidence is that he is giving adequate service from his standpoint. It is obvious that he is not fully rendering the prompt efficient service that the industry requires. Rogers does not indicate a willingness to increase his equipment to the place where he can give the requisite prompt service that peak-load demand requires.

Shippers testified that the volume of business in the industry and its demands were such that more than one fully adequate carrier in the field was a necessity. One shipper went to the extent of saying that his company might find it necessary to purchase equipment for its own needs unless additional common carrier service were made available.

This evidence develops another situation. It appears that the commission fixes the rates for the service here involved, but that it is done on a credit basis by the

carrier. Both Whitlock and Rogers testified that they have found it necessary to establish the credit ratings of prospective shippers and that they deny common carrier service to shippers whose credit ratings are not satisfactory to them. There is evidence that Whitlock had advised one shipper that it would not serve him. Whether this was because of a credit or a personal problem is not at all certain.

There is also evidence that Rogers had denied common carrier service to one shipper. It appears that the dispute arose over what was a proper charge. Rogers stated there was a long delay in receiving payment of a large account. Whatever the cause, that shipper has been denied common carrier service by Rogers.

By statute a common carrier is defined as: "* * * any person who or which undertakes to transport passengers or property for the general public in intrastate commerce by motor vehicle for hire, whether over regular or irregular routes, upon the highways of this state; * * *." § 75-223, R. S. Supp., 1955.

We have held: "* * * at common law, so far as its vocation is concerned, a common carrier is one which holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately." State ex rel. Winnett v. Union Stock Yards Co., 81 Neb. 67, 115 N. W. 627. See, 13 C. J. S., Carriers, § 3, p. 25; 9 Am. Jur., Carriers, § 4, p. 430.

Carriage for all persons indiscriminately is implicit in the statutory definition of a common carrier.

We recognize the rule stated in State ex rel. Board of R. R. Comrs. v. Lischer Bros., 223 Iowa 588, 272 N. W. 604, that: "* * * a common carrier does not cease to be such by refusing to carry for shippers whose ability to pay is doubtful." That issue is not here.

The commission was confronted with a situation where the certified carrier or carriers were electing to set up their own standard as to whom they would serve and

whom they would not serve. It is apparent that indiscriminate service to all persons was not available. This situation bears directly on the question of public convenience and necessity. The protestants rely on our holding in In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507, and Edgar v. Wheeler Transport Service, Inc., 157 Neb. 1, 58 N. W. 2d 496. In those cases we found that the record did not sustain a finding that the present and future public convenience and necessity demanded the service of an additional carrier in the field. Here the record sustains such a finding by the commission.

That finding is within the jurisdiction of the commission's power and duty. It made the finding. The record sustains it. It is not for us to set it aside.

Finally, protestants contend that the order of the commission must be set aside for failure to give consideration to the effect of the grant of the application upon the service of existing carriers. Such consideration is inherent in the order of the commission. Obviously the grant of the certificate to the applicant and its entry into competitive service might well be determined by the commission to be the cause of protestants improving a service which the commission could find from the evidence was not entirely satisfactory.

The declared policy of section 75-222, R. R. S. 1943, is, in part, to regulate transportation "in the public interest," and to promote "efficient service" without "undue preferences or advantages, and unfair or destructive competitive practices." The declared policy does not condemn competition. It does condemn "unfair or destructive competitive practices."

As we read this record the decision of the commission is reasonably reconcilable with the declared legislative policy of this state.

Protestants' contention resolves itself down to the position that they are entitled to have and maintain a monopoly to render the service here involved. On the

showing here, it is that Rogers is entitled to that monopoly. Heretofore we observed that Whitlock had brought itself fairly within the scope of our decision in Dalton v. Kinney, *supra*. Rogers, also, due to its policy of selectivity of shippers and no declared willingness either to improve its service or fully and promptly meet the service required in this industry, placed itself where the commission could have found that it also was within the scope of Dalton v. Kinney so as to justify the issuance of a certificate to applicant. We concluded the opinion in Dalton v. Kinney with this holding: "We also held in In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413: 'Furthermore, the statute requires that the finding that applicant is fit, willing, and able to perform the proposed service, and that such service is or will be required by the present or future public convenience and necessity, must be sustained by evidence showing that the granting of the certificate was not arbitrary or unreasonable.' The evidence here meets that test."

The holding is applicable here.

Protestants rely on our decision in In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. Material distinctions exist in that case from the instant one. There the commission was considering an application for a certificate to permit a carrier to enter into a competitive common carrier status in the carrying of passengers over fixed routes on regular schedules. There inheres in such service certain monopolistic characteristics that are generally recognized in the regulation of such public utilities. That element does not exist to that extent in the regulation of common carriers such as are here involved.

There as here we followed the rule that the determination of the issues presented rests with the railway commission and that "its findings and orders will not be interfered with on appeal if any reasonable basis exists

upon which they can be supported." In re Application of Effenberger, *supra*.

There as here we were reviewing a determination of the commission to grant an application. The last two paragraphs of our opinion in the Effenberger case are quite applicable here and with this quote we conclude this opinion: "This court has no power to regulate public utilities. Its function on appeal is limited to an examination of the jurisdiction of the railway commission over the subject matter and a determination of whether or not the order made by the railway commission is reasonable as distinguished from arbitrary action. The policy or wisdom of its action cannot be reviewed by the courts where the foregoing requirements to lawful action are found to exist.

"We are of the opinion that the action of the railway commission in the present case has evidentiary support in the record and constitutes a proper exercise of the powers vested in the railway commission by the Constitution and laws of this state. Under such circumstances this court is without authority to interfere with the result."

AFFIRMED.

J. EDWARD REED AND CLAIRE B. REED, DOING BUSINESS AS REED CONSTRUCTION COMPANY, ET AL., APPELLEES, V. LOWELL J. WILLIAMSON ET AL., APPELLANTS.
82 N. W. 2d 18

Filed March 22, 1957. No. 34065.

1. **Municipal Corporations: Covenants.** A restrictive covenant that lots in an addition to a city shall be exclusively a residential area is unambiguous and prohibits use of the lots for any purpose other than residential.
2. **Mines and Minerals.** A valid restriction that lots in an addition to a city shall be exclusively a residential area prevents use of them for the exploration for or production of oil and gas.

3. **Contracts.** A consideration for a promise may be a detriment to the promisee as well as a benefit accruing to the promisor.
4. **Covenants.** The mutual agreement and obligation of the signers of an instrument to conform to a restrictive covenant expressed therein are a sufficient consideration to support the contract.
5. **Covenants: Easements.** Restrictive covenants, particularly if negative, create equitable easements or servitudes which may be enforced in equity by anyone interested in the property without regard to privity either of contract or of estate and without regard to whether or not the covenants run with the land.
6. ———: ———. Such a restriction is not required to be a grant or reservation. It creates an equitable right in the nature of an equitable easement or servitude if imposed on the use of the land by a common grantor in furtherance of a general improvement plan intended for the mutual benefit of all who may become interested, enforceable in equity on no broader principle than that equity will enforce a proper contract concerning real estate against all taking with notice of it.
7. **Municipal Corporations: Covenants.** The test of whether a change of condition of the surrounding neighborhood is a defense to an action to enforce a restrictive covenant is whether the original purpose and intention of the parties creating the restriction, pursuant to the general scheme, has been so destroyed by the changed condition that the restriction is no longer a substantial benefit to the residents.
8. ———: ———. If the restriction in a residential area has been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not generally change the character of the area itself so that the owners of property therein may not be entitled to have the restriction enforced.
9. **Injunctions: Covenants.** Injunction is a proper remedy to prevent violation of a restrictive covenant. A remedy at law may be inadequate, may result in a multiplicity of actions, and may permit the subversion of the plan of improvement and development to continue.

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

Torgeson, Halcomb & O'Brien, John Knapp, P. M. Everson, for appellants.

Van Steenberg & Myers, George P. Burke, for appellees.

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

BOSLAUGH, J.

This is an injunction action to prohibit appellants from trespassing on the part of Sunny View Heights Addition to Kimball, Nebraska, which is subject to and affected by restrictive covenants, from drilling oil and gas wells thereon, and for general equitable relief.

The following are the circumstances of this litigation:

Gus Rieseberg, referred to as appellant, was the owner of the northeast quarter of the northeast quarter of Section 32, Township 15 North, Range 55 West of the 6th P. M., in Kimball County, which he platted as Sunny View Heights Addition to Kimball on August 12, 1949. He sold and conveyed to J. Edward Reed and Claire B. Reed, husband and wife, as joint tenants, on March 3, 1953, Lots 3 to 8, inclusive, Block 1 of the addition subject to the reservation expressed in the deed "Save and except, however, the oil, gas and other minerals in, on and under said real estate which are reserved to the grantor, his heirs and assigns forever * * *." Appellant, by contract in writing, on March 27, 1953, sold to and J. Edward Reed purchased Block 1 except Lots 1 to 8, inclusive, and Block 2 of said addition subject to the reservation of oil, gas, and other minerals quoted above. The original plat of the addition was vacated on May 29, 1953, the area of the addition was replatted as Sunny View Heights Addition to Kimball, it has since been in existence, and the last plat is the one referred to in this cause.

Appellant, J. Edward Reed, and Claire B. Reed on August 27, 1953, executed and acknowledged an instrument which was by its title characterized as "RESTRICTIVE COVENANTS." It was filed September 1, 1953, and recorded in the public records of Kimball County in the office of the county clerk. It recited that the persons who executed it were the owners of the addi-

tion except the west 165 feet of Block 4 and that they desired to assure persons who acquired lots in the addition that the real estate therein would be used only for certain purposes and in a certain manner. It was made applicable to all the addition except the west 164 feet of Block 4 owned by E. E. Brown on which a house had been constructed and all of Block 5 owned by appellant on which a residence had been built. The instrument consists in part of the following:

"NOW THEREFORE the undersigned Gus Rieseberg, single; J. Edward Reed and Claire B. Reed, husband and wife, do hereby covenant and agree with each and every person who shall hereafter acquire any portion of the above described real estate that: * * *

"2. All of the lots in said Addition shall be exclusively a residential area with the exception of Blocks 1 and 2 and lots 1, 2, 3 and 4 of Block 3 in which commercial development will be permitted, restricted however, to businesses which are either of a retail or professional nature.

"3. That the only buildings which may be erected in said Addition except on those lots where commercial development is permitted shall be either a detached single family dwelling with at least one or more stories above the ground level or a one or two car garage or the equivalent of the latter for exclusive use of storage of furniture, lawn tools, etc, used in ordinary living or maintenance of property. * * *

"5. That no dwelling shall be erected with less than 768 square feet of floor space at or above the ground level.

"6. No trade or activity shall be carried on which will constitute an annoyance or nuisance or which may be offensive or objectionable to the neighborhood. * * *

"It is expressly understood and agreed that these covenants are to run with the land and shall be binding upon each and every person hereafter acquiring an interest in and to any portion of the above described real

estate and they shall be in full force and effect for a period of forty years from and after the first day of June, 1953."

The instrument was joined in by appellant at the solicitation of J. Edward Reed. There was no money or other thing of value given the former by the latter at the time it was executed except as evidenced by the terms of the instrument. Appellant then owned no part of the surface estate of the real estate affected by the instrument except he had the legal title to the part thereof described in the contract of sale and purchase made on March 27, 1953, by him and J. Edward Reed and appellant was entitled to retain the legal title thereto until the unpaid part of the purchase price thereof was satisfied. There was a continuous contract relationship between appellant and J. Edward Reed at all times important to this case.

The contract of March 27, 1953, was canceled by the parties thereto and a new one was made May 27, 1954, containing the reservation to appellant of all oil, gas, and other minerals in, on, or under the real estate. Deeds of the surface estate were made and delivered as required by the contracts. The last deed bears date of February 24, 1955, after this litigation was commenced. Each of the deeds contained reservation in appellant of the oil, gas, and other minerals by the use of the language above set out.

On September 16, 1954, appellant executed and delivered to Lowell J. Williamson, hereafter mentioned herein as lessee, an oil and gas lease of all the real estate first described herein except the west 165 feet of Block 4 of the addition which was owned by E. E. Brown who is not a party to this case. The lessee, or persons acting for him, about January 3, 1955, went upon Lot 10, Block 14 of the addition, without permission, for the purpose of staking a location on which to drill a test well by virtue of the lease given thereon by ap-

pellant. He or they were ordered from the premises and this litigation was instituted.

Gus Rieseberg and Lowell J. Williamson, collectively designated appellants herein, offered at the trial to be bound by and to comply with ordinance No. 140 of Kimball as though it were a contract between them and persons interested in property in the addition. The ordinance was not passed until January 17, 1955, after this litigation was commenced.

J. Edward Reed, hereafter designated Reed, financed the housing project he developed on the premises he bought from appellant through the Prudential Insurance Company of America, hereafter called insurance company, by loans made by it and guaranteed by the Federal Housing Administration, designated herein FHA. The negotiations for financing the project had their inception about May 15, 1953, when FHA was advised of the proposed plans of the project. FHA would not have insured loans on property in the addition in the absence of restrictive covenants as suggested in an outline issued by it for development of single-family, detached dwellings. The first sentence of Requirement 1 of the FHA outline for that class was: "No lot shall be used except for residential purposes." The first loan application submitted by Reed was June 23, 1953, prior to the execution of the restrictive covenants by him and appellant, and the commitment of the insurance company was made July 14, 1953, but it was conditioned upon restrictive or protective covenants being secured before the loan was closed. A temporary injunction was granted January 4, 1955, by the district court which prohibited appellants from going upon the premises and exploring for oil and gas. There had been loaned prior thereto on property in the addition $93,000. Loaning on property therein had been discontinued until the injunction was procured, but subsequent thereto the insurance company loaned on property in the addition $162,600.

Appellant offered proof that the reasonable value of

the mineral estate in the 40 acres comprising the addition was $400,000. Appellee produced evidence that the leasehold interest was worth $225 to $250 per acre for the 40-acre tract. Reed had expended on the addition between $50,000 and $60,000. The value of the houses constructed on the addition by Reed was $430,000.

The interveners, except the insurance company, are purchasers from Reed of residences within Sunny View Heights Addition and the relief they seek is identical with the relief asked by Reed. The district court did not obtain jurisdiction of the person of any of the defendants named in the petition except appellant and the lessee who are the appellants in this court.

The district court found generally for appellees and against appellants; that the use of the property involved for drilling oil wells is prohibited by the restrictive covenants entered into by Reed, his wife, and appellant; that by the execution of the restrictions contained in the covenants appellant abandoned his easement for entry upon the premises to explore for oil and gas; and that the bar thereof against appellant extends to his successors in interest. The judgment rendered permanently enjoined appellants and their successors from trespassing on the premises and from drilling oil and gas wells thereon. That judgment is the subject of this appeal.

In the instance of the sale and conveyance of a surface estate the law implies a means for providing the benefit of the mineral estate. It is the rule that if the surface estate and the mineral estate are separated, the law implies a means of access to permit the owner of the mineral estate to have the benefit of it. A conveyance of the surface of the land or the reservation of the oil and gas in place contains an implied reservation of a right of access to the severed estate below. This is expressed in MacDonnell v. Capital Co., 130 F. 2d 311: "There is, apparently, complete unanimity amongst the various jurisdictions as regards the rule that an expressed

mineral reservation contained in a deed carries with it, by necessary implication, the right to remove such minerals (including gas and oil) by the usual or customary methods of mining and thus reduce them to possession even though the surface ground may be wholly destroyed as a result thereof." See, also, Annotation, 146 A. L. R. 901. It was the right described in the above of access to and use of the surface estate that the trial court found appellant abandoned when he executed and delivered the instrument containing the restrictive covenants.

The problem indispensable to the decision of this case is the meaning and effect of the language of the instrument entitled "RESTRICTIVE COVENANTS" executed by appellant that "All of the lots in said Addition shall be exclusively a residential area * * *."

In Carr v. Trivett, 24 Tenn. App. 308, 143 S. W. 2d 900, the court said: "A restrictive covenant providing that conveyed property should not be used except for 'residential purposes' and that no building should be erected thereon to be used for purposes of any trade, manufacture, or other business was unambiguous and could not be construed otherwise than as a prohibition against use of property for any purpose other than residential." In the opinion it is stated: "While restrictive covenants are to be strictly construed and will not be extended by implication to include limitations upon the free use of the property not plainly prohibited by the terms of the deed * * * such restrictions are to be given a fair and reasonable meaning so as to ascertain the intention of the parties * * *. The restrictive clause here under consideration is clear and unambiguous and cannot be reasonably construed otherwise than as a prohibition against the use of the property for any purposes other than for residential purposes."

The court in Briggs v. Hendricks (Tex. Civ. App.), 197 S. W. 2d 511, considered a restriction that all lots in the tract should be known and described as residential lots

except the portion designated as a business center, and that no structure should be erected on any residential building plot other than for detached family dwelling and other outbuildings incidental to the residential use of the plot. In reference thereto the court said: "Courts judicially know that the purpose of restricting lots in additions to cities to residential use is to establish an area free from commercial activity, and thereby enhance the value of such lots as residential property. The word 'residential' as used in a covenant restricting the use of property, is used in contradistinction to 'business' or 'commerce.' "

Hunt v. Held, 90 Ohio St. 280, 107 N. E. 765, L. R. A. 1915D 543, Ann. Cas. 1916C 1051, considered a restriction that the property was sold for residence purposes only and therein this observation is made: "But is there any doubt as to the meaning of the words? The word 'residence,' as we view it, is equivalent to 'residential' and was used in contradistinction to 'business.' * * * The word 'residence' has reference to the use or mode of occupancy to which the building may be put."

The opinion in West Nichols Hills Presbyterian Church v. Folks, — Okl. —, 276 P. 2d 255, uses this language: "We think the terms of the restrictions before us are clear and unambiguous. The use of the land for 'residence purposes only' means that the lots shall be used for residences and for no other purpose, and the recital of certain specific uses which are prohibited for the entire eight blocks, but failing to specifically forbid parking for those attending a nearby church, does not nullify or in any way effect (affect) the clearly expressed intention of the dedicator that the lots involved here shall be used for residence purposes only."

In Jernigan v. Capps, 187 Va. 73, 45 S. E. 2d 886, 175 A. L. R. 1182, the court said: "It is not necessary that we go to a dictionary or a law book to ascertain the meaning of 'a residential building.' Giving the words their plain and ordinary meaning, we would say that

such a building is one which is used for residential purposes,—that is, one in which people reside or dwell, or in which they make their homes, as distinguished from one which is used for commercial or business purposes. But if the obvious must be supported by authority or judicial precedent, we find that they are of the same view. Webster's New International Dictionary, 2d Ed., defines 'residential' as: 'Used, serving, or designed as a residence or for occupation by residents; * * *. Adapted to, or occupied by, residences; as, a residential quarter.'"

Moore v. Stevens, 90 Fla. 879, 106 So. 901, 43 A. L. R. 1127, decided: "The covenant under which appellee claims the right to injunctive relief is the one which provides that appellant's property 'is to be used for residence purposes only.' There is no ambiguity in the quoted expression, nor doubt as to its meaning, when considered in the light of the entire transaction in which it was used and its component words are accorded their ordinary, well understood meaning. The word 'residence' is one of multiple meanings, but the context in which it is used in this instance clearly indicates its meaning to be a dwelling house where a person lives in settled abode. The word, in this instance, relates solely to the use or mode of occupancy to which the property may be put. * * * When so employed and understood, it necessarily excludes all uses of the property other than for residence purposes, and the interposition of other negative terms specifically prohibiting the use of the property for business, mercantile or other similar purposes are unnecessary."

Southwest Petroleum Co. v. Logan, 180 Okl. 477, 71 P. 2d 759, concerned a part of Lincoln Terrace Addition to Oklahoma City. There were three plats of different parts of the addition. Attached to each was a certificate of the owner. The first and second each specified: "All lots in this plat are restricted to residences only * * *." The certificate attached to the last plat recited: "All

lots in this plat are restricted to dwellings only." The court said: "A valid restriction that 'All lots in this plat are restricted to residences only' prevents the use of such property for the drilling of oil and gas wells." This language appears in the opinion: "The question then narrows to one of interpretation of the clause, 'All lots in this plat are restricted to residences only,' or 'to dwellings only.' Both terms will be considered as synonymous. We are not unmindful of the rule that restrictions on the use of real property must be construed strictly. * * * Nevertheless they will be enforced in a proper case and will not be extended on the one hand or limited on the other, but strictly enforced. * * * The phrase 'All lots in this plat are restricted to residences only' excludes all other uses upon the land, and is clear and unambiguous. Under the natural and common sense meaning of the term 'residences' we cannot say that the drilling of wells for oil and gas is a use of property for residence purposes. It does not matter that the parties did not anticipate the oil development in this area and contemplate the necessity of excluding the drilling of oil wells in the addition when it is clear that they intended to exclude every use not pertaining to residence purposes." Smith Oil Co. v. Logan, 180 Okl. 474, 71 P. 2d 766, is a companion case of the one last quoted. State ex rel. Marland v. Phillips Petroleum Co., 189 Okl. 629, 118 P. 2d 621, approves the conclusion of the Southwest Petroleum case by saying that the court adheres to the rule there announced that a lot owner in Lincoln Terrace could not subject the land to the ordinary right of an oil and gas lease to the extent of drilling an oil and gas well thereon. See, also, Christ's Methodist Church v. Macklanburg, 198 Okl. 297, 177 P. 2d 1008; Arlt v. King, 328 Mich. 645, 44 N. W. 2d 195; Redfern Lawns Civic Assn. v. Currie Pontiac Co., 328 Mich. 463, 44 N. W. 2d 8; West Bloomfield Co. v. Haddock, 326 Mich. 601, 40 N. W. 2d 738; Mattson v. Fezler, 202 Okl. 589, 216 P. 2d 275; Hogue v. Dreeszen, 161 Neb. 268, 73 N. W. 2d 159; Dundee Realty Co. v. Nichols, 113

Neb. 389, 203 N. W. 558; 26 C. J. S., Deeds, § 164 (3), p. 1114; Annotation, 175 A. L. R. 1191.

Cooke v. Kinkead, 179 Okl. 147, 64 P. 2d 682, is characterized by appellants as a case directly in point with the one now under consideration. The language of the opinion in the Kinkead case demonstrates that the appraisal of it as decisive of the case presently being considered is unjustified. This language of the Kinkead case sets it apart from this case: "The language is clear and specific to the effect that no building shall ever be used or occupied for any purpose except that of residence exclusively. There can be no doubt as to the meaning of such language. In order to sustain plaintiff's contention in this case we would be compelled to distort the well-established meaning of words of common usage, and to extend such meaning by implication to situations unexpressed in the instrument. If there was an intention on the part of the dedicators to restrict the use of the land itself, such intention is unexpressed, and is unavailing in this case. Moore v. Stevens, supra. In so far as the land itself is concerned, there are no express words limiting its use, and to that extent the defendants who are landowners in the addition hold the same in fee-simple title, subject only to the restrictions on the use of buildings erected thereon." The court that decided the Kinkead case distinguished it in Southwest Petroleum Co. v. Logan, *supra,* by this language: "The case of Cooke v. Kinkead, supra, denying an injunction to prevent drilling in Howe's Capitol addition to Oklahoma City, is distinguishable from the instant case in that the restrictions there were held to apply to the use of buildings on the premises and not to the use of the land itself. In the case before us, the restrictions clearly apply to the use of the land." In this case the language of the restriction that "All of the lots in said Addition shall be exclusively a residential area" applies to the use of the land. In this situation the Kinkead case cannot influence the decision of this case.

The premises involved were, at the time of the execution of the instrument evidencing the restrictive covenants, owned in this manner: Appellant owned the mineral estate and the legal title to the part of the surface estate sold by him to Reed on contract which had not been fully performed. Reed owned the surface estate except the legal title to a part of it which was held by appellant as above stated. The appellants argue that the restrictive covenants do not affect the mineral estate of appellant because of a lack of consideration. He owned Block 5 of the addition when he executed the instrument containing the restrictions. It was not burdened by them but it was obviously benefited thereby. Appellant was assured by them that the addition would be an exclusive restricted residential area consisting of newly built houses according to a plan for its permanent improvement; that no undesirable improvement could be made therein; and that no objectionable activity could be conducted thereon. Block 5 would enjoy this advantage and benefit without the burden imposed on the property within the terms of the restrictions.

The unpaid part of the indebtedness of Reed on his contract of purchase of March 27, 1953, probably in excess of $12,000, was secured to appellant only by the legal title to the real estate described in the contract. The real estate was then unimproved. Reed could not accomplish his house-building project on it without financing and he could get it only if the use of the real estate was restricted to residential purposes. This was accomplished by appellant becoming a party to the restrictions and thereby the value of the security he had for the indebtedness owing him was very materially increased because of the improvements made.

The restrictions were in these respects a two-fold advantage and benefit to appellant. They were also a detriment to him if they operate, as the trial court found, to limit the means of access to the restricted premises he had to recover and enjoy any oil and gas in and

under the land. If what was done conferred a benefit on appellant or was a detriment to him, it was a consideration for the transaction. A consideration sufficient to support a promise may be a detriment to the promisee as well as a benefit accruing to the promisor. United States Fidelity & Guaranty Co. v. Curry, 126 Neb. 705, 254 N. W. 430; Crawford State Bank v. McEwen, 132 Neb. 399, 272 N. W. 226; Fluckey v. Anderson, 132 Neb. 664, 273 N. W. 41; Phelps v. Blome, 150 Neb. 547, 35 N. W. 2d 93.

The instrument expressing the restrictions contains reciprocal and mutual covenants. Appellant thereby bound himself not to violate the covenants and if he did, anyone interested in the real estate was authorized to enforce them or sue for damages at his election. Reed made the same promise and for any violation exposed himself to proceedings to enforce the covenants or to be subjected to a suit for damages. A like promise proceeded from appellant and Reed to subsequent purchasers and from them to appellant and Reed. These are mutual and reciprocal promises and rights.

The court said in Erichsen v. Tapert, 172 Mich. 457, 138 N. W. 330: "The mutual agreements of the signers to conform to the restrictions was sufficient consideration to support the contract." See, also, 12 Am. Jur., Contracts, § 113, p. 606; Restatement, Contracts, §§ 75-76, pp. 80-86. The execution and delivery of the restrictive covenants were not without legal and sufficient consideration.

The prohibitory efficacy of the restrictions as to appellants is contested by their assertion that the instrument containing them does not literally eliminate the drilling of test wells for oil and gas and was not intended to do so. The words oil and gas are not written in the instrument containing the restrictions. It is significant that paragraph 2 of the instrument which contains the words "All of the lots in said Addition shall be exclusively a residential area" is not mentioned by appellants.

They refer to and set out in full paragraph 3 which describes the buildings that may be erected and paragraph 6 which forbids any activity which may cause an annoyance or nuisance or which may be offensive or objectionable as the parts of the instrument pertinent to the discussion of this contention. They disregard the highly important and all-inclusive declaration that the lots shall be exclusively a residential area. It may not be concluded that the drilling of a well or wells for oil and gas is a use of the lots for residential purposes or that a limitation on the use of the real estate like that contained in the restriction in this case does not exclude every use of the premises not pertaining to residence purposes.

In Southwest Petroleum Co. v. Logan, *supra*, the court said: "Under the natural and common sense meaning of the term 'residences' we cannot say that the drilling of wells for oil and gas is a use of property for residence purposes. It does not matter that the parties did not anticipate the oil development in this area and contemplate the necessity of excluding the drilling of oil wells in the addition when it is clear that they intended to exclude every use not pertaining to residence purposes."

West Nichols Hills Presbyterian Church v. Folks, *supra*, employs this language: "The use of the land for 'residence purposes only' means that the lots shall be used for residences and for no other purpose, * * * but failing to specifically forbid parking for those attending a nearby church, does not nullify or in any way effect (affect) the clearly expressed intention of the dedicator that the lots involved here shall be used for residence purposes only."

Carr v. Trivett, *supra*, concluded: "The restrictive clause here under consideration (for 'residential purposes') is clear and unambiguous and cannot be reasonably construed otherwise than as a prohibition against the use of the property for any purposes other than for residential purposes."

In Moore v. Stevens, *supra,* the restriction upon which injunctive relief was based provided that the property could be used for residence purposes only. The court said in reference thereto: "The covenants here under consideration relate to the *use* to be made of the property rather than to the character of the building to be erected upon it." See, also, Annotation, 155 A. L. R. 528.

The argument is made that the restrictions concerned herein must fail because of lack of privity of estate. The factual basis for this, as stated by appellants, is that Reed had no interest in the mineral estate and at the time the restrictions became effective appellant had only the legal title as security for an indebtedness to a part of the surface estate which is considered personal property. Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252. Appellants concede, with some undefined reservation, that there is "perhaps privity of estate between Reed and Rieseberg" as to the surface estate but they assert this does not authorize interfering with the mineral estate. The present case permits escape from what has been characterized the utter confusion of judicial decisions involving the problem of whether a covenant is real so as to run with the land or merely collateral or personal.

The discussion in Southwest Petroleum Co. v. Logan, *supra,* is pertinent to the hypothesis of appellants: "It has long been an established principle that an agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein, may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions. * * * The restrictions need not rise to the dignity of a grant or reservation, but create an equitable right in the nature of an easement, enforceable in equity against all persons taking with notice, even if it rests on no broader

principle than that equity will enforce a proper contract concerning land, against all persons taking with notice of it."

In Johnson v. Robertson, 156 Iowa 64, 135 N. W. 585, Ann. Cas. 1915B 137, it is declared: "From these decisions it will be observed that these building restrictions or agreements, particularly where negative in character, create equitable easements, amenities, or servitudes, and that they may be enforced by any one interested in the property without regard to privity either of contract or estate and no matter whether the covenant may be said to run with the land or not."

Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080, contains this language: "A restriction imposed by subdividers of a tract of land contained in all deeds conveying lots therein that the premises shall be used for residence purposes only, which restriction was to inure to the benefit of each of the lots in the tract and was accepted by the grantees of said lots, is in the nature of a negative easement or equitable servitude and not a positive easement of right in the land itself * * *. It is merely a right enforceable in equity as between the parties to the contract, or their successors with notice, on the theory that it would be unconscionable to permit one who had contracted to use his property in a particular way to violate his agreement."

The Wisconsin court said in Boyden v. Roberts, 131 Wis. 659, 111 N. W. 701: "The whole tract of land being by the Johnston-Weiss agreement impressed with an equitable servitude for the benefit of all purchasers under the scheme that the property should be preserved for first-class residence property, and other uses named prohibited, each grantee is entitled to enforce such restriction in equity. 2 Pom. Eq. Jur. (3d ed.) § 689; 1 Jones, Real Prop. in Conv. § 780. Where the general plan or scheme of an agreement restricts property to a certain use and prohibits other uses, it is immaterial whether the covenant runs with the land or not, where

the agreement is made for the mutual benefit of all the land though held by different owners. In such case equity will enforce such servitude as between the several grantees of parts of the premises with notice." See, also, 7 Thompson on Real Property (Perm. Ed.), § 3614, p. 102; II American Law of Property, § 9.26, p. 409; 26 C. J. S., Deeds, § 167 (2), p. 1143; 14 Am. Jur., Covenants, Conditions and Restrictions, § 193, p. 608.

Appellants are barred from trespassing on the part of Sunny View Heights Addition to Kimball, Nebraska, which is subject to and affected by restrictive covenants, and from going upon the premises which are within the reach of the provisions of the instrument containing the restrictions involved herein for the purpose of exploring for and producing oil and gas or for any other purpose inconsistent with the terms of the instrument. Appellant desired that Sunny View Heights Addition be constituted and developed as a restricted area for residential purposes only. He was pleased to have an instrument to accomplish this executed and made effective as to all who had or acquired any part of the addition. He realized this by joining appellees in the execution of the instrument on August 27, 1953. Appellees, because of this instrument, expended between that date and May 27, 1954, about $10,000 for a sewage system and for sidewalks. They also invested more than $50,000 in development of the property, about three-fourths of which was after August 27, 1953. The restrictions made it possible for appellees to finance the housing project and this in turn induced the large investment which they made of their individual resources. The insurance company, after the execution and recording of the instrument reciting the restrictions, loaned more than $200,000 on residence properties in the addition. The individual interveners purchased houses therein because of the restricted nature of the area. Any rights acquired by Lowell J. Williamson in the addition are subject to the restrictions. He claims through appellant.

May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, repeats the language of 10 R. C. L., § 19, p. 689, as follows: "Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. * * * The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity." See, also, 31 C. J. S., Estoppel, § 59, p. 236.

Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365, 73 Am. S. R. 491, 42 L. R. A. 794, adopts this language from 2 Pomeroy, Equity Jurisprudence, p. 804: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." See, also, Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612. Appellants may not escape the effect of the instrument to which one of them was a party and which has produced the result of which they now complain. Polyzois v. Resnick, 123 Neb. 663, 243 N. W. 864.

The many changes in the Kimball area and community resulting from the production of oil and gas and the incidences thereof are detailed in an effort to show that the purposes of restrictions imposed on the addition have been to such an extent defeated that the prohibitions sought as to appellants are meaningless and

futile. A reference to language in Southwest Petroleum Co. v. Logan, *supra,* is an appropriate refutation of this: "The law regarding change of condition of the surrounding neighborhood as a defense to such actions appears fairly well settled, but each case must be decided on the equities of each particular situation as it is presented. The test ordinarily is whether the original purpose and intention of the parties creating the restrictions pursuant to the general scheme has been so destroyed by the changed conditions, without fault on the part of those who seek to be relieved, that the restrictions are no longer of substantial benefit to the residents, and the original purpose cannot be reasonably effected by the granting of an injunction. * * * From our examination of the entire record we conclude that the addition still has substantial value to the lot owners for residential purposes. Under these circumstances, although the property is undoubtedly valuable for oil and gas purposes, this will not relieve the defendants from the restrictions, for we cannot say that the original purpose of preserving to the home owners in the addition a purely residential district cannot be accomplished by granting the injunctions. * * * We cannot accede to defendants' argument that the original purpose to create an exclusive high class residence district has been destroyed because it will no longer be high class or exclusive. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district."

The Michigan court said in Bohm v. Silberstein, 220 Mich. 278, 189 N. W. 899: "Where the restrictions in a residential subdivision consisting of 18 blocks have been substantially complied with, the fact that adjoining or surrounding property is used for business purposes does not so change the character of the subdivision itself that the owners of property therein may not have the restrictions enforced."

Appellants contest injunction as an appropriate remedy in this case. They say the harm therefrom to them is very much greater than the benefit to those in whose favor it has been granted because, they affirm, the effect of it is a confiscation of the mineral estate of appellant. These arguments may not be accepted. Appellant's mineral estate has not been confiscated. He may drill for oil on Block 5 of the addition and produce all the oil and gas thereby discovered. There is no claim in this case that the restrictions apply in any way to Block 5. Appellants may adopt, if they desire, directional drilling from that location. Appellant owns and may continue to own the mineral estate as far as any effect this case has on it. Injunction is in this class of cases an appropriate if not the only adequate remedy. This has been declared by this court in Dundee Realty Co. v. Nichols, *supra*: "A remedy at law would be inadequate, and would lead to a multiplicity of actions, and the subversion of this ideal scheme of improvement and development would still remain. This dwelling, as located, is a clear and direct violation of the letter as well as the spirit of the restrictive covenant, and is an irreparable injury to each of plaintiffs, and to each lot owner in the addition, thus creating a condition which is appealing to a court of equity, in the exercise of its extraordinary power. The relief sought by plaintiffs is fair, equitable, and just." See, also, Hogue v. Dreeszen, *supra*.

The restrictive covenants involved herein by their terms terminate June 1, 1993. The judgment granted an injunction of unlimited duration, enjoining appellants and their successors from trespassing on the premises involved and from drilling oil and gas wells thereon. The judgment is incorrect in the respect that the injunction was not limited to the period of the existence of the restrictions. The judgment should be and it is modified to provide that the injunction granted be and is limited to the period ending June 1, 1993.

The judgment should be and it is affirmed as modified.

AFFIRMED AS MODIFIED.

CHAPPELL, J., participating on briefs.

KATHLINE BEACOM, ADMINISTRATRIX OF THE ESTATE OF HELEN D. DALEY, DECEASED, APPELLEE, V. JOSEPH J. DALEY, APPELLANT.

81 N. W. 2d 907

Filed March 22, 1957. No. 34076.

1. **Landlord and Tenant.** The occupancy of premises by one person with the consent or permission of the owner, or with the consent of the person entitled to assert a right to the possession of the premises, creates between the parties the relation of landlord and tenant and, in the absence of an agreement or circumstances indicating a contrary intent, the law will imply an agreement on the part of the tenant to pay the reasonable value for his use and occupation.
2. ———. Where rent is payable yearly, and there is no provision for payment in advance, it is not due until the end of the year.
3. **Limitations of Actions.** An action for the recovery of the reasonable value for the use and occupancy of lands is not barred by the statute of limitations until 4 years have elapsed from the accruing of such action.
4. ———. Any voluntary payment made by the debtor upon such cause of action would arrest the running of the statute of limitations with reference thereto.
5. ———. A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability.
6. **Attorney and Client.** 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.
7. ———. When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese.
8. ———. Communications between attorney and client made in

the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943.

9. Life Estates. On the termination of a life estate the reversioner becomes immediately entitled to the possession of the real estate and, in the absence of any specifically controlling provision in the instrument creating the life estate or statute relating thereto, the right to all rentals thereafter becoming due.

10. ———. As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate.

11. ———. A life tenant must make all the ordinary repairs necessary to preserve the property and prevent its going to waste, but he need not make extraordinary repairs.

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

Warner & Warner, C. D. Shokes, and *S. W. McKinley, Jr.,* for appellant.

Mark J. Ryan, for appellee.

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

WENKE, J.

This is an appeal from the district court for Dakota County of an action wherein Kathline Beacom, as administratrix of the estate of Helen E. Daley, also appearing in the evidence as Hellen E. Daley, deceased, seeks to recover from Joseph J. Daley the fair and reasonable rental value of certain lands in Dakota County for the years from 1941 to 1952, both inclusive. The trial court awarded plaintiff a judgment for the sum of $9,741.88. Defendant thereupon filed a motion for new trial and, from the overruling thereof, took this appeal.

The lands involved consist of 155 acres in Dakota County described as follows: "The South 13 2/3 chains of the South Half of the Northeast Quarter (S½ NE¼) and the South 13 2/3 chains of the Southeast Quarter of the Northwest Quarter (SE¼ NW¼) and the North-

west Quarter of the Southeast Quarter (NW¼ SE¼) and the Northeast Quarter of the Southwest Quarter (NE¼ SW¼) all in Section 1, Township 28, Range 7, East, in said County and State."

Basically these facts are not in dispute: That on and immediately prior to February 21, 1941, Helen E. Daley, a widow, was the owner of the foregoing lands; that on February 21, 1941, she conveyed these lands to her son, appellant Joseph J. Daley, by warranty deed; that appellant has been in continuous possession of and farmed these lands at all times herein material, up to and until the time of his mother's death on June 22, 1952; that this occupancy was without any lease agreement, either written or oral; and that Helen E. Daley died intestate, leaving appellant and 4 daughters as her sole heirs at law. The daughters are Kathline Beacom, Ann Ebel, Evelyn Rush, and Margaret O'Neill. Appellee is the duly appointed, qualified, and acting administrator of her estate. The father, John T. Daley, died on July 11, 1938. However, prior to his death, he had conveyed the foregoing premises to his wife, Helen E. Daley. Appellee commenced this action on July 30, 1953. We shall herein refer to the decedent, Helen E. Daley, as the mother.

The deed to appellant contained this reservation: "Grantor, however, reserves the right to the use and enjoyment and income from said premises as long as she lives." The mother thereby retained a life estate in the premises and appellant, who was thereafter in possession, was, under the situation herein disclosed, liable to his mother for the fair and reasonable value of the use and occupancy of the premises, payable at the end of each year. Guthmann v. Vallery, 51 Neb. 824, 71 N. W. 734, 66 Am. S. R. 475; Mast v. Murray, 122 Neb. 284, 240 N. W. 302. As stated in Mast v. Murray, *supra:* "It is the rule: 'Where the rent is payable periodically as yearly, quarterly or the like, and there is no provision for payment in advance, it is not due and payable until

the end of the year.' 16 R. C. L. 928, sec. 436." And as stated in the annotation to 126 A. L. R. 565: "Where by the contract the rent is payable either yearly, half yearly, quarterly, monthly, or weekly, and there is no provision for payment at any particular time during such periods, either expressly made or to be gathered by necessary implication from the acts and circumstances of the parties or by custom or usage in the community, the rent is not due and payable until the end of those respective periods."

However, appellant contends there can be no implied contract where there is an express agreement between the parties relative to the same subject matter, citing Acton v. Schoenauer, 121 Neb. 62, 236 N. W. 140, in support thereof. The foregoing is undoubtedly a correct statement of the law but has no application here. While the evidence adduced establishes there was some form of verbal arrangement between the appellant and his mother as to the former's use of these lands, appellant admits this arrangement never reached the status of having definite terms. Under this situation appellant would be required to pay a fair and reasonable annual rental for the premises he occupied during the period of the life estate. See, Stoddard v. Baker, 85 Neb. 729, 124 N. W. 159; Oakes v. Oakes, 16 Ill. 106; 32 Am. Jur., Landlord and Tenant, § 430, p. 349; 52 C. J. S., Landlord and Tenant, § 462, p. 201, § 470, p. 209. As stated in 52 C. J. S., Landlord and Tenant, § 470, p. 209: "* * * ordinarily, in the absence of an agreement to the contrary, the occupancy of premises belonging to another with the consent of the owner implies an agreement by the tenant to pay rent." And as stated in 32 Am. Jur., Landlord and Tenant, § 430, p. 349: "The occupancy of premises by one person with the consent or permission of the owner, or with the consent of the person entitled to assert a right to the possession of the premises, creates between the parties the relation of landlord and tenant, and in the absence of an agreement or circumstances in-

dicating a contrary intent, the law will imply an agreement on the part of the tenant to pay the reasonable value of his use and occupation." And, in this respect, we do not think the relationship of mother and son raises a presumption of gift in view of the fact that the appellant admits there was some arrangement between he and his mother that he was to pay his mother for the use thereof. See, Johnson v. Ghost, 11 Neb. 414, 8 N. W. 391; Fischer v. Wilhelm, 140 Neb. 448, 300 N. W. 350; Oakes v. Oakes, *supra.*

As already stated, appellee brought this action for an accounting of rents. Appellant contends that if appellee has a cause of action against him it is one at law and not in equity. Ordinarily a court of equity has no jurisdiction of an action for rent and claims for unpaid rent are separate and distinct causes of action for each term or payment involved. However, rent may be recovered in equity where the remedy has become difficult or where there is an uncertainty as to the title or the extent of the defendant's responsibility. See, Schuster v. Schuster, 84 Neb. 98, 120 N. W. 948, 29 L. R. A. N. S. 224; Fiala v. Tomek, 164 Neb. 20, 81 N. W. 2d 691; 32 Am. Jur., Landlord and Tenant, § 521, p. 427, § 523, p. 430, § 527, p. 434; 52 C. J. S., Landlord and Tenant, § 552b, p. 365. In Schuster v. Schuster, *supra*, we remanded the cause "with directions to take an accounting of the rents and profits of the land in controversy herein" but limited it to 4 years. In this respect the form of the action does not arrest the statute of limitations. See, Schuster v. Schuster, *supra;* Logan v. Davis, 190 Iowa 278, 180 N. W. 184; 32 Am. Jur., Landlord and Tenant, § 521, p. 427; § 25-206, R. R. S. 1943. As held in Schuster v. Schuster, *supra:* "An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until four years have elapsed from the accruing of such action." Of course any voluntary payment made by the debtor upon any cause of action would be sufficient to arrest the run-

ning of the statute of limitations with reference thereto. S. 25-216, R. R. S. 1943; Alexanderson v. Wessmann, 158 Neb. 614, 64 N. W. 2d 306. As stated in Alexanderson v. Wessmann, *supra:* "The voluntary payment of part of a debt arising on contract, a written acknowledgment of it, or a promise in writing to pay it tolls the statute of limitations except as is otherwise provided by section 25-216, R. R. S. 1943." But as stated in In re Estate of Anderson, 148 Neb. 436, 27 N. W. 2d 632: "A voluntary payment upon a claim otherwise barred by the statute of limitations is one that was intentionally and consciously made and accepted as part payment of the particular indebtedness in question under such circumstances as would warrant a clear inference that the debtor assented to and acknowledged the greater debt to be due as an existing liability."

We have come to the conclusion that although an accounting is not the proper form of action in cases to recover rents, however, because of the complexity of the situation as it relates to appellant's liability, it was proper for the trial court to proceed to try this case as one in equity.

Does the evidence adduced establish that the mother and appellant, on July 27, 1949, settled everything owing by appellant for his use of these lands for the years 1941 to 1948, both years included? An affidavit by the mother of that date, subscribed by her before F. B. Hurley, a Notary Public, contains the following language: "Affiant further states that subsequently, on February 21, 1941, she conveyed said premises * * * to her son, Joseph J. Daley, and that ever since said time he has been the owner of said premises; that in said deed she reserved the life use of said premises and that she has always had a satisfactory return from said land ever since said time and that her present arrangement with said Joseph J. Daley as to the income is entirely satisfactory to her." Hurley, a practicing attorney at Ponca, Nebraska, tes-

tified in regard to this affidavit that: "Well, the conversation principally was relative to this instrument which I prepared relating to delivery of the deed mentioned, and at that time she told me that her present arrangement with Joe was entirely satisfactory to her and everything had been settled up to date." We think this evidence, if admissible, together with all the circumstances established by the record, fully supports a finding that appellant and his mother had made a full settlement between themselves covering these years as far as appellant's use of the lands herein involved is concerned. The question then is, was Hurley disqualified to testify in regard thereto because of his relationship to the mother, he being an attorney?

The record shows that at the time this affidavit was drafted, signed by the mother, and subscribed by her before Hurley appellant was present. Whether or not Hurley represented the mother, appellant, or both is not too clear from the evidence, although we are inclined to think he was representing appellant. However, under our holdings, this would be immaterial for Hurley's evidence would be admissible in any event. If the mother was not represented on that occasion by Hurley the following from O'Connor v. Padget, 82 Neb. 95, 116 N. W. 1131, would apply: "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 in some other capacity." See, also, 70 C. J., Witnesses, § 545, p. 404. If both the mother and appellant were represented on that occasion by Hurley then the following from Jenkins v. Jenkins, 151 Neb. 113, 36 N. W. 2d 637, would apply: " 'When two or more persons employ or consult the same attorney in the same matter, communications made by them in relation thereto are not privileged inter sese. By selecting the same attorney, each party waives his right to place those communications under the shield of professional confidence. Either party

may introduce testimony concerning the same as against the other, or his heirs or representatives. * * *.' 58 Am. Jur., Witnesses, § 496, p. 277." See, also, 70 C. J., Witnesses, § 551, p. 410. If the mother was represented by Hurley and appellant was not then what was held in Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182, would have application. Therein we said: "Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943." See, also, 70 C. J., Witnesses, § 545, p. 404.

Since the mother died on June 22, 1952, the question arises, was appellant liable for rent for the year 1952? Death of the mother (life tenant) terminated her interest immediately and thereupon appellant became entitled to the possession of the real estate. Guthmann v. Vallery, *supra.* As stated in Guthmann v. Vallery, *supra:* "On the termination of the life estate the reversioner became at once entitled to the possession of the real estate; * * *."

The rent for 1952 was not due until March 1, 1953. As stated in 33 Am. Jur., Life Estates, Remainders, Etc., § 308, p. 813: "The right to rentals continues only until his death and no longer, if he is a life tenant for the duration of his own life." And in 31 C. J. S., Estates, § 65b, p. 81: "On the termination of a life estate, rights claimed through the life tenant cease and the remainderman is entitled to possession."

As stated in Johnson v. Siedel, 178 Iowa 244, 159 N. W. 677: "The authorities seem to hold that, without a special provision in the lease or by statute, rents are not apportioned in respect to time, so that the person who owns the reversion on the date the rent becomes due, is entitled to the entire rental matured that day. 1 Tiffany on Landlord and Tenant, Sec. 176; 2 McAdam on Landlord and Tenant (4th Ed.), Sec. 291; 24 Cyc. 1185; Russell v. Fabyan (N. H.), 61 Am. Dec. 629." See, also,

33 Am. Jur., Life Estates, Remainders, Etc., § 309, p. 813, § 310, p. 816, § 311, p. 816. As stated in 33 Am. Jur., Life Estates, Remainders, Etc., § 309, p. 813: "The general rule followed in the absence of contrary statute and in the absence of an intention in favor of apportionment appearing from the will or other instrument under consideration is that income consisting of rent money is not apportionable as between persons successively entitled, where the right of one person ends and that of another begins during a rent period."

And in 33 Am. Jur., Life Estates, Remainders, Etc., § 310, p. 816, it is stated: "If the estate of the life tenant terminates intermediate rent days, or before any rent has become due, the accruing rent becomes an incident of and is annexed to the estate of the reversioner. Whoever owns the reversion when the rent falls due is entitled to receive the whole sum, unless it is otherwise provided by contract or statute."

We think, in view of the above principles, that appellant was not liable for rents for the year 1952.

What does the evidence show was a fair and reasonable rental for these lands in 1949, 1950, and 1951? Appellee produced two well-qualified witnesses who testified a fair and reasonable rental was $20 an acre, whereas appellant produced a well-qualified witness who testified it was $10 an acre. The trial court found it to be $18 an acre and we are of the opinion that $18 an acre was the fair and reasonable rental value of these lands for each of these years or $2,790 per annum.

The appellant, during the years 1949, 1950, and 1951, paid the taxes assessed against these lands; paid for insurance on the improvements; and paid for repairs, improvements, and replacements on the property. Since it is the duty of a life tenant to pay the taxes, protect the improvements, and keep them in repair, we think the appellant should be allowed credit therefor but not for improvements or replacements. See, Spiech v. Tierney, 56 Neb. 514, 76 N. W. 1090; 31 C. J. S., Estates,

§ 44, p. 55; 33 Am. Jur., Life Estates, Remainders, Etc., § 448, p. 976, § 464, p. 1002.

As stated in Spiech v. Tierney, *supra*: "As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate."

Also in 33 Am. Jur., Life Estates, Remainders, Etc., § 448, p. 976: "* * * a life tenant is not bound to make 'extraordinary' repairs, such as those which involve substitution of new structures for old."

And as stated in 31 C. J. S., Estates, § 44, p. 55: "A life tenant must make all the ordinary repairs necessary to preserve the property and prevent its going to waste, but he need not make extraordinary repairs. * * * He is bound to keep the premises in as good repair as they were when he took them, not excepting ordinary or natural wear and tear, and this duty devolves on one holding under the life tenant." And in 31 C. J. S., Estates, § 45, p. 56: "A tenant for life is not bound to make any permanent improvements on the estate; * * *."

And as stated in 33 Am. Jur., Life Estates, Remainders, Etc., § 456, p. 984: "The rule appears to be well established that although a life tenant must keep the property in repair, he is under no general legal duty to make permanent improvements thereon, and according to the great weight of authority, if he makes such improvements voluntarily, he has no claim against the estate or a reversionary interest in it for compensation or reimbursement."

These items for 1949 were taxes $554.43, insurance $52.05, and repairs $162.45; for 1950 they were taxes $607.91, insurance $35.56, and repairs $55.77; and in 1951 they were taxes $773.44, insurance $92.70, and repairs $111.64. In this respect we have not allowed appellant the cost of putting in a new furnace in the house in 1951, which replaced an old one, because it is such an extraordinary repair, under the circumstances

of when it was put in, that we do not feel it should be allowed.

There is established the fact that during these 3 years the appellant advanced money to the mother and to others for the mother's care. It is apparent that this was done under and pursuant to some arrangement with the mother in relation to the appellant's use of the land. While a claim for money advanced to or for a deceased person must ordinarily be filed as a claim against the estate we think, under the circumstances here shown, appellant should be given credit for these amounts in this action for, as stated in Herrin v. Johnson Cashway Lumber Co., 153 Neb. 693, 46 N. W. 2d 111, and approved in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131: "It is the practice of courts of equity, when they once have obtained jurisdiction of a case, to administer all the relief which the nature of the case and the facts demand, and to bring such relief down to the close of the litigation between the parties."

On July 29, 1949, appellant paid to Margaret O'Neill, with the mother's approval, the sum of $2,500 as consideration for an agreement with Mrs. O'Neill that she would take care of the mother for the rest of the mother's life; during 1949, 1950, and 1951 appellant paid the mother $1,550; on December 14, 1951, appellant paid his mother's hospital bill at St. Vincent's hospital of $155.65; and later part of her doctor bill in the sum of $50. We think appellant should be given credit for all of these sums advanced to or for the mother's use. This leaves a balance owing by appellant for the years 1949, 1950, and 1951 of $1,668.40.

Other questions are raised by appellant but in view of what we have herein held it is not necessary to discuss them. We reverse the judgment of the trial court and remand the cause with directions to enter a judgment for appellee in the sum of $1,668.40 with interest at 6 percent from date rendered and all costs in the district

court, but against appellee as to all costs of the appeal to this court.

REVERSED AND REMANDED WITH DIRECTIONS.

CHAPPELL, J., participating on briefs.

MARILYN A. WALKER COMBES, APPELLANT, V. LUELLA B. ANDERSON ET AL., APPELLEES.
81 N. W. 2d 899

Filed March 22, 1957. No. 34104.

Appeal and Error. In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and that the only question that will be considered on appeal is the sufficiency of the pleadings to support the judgment.

APPEAL from the district court for Butler County: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

Charles E. Kirchner and *Tomek & Tomek*, for appellant.

Van Pelt, Marti & O'Gara, Chauncey C. Sheldon, Frederick M. Deutsch, and *Frederic J. Coufal*, for appellees.

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

BOSLAUGH, J.

Appellant seeks the recovery of damages from appellees because of injuries she sustained by collision of an automobile operated by Luella B. Anderson, one of the appellees, with an automobile in which appellant was riding with her husband, the proximate cause of which, as appellant alleges, was the concurrent negligence of appellees. The defenses pleaded by Sam Conley, one of the appellees, to the petition of appellant were a general denial and an assertion that the collision of the automobiles was proximately and solely caused by the negligence of appellant and her husband. The answer of

Luella B. Anderson and Theodore Anderson, appellees, was a denial of the assertions of the petition and an allegation that the collision of the automobiles was proximately caused by the negligence of the husband of appellant.

The trial of the issues resulted in a verdict of the jury for appellees and against appellant. A motion of appellant for a new trial was denied.

There is no bill of exceptions in this case. All presumptions exist in favor of the regularity and correctness of a judgment of a court of general jurisdiction and the litigant who asserts the contrary is required to establish the alleged defect or error by an exhibition of the record. It is only for errors appearing on the face of the record that the judgment of the district court can properly be reversed. Bryant v. State, 153 Neb. 490, 45 N. W. 2d 169; Doon v. Adcock, 127 Neb. 335, 255 N. W. 548. In the absence of a bill of exceptions, no question may or will be considered a determination of which requires an examination of evidence produced at the trial but it will be presumed that issues of fact raised by the pleadings were sustained by the evidence and that they were correctly decided. Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312.

Appellant attempts to classify the errors she relies upon as those based upon the transcript and those based on the bill of exceptions. There are enumerated in the first class many alleged errors in instructions given by the court. This court may not determine that any instruction, however erroneous, was prejudicial since the evidence may have been such as would have justified the trial court in directing the verdict which was returned by the jury. Doon v. Adcock, *supra*.

The only question which can be presented on appeal to this court in a civil action in the absence of a bill of exceptions is the sufficiency of the pleadings to support the judgment. Neighbors & Danielson v. West Nebraska Methodist Hospital, 162 Neb. 816, 77 N. W. 2d 667. The

pleadings support the final conclusion and action of the district court in this case. It should be and is affirmed.

AFFIRMED.

JOSEPH ROLL ET AL., APPELLEES, V. LEWIS MARTIN ET AL., APPELLANTS.
82 N. W. 2d 34

Filed March 29, 1957. No. 34064.

1. **Estoppel.** Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
2. ———. Where one by his own words or conduct willfully causes another to believe in a certain state of facts, as that he is not the owner of certain property, and thereby induces him to act on that belief so as to alter his own position, as by purchasing the same, the former is concluded from averring against the latter a different state of facts from that represented.
3. ———. Ordinarily estoppels in pais are available in favor of privies, provided the privity is created after the event out of which the estoppel arises, and provided the elements of such estoppel are present.
4. ———. Title to real estate may not be created by estoppel but a party may estop himself, after a transaction has been fully executed, from asserting that the title he, by his own acts, has created or aided in creating is not the true title.

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

Bernard M. Spencer, for appellants.

Edwin Moran, for appellees.

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

WENKE, J.

This is an appeal from the district court for Otoe County of an action wherein the trial court held the defendants, Lewis Martin and Chiona Martin, husband and wife, had, by their words, acts, statements, representations, and conduct, forever estopped themselves from denying the title of plaintiffs, Joseph Roll, Edward Roll, and Carl Roll, in and to certain lands described in the decree and permanently enjoined the defendants from in any manner interfering with the plaintiffs' use and occupancy thereof. After the foregoing decree had been rendered defendants filed a motion for new trial and this appeal is from the overruling thereof.

Appellees, in their amended petition on which the case was tried, claimed to own the lands herein involved by adverse possession and prayed that the title thereto be quieted and confirmed in them as the owners in fee simple by reason thereof. At the conclusion of their evidence, but before they rested their case, appellees asked leave of, were granted permission to, and did withdraw this issue. However, in their amended petition the appellees properly set forth the claim upon which the trial court granted the relief that it did, which appellees had prayed for.

Since this is an equitable action it will be reviewed here de novo. In view of the record, which discloses that the trial court viewed the premises, we think the following principles have particular application:

" 'While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.' Gentry v. Burge, 129 Neb. 493, 261 N. W. 854." Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502.

"This court has held that, when the court views the topography of a certain locality, its findings are entitled to great weight." Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647.

The evidence is in irreconcilable conflict on material matters. We have come to the conclusion that appellees' version of what happened is correct and will set forth the facts accordingly as it would serve no useful purpose to set out appellants' evidence that is in conflict therewith.

The lands herein involved are described by metes and bounds. We shall not set forth the rather lengthy description thereof but only state that they lie between the Chicago, Burlington and Quincy Railroad Company's right-of-way and what was Frazer's Island and are in Sections 14 and 15, Township 8 North, Range 14 East of the 6th P.M., in Otoe County, Nebraska.

Frazer's Island, also referred to in the record as Frazier's Island, was located in the Missouri River, near the Nebraska side, just below Nebraska City. In 1936 the United States government closed a channel of the Missouri River that was then flowing between the island and the Nebraska mainland. It did this by means of constructing an earthen dike across the channel. This caused the channel that was closed to fill with silt and some years thereafter the island became attached to the mainland.

The Martin family had lived on the island for many years. Their occupancy included three generations: Appellants, their children, and his parents. Sometime after the earthen dike was put in appellant Lewis Martin, whom we shall hereinafter refer to as Martin, built a fence along the west and north side of the land appellants were then occupying on the island. The fence built on the north side ran generally east and west along a wooden pile dike. It extended east to the Missouri River. The fences constructed on the west side ran generally north and south some distance east of the

channel that was closed. At the south end this north-south fence was 1,038 feet east of the center line of the railroad right-of-way and at the north end it was 608 feet east thereof. At the latter point it connected with the west end of the east-west fence along the wooden pile dike. The land here involved lies generally west and north of these two fences and they are the fences hereinafter referred to.

John McCarthy, who died on February 13, 1946, at the time of his death owned the record title to whatever land there was in Sections 14 and 15 which lay east of the railroad right-of-way and west of the Missouri River, which right-of-way was located on the Nebraska mainland and ran along the west bank of the channel that was closed in 1936. Just how much land there was between the right-of-way and the river, prior to 1936, is not shown although there was apparently some.

In the latter part of May or the first part of June 1946, while the estate of decedent John McCarthy was being administered by the county court of Otoe County, Vantine A. James, attorney for the estate, Otto H. Wellensiek, and T. Simpson Morton went to see Martin. They went to find out from him just what land decedent owned and the boundaries thereof as they related to appellants' land as James and Wellensiek were both interested in buying the land and James also wanted the information for the benefit of the heirs of the decedent. They found Martin at home and told him the reason for their coming. Martin then showed them the north-south and east-west fences he had built, walking along the north-south fence from the earthen dike north to the wooden piling dike and then east along it to the river. While doing so he told them he owned nothing west or north thereof, as that land belonged to either Woolsey or McCarthy, and that he only claimed to own the land that lay to the east and south thereof. James, relying on these statements of Martin, purchased from the heirs of decedent John McCarthy all their interests

in these lands. He paid a valuable consideration therefor. The deed of conveyance is dated April 5, 1947.

In 1948 James offered to sell these lands to appellees. Before buying this land appellees Joseph and Edward Roll made inquiries of Martin concerning it because they wanted to find out for sure what claims, if any, Martin was making thereto and what he considered the boundary lines to be. Martin told them, as he had the others in 1946, that he did not claim anything west of the north-south fence and nothing north of the east-west fence constructed along the wooden pile dike. Relying on these statements appellees, for a valuable consideration, purchased the interests of James in the lands, the deed being dated January 27, 1949.

In 1949 and 1950 appellees did considerable work on the land by breaking down the willows and other vegetation growing thereon. They did this with two bulldozers. In the summer of 1953 appellees sprayed the land by means of a plane. Some of the poisonous spray used apparently blew over onto a melon patch which Martin had east of the north-south fence and damaged it for Martin sued appellees in the county court of Otoe County on that basis. During the course of the trial Martin admitted appellees owned the land west of the north-south fence. In the fall of 1954 the appellees began clearing the area they had sprayed in 1953. They cleared some 12 to 15 acres. It was while they were doing this clearing that Martin first objected to their taking possession of the land. Martin then constructed a one-wire fence almost over to the railroad right-of-way thus, for all practical purposes, excluding appellees from the lands herein involved. This suit followed.

We find that neither Martin nor his father, Manley Martin, ever made any claim to any of the lands herein involved, until Martin did so in the fall of 1954, and that neither Martin nor his father did anything that resulted in their obtaining any rights thereto by adverse possession. In fact, it appears the first time any of the Mar-

tins attempted to take possession thereof was in the fall of 1954.

Appellants contend, since they were and are the owners of land on Frazer's Island and the area involved was the bed of the river, that they are entitled to all accretions to their land on the island to the thread of the closed channel as a matter of right; that they were not required to take possession thereof; and that failure to do so did not forfeit such right unless someone actually had established the right thereto by adverse possession. With these principles we find no fault and they are supported by the authorities cited. See, Briard v. Hashberger, 107 Neb. 199, 185 N. W. 430; Higgins v. Adelson, *supra;* Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737; Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538; 56 Am. Jur., Waters, § 479, p. 895, § 477, p. 892. Of course, James and Martin or appellees and Martin could have agreed upon their respective interests in the accretions adjoining their lands regardless of their exact legal rights. See Conkey v. Knudsen, 135 Neb. 890, 284 N. W. 737. Whether or not they actually did so we do not decide for it is not material to a decision herein.

But appellees' claim of right is not based on either accretion or adverse possession but on estoppel, consequently, neither of these principles has application here. In other words, the question presented is, do the facts as herein set forth estop appellants from asserting ownership to the lands herein involved?

In a comparable situation in Blodgett v. McMurtry, 34 Neb. 782, 52 N. W. 706, we said: "The rule is, where one by his own words or conduct willfully causes another to believe in a certain state of facts, as that he is not the owner of certain property, and thereby induces him to act on that belief so as to alter his own position, as by purchasing the same, the former is concluded from averring against the latter a different state of facts from that represented."

We said in Ricketts v. Scothorn, 57 Neb. 51, 77 N. W.

365, 73 Am. S. R. 491, 42 L. R. A. 794: "An estoppel in pais is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.' Mr. Pomeroy has formulated the following definition: 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' (2 Pomeroy, Equity Jurisprudence 804.)"

And in May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, we said: " 'Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. * * * The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.' 10 R. C. L., sec. 19, p. 689. See, also, 31 C. J. S., sec. 59, p. 236." See, also, Reed v. Williamson,

ante p. 99, 82 N. W. 2d 18; Bleicher v. Heeter, 141 Neb. 787, 4 N. W. 2d 897; Neset v. Rudman, —— N. D. ——, 74 N. W. 2d 826; Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618; 31 C. J. S., Estoppel, § 63, p. 248.

As stated in Colonial Theatrical Enterprises v. Sage, 255 Mich. 160, 237 N. W. 529: " 'It has been held in many cases that if the owner of land knowingly stands by and permits his property to be mortgaged or sold by another, to one who is to the owner's knowledge relying on the apparent ownership of the person executing the conveyance, such conduct will estop the owner from asserting his title against the mortgagee or grantee.' Craig v. Crossman, 209 Mich. 462, 480."

"An equitable estoppel may be claimed by a party or privy, but not by a stranger or volunteer. * * * ordinarily estoppels in pais are available in favor of privies, provided the privity is created after the event out of which the estoppel arises, and provided the elements of such estoppel are present." 31 C. J. S., Estoppel, § 130, p. 397. In this respect appellees, as grantees of Vantine A. James, stood in privity with him as to his right to set up estoppel as a defense to any claims made by Martin.

Estoppel may be urged to protect rights, not to create them, but the principle here controlling is stated in Colonial Theatrical Enterprises v. Sage, *supra*, as follows: "In Stevens v. DeBar, supra (229 Mich. 215, 200 N. W. 978), with review of the authorities, it was said: 'This court has consistently held that title to real estate may not be created by estoppel, but in numerous cases this court has also held that a party may estop himself after the arrangements have been fully executed from asserting that the title he by his own acts has created or aided in creating is not the true title.' See, also, 50 A. L. R. 685."

Here the parties did not know what Martin claimed was his. They inquired of him in regard thereto and were informed. Relying upon such information they

acted thereon and expended their funds. To now permit Martin to assert otherwise would be inequitable and a fraud upon those who believed what he told them. We think he should be estopped from doing so. We therefore affirm the trial court's decision.

AFFIRMED.

ARCHIE D. DREW ET AL., APPELLANTS, V. CHARLES H. HAWLEY ET AL., APPELLEES.
82 N. W. 2d 4

Filed March 29, 1957. No. 34114.

1. **Specific Performance: Wills.** One seeking specific performance of an oral contract to will property to him has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby.
2. ———: ———. An interested third person who seeks to enforce an oral contract to will property to him has the burden not only of proving the contract but also that the obligations imposed by the contract have been performed.
3. **Executors and Administrators: Frauds, Statute of.** When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and unequivocal.
4. **Wills.** Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death, the presumption is that the testator destroyed it animo revocandi.
5. ———. The presumption that a will has been destroyed animo revocandi is one of fact, and it may be overcome by evidence, circumstantial or otherwise, to the contrary.
6. ———. The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence (1) that the grantor, testator, or donor was a person who would be subject to such influence, (2) that there was an opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence.

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

Lyle B. Gill, for appellants.

Sidner, Lee, Gunderson & Svoboda and *Robert L. Flory,* for appellees.

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

YEAGER, J.

This is an action in equity by Archie D. Drew and Frank M. Drew, plaintiffs and appellants, against Charles H. Hawley, the First National Bank of Fremont, Nebraska, a corporation, the Equitable Savings and Loan Association, a corporation, and the Nebraska State Savings and Loan Association, a corporation, defendants and appellees. The purpose of the action is to have a trust imposed upon certain moneys and properties which plaintiffs claim properly belong to them and others similarly situated by virtue of an agreement between Fred D. Drew and Nellie H. Drew, husband and wife, both now deceased, to make a joint, reciprocal, and irrevocable will, which will was duly made and was valid and subsisting at the time of their death, all of which moneys are claimed by the defendant Hawley as his own.

A trial was had to the court at the conclusion of which a decree was rendered in which it was adjudicated that the defendant Hawley was the true owner of all the money and property in question. Thereafter a motion for new trial was filed and by the court overruled. From this adjudication and the order overruling the motion for new trial the plaintiffs have appealed.

By the petition which is the basis of this action it is substantially alleged that on or about July 28, 1947, Fred D. Drew and Nellie H. Drew entered into an oral agreement to execute joint, reciprocal, and irrevocable wills whereby the survivor was to receive all the property of the two and that on the death of the survivor all of the property was to go to the plaintiffs herein and to a group of others similarly situated, whose names it is not necessary to set forth herein; that in pursuance of the agreement a will was duly made and executed on or

about July 28, 1947; that the will was never revoked by the two parties; that Fred D. Drew died on October 13, 1954, at the age of 81 years and Nellie H. Drew died June 17, 1955, at the age of 84 years; that during the lifetime of Fred D. Drew and Nellie H. Drew they had a joint bank account with right of survivorship in the First National Bank of Fremont, Nebraska, and that they held jointly stock certificates, with right of survivorship, in the Nebraska State Savings and Loan Association of Fremont, Nebraska, and the Equitable Building and Loan Association of Fremont, Nebraska, now known as Equitable Savings and Loan Association of Fremont, Nebraska; that on May 28, 1954, the signature of Charles H. Hawley was added as a joint tenant with right of survivorship to the account in the First National Bank; that on or about March 10, 1955, the certificates of stock in the amount of $8,800 in the Nebraska State Savings and Loan Association were placed jointly in the names of Nellie H. Drew and Charles H. Hawley; that the same arrangement was effected as to $1,600 in stock of the Equitable Savings and Loan Association; and that on October 15, 1954, stock certificates in the Equitable Building and Loan Association in the amount of $2,562.80 were cashed and the money deposited in the joint account in the First National Bank.

It is further substantially alleged that Charles H. Hawley became joint tenant with right of survivorship in the bank account by reason of his undue influence exercised upon Fred D. Drew and Nellie H. Drew, and in the savings and loan certificates by his undue influence upon Nellie H. Drew.

It is further alleged in substance that on account of undue influence of Charles H. Hawley, which caused him to become joint tenant with right of survivorship as described, the contract of Fred D. Drew and Nellie H. Drew was breached, the consequence of which was to deprive the plaintiffs and the others similarly situated of the money and property involved, which money and

property would have passed to them under the provisions of the will contracted to be made.

It is further pleaded substantially that the defendant Hawley has possession and control of the moneys and shares of stock in question.

The purpose of the action is, during its pendency, to restrain the bank and the savings and loan associations from paying any money to the defendant Hawley and from making any transfers of the certificates, and as to the defendant Hawley to have the agreement to make the will established and to cause the money and property in the bank and in the savings and loan associations and any money received by the defendant Hawley, by virtue of the joint tenancy with right of survivorship arrangements described, to be distributed to the plaintiffs and the others similarly situated.

The bank and the two savings and loan associations filed separate answers, the contents of which are not deemed of importance here.

The defendant Hawley filed a separate answer and an amended answer. The amended answer contains the basic contentions of this defendant. To the extent necessary to set them forth herein, he denied generally the allegations of the petition. He admitted that Fred D. Drew and Nellie H. Drew attempted to make a joint will in 1947. He alleged substantially that if Fred D. Drew and Nellie H. Drew made a will in 1947 such will was not their last will and testament as of the time of their deaths; and that the moneys and property which are the subject of controversy in this action were not the subject of testamentary disposition for the reason that they were the property of this defendant by reason of the fact that he was validly a joint tenant with right of survivorship of the bank account at the time of the death of Fred D. Drew, and that he was validly a joint tenant with right of survivorship of the bank account and the certificates of stock in the Nebraska State Savings and Loan Asso-

ciation and the Equitable Savings and Loan Association at the time of the death of Nellie H. Drew.

The plaintiffs for reply to the extent necessary to state here filed a general denial.

The district court after a trial on these issues, as has been pointed out, found and decreed that the plaintiffs had failed to sustain a cause of action against the defendants or either of them.

As grounds for reversal of this adjudication the plaintiffs have set forth numerous assignments of error. These however will not be referred to specifically since in summary they present the question of whether or not the evidence under law sustains a cause of action in favor of the plaintiffs.

In order that it may be said that the cause of action has been sustained the preponderance of the evidence first must show that there was an agreement to make a reciprocal will and that there was part performance thereof. In Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478, it was said: "One seeking specific performance of an oral contract to will property to him has the burden not only of proving the contract but also that he has performed the obligations imposed upon him thereby." See, also, Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793.

The case at bar is not of course, in the strict sense, a case seeking specific performance as was the case of Sopcich v. Tangeman, *supra,* but it is one having the same purpose. The rule however in the class of cases wherein interested third parties are seeking to enforce such an agreement is the same. This was pointed out in Eagan v. Hall, 159 Neb. 537, 68 N. W. 2d 147. That was a case wherein a third party was seeking the benefit of an alleged oral agreement to make a will. In the syllabus it was said: "When one claims the estate of a deceased person under an alleged oral contract, the evidence of such contract must be clear, satisfactory, and

unequivocal." See, also, Wyrick v. Wyrick, 162 Neb. 105, 75 N. W. 2d 376.

The record in this case conclusively shows that on or about July 28, 1947, Fred D. Drew and Nellie H. Drew, in pursuance of an agreement, did execute a joint and purportedly irrevocable will in form and substance as contended by the plaintiffs. A stipulation of the parties unequivocally so purporting appears in the bill of exceptions.

The record fails to disclose any information as to what became of the will thereafter. As to whether or not it was destroyed or revoked by the parties there is no information. There is testimony by the defendant Hawley the effect of which is to say that at the request of Nellie H. Drew he procured for her from a safety deposit box an envelope which she said contained a will. He said he did not know what it contained and that the contents of the will, if there was one, were never disclosed to him.

This state of the record leaves the plaintiffs without evidence to sustain their burden of showing that the will of 1947 had not been revoked by Fred D. Drew and Nellie H. Drew in their lifetime. In Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383, it was said: "Where a will is shown to have been made and left in the custody of the testator, if it cannot be found after his death the presumption is that the testator destroyed it animo revocandi." This pronouncement was quoted with approval in the syllabus of In re Estate of Ladman, 128 Neb. 483, 259 N. W. 50. See, also, In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

Also in Williams v. Miles, *supra,* it was said: "But this is a presumption of fact only. It may be overcome by evidence, circumstantial or otherwise, to the contrary; and declarations of the testator may be shown for this purpose." This was likewise quoted with approval in the syllabus of In re Estate of Ladman, *supra.*

In the case here the presumption must prevail, since there is no evidence of any kind or character to overcome it.

It follows therefore that the plaintiffs have failed to establish any right to recover anything for themselves, or the others claimed to be represented by them, by virture of any contract to make a will entered into between Fred D. Drew and Nellie H. Drew or any will executed in pursuance of such agreement.

Assuming however that there was such a will as claimed which had not been revoked prior to the death of the makers, still on the record in the case none of the property on which it is sought to have a trust imposed could pass under the will, and for that reason the plaintiffs could not be allowed to prevail in this action.

It is not contended by the plaintiffs that in form the defendant Hawley did not take all of the property in question as the survivor of joint tenancies. It is the contention that the joint tenancies came into being as the result of undue influence of Hawley exercised upon the other tenants.

A well-settled rule as to proof of undue influence is stated as follows in Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117: "The burden of proof is on the person asserting undue influence to prove by a preponderance of the evidence (1) that the grantor, testator, or donor was a person who would be subject to such influence, (2) that there was an opportunity to exercise such influence, (3) that there was a disposition to exercise such influence, and (4) that the result was the effect of such influence." This rule has no exceptions. In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573; In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80.

There is no evidence in the record either direct or circumstantial to support any of these elements except that of opportunity. The plaintiffs called no witness to testify with regard to this or, for that matter, any other

phase of the case, except Hawley. And as a witness the only inquiry made of him related to the matter of his removing an envelope and contents from a safety deposit box.

Hawley, who was a brother of Nellie H. Drew, testified in his own behalf, as did representatives of the other defendants. In none of this was there anything tending to sustain the charge of undue influence. Their testimony was all to the contrary. Also there was no evidence upon which to base a finding that there was a failure of regularity in the creation of the joint tenancies with right of survivorship by which the defendant Hawley became a tenant.

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

AFFIRMED.

SCHOOL DISTRICT NO. 228 OF HOLT COUNTY, NEBRASKA, APPELLANT, V. THE STATE BOARD OF EDUCATION, A BODY CORPORATE, ET AL., APPELLEES.
82 N. W. 2d 8

Filed March 29, 1957. No. 34131.

1. **Statutes.** In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will.
2. **Highways.** The word "highway" as used in section 79-701(5), R. S. Supp., 1955, means a public road of general use by the public in travel from place to place.
3. ———. The word "improved" qualifying "highway" as used in section 79-701(5), R. S. Supp., 1955, means a highway made better for travel by human effort. This includes one or more of the elements of grading, elevating or lowering a roadbed, surfacing, drainage, and like betterments.
4. ——— The word "reasonably" qualifying "improved highway" as used in section 79-701(5), R. S. Supp., 1955, means sufficiently

improved to meet the normal demands put upon its use by children of school age required to attend school regularly.

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

Davis, Healey, Davies & Wilson, Robert A. Barlow, and *Leo F. Clinch,* for appellant.

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

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

SIMMONS, C. J.

Plaintiff, and appellant here, is a school district in Holt County. The appellees are the State Board of Education and the Commissioner of Education. Directly, the State Board of Education is involved. We refer to it hereinafter as the defendant.

Plaintiff sought to enjoin the defendant from enforcing a ruling of nonapproval of the high school of plaintiff. The effect of the ruling was to deny high school tuition advantages to plaintiff. Plaintiff's school was also classed as a nonoperative high school. Issues were made and trial was had resulting in a judgment of dismissal of plaintiff's cause of action. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause with directions.

Plaintiff operates a 10-grade school at Amelia. The ninth and tenth grades, as a 2-year high school, only are involved.

On March 1, 1956, defendant notified the plaintiff that its high school operations would not be approved for the collection of free high school tuition and would not be exempt from the free high school tuition levy for the school year 1956-1957.

The nonapproval rested on the ground of an extremely limited high school program and inadequacy of facilities.

Section 79-328(5), R. S. Supp., 1955, provides in part that the State Board of Education shall have the power to "establish standards and procedures for classifying, approving, and accrediting schools, including the establishment of minimum standards and procedures for approving the opening of new schools, the continued legal operation of all schools, and for the approval of high schools for the collection of free high school tuition money, * * *." Plaintiff challenged the constitutionality of a part of that act. The challenge rests upon our decision in School District No. 39 v. Decker, 159 Neb. 693, 68 N. W. 2d 354.

The defendant did establish criteria for approved Public Schools to be effective January 1, 1956. However, filing with the Secretary of State did not occur until June 22, 1956, almost 4 months after the letter of March 1, 1956, was written to plaintiff.

The plaintiff argues here that under the provisions of sections 84-901 to 84-906, R. R. S. 1943, these criteria are not binding upon it in any event insofar as this case is concerned. The defendant does not contend otherwise and accordingly suggests that the constitutional question is not here for determination.

The second ground for the position taken by the defendant in the notice to the plaintiff is bottomed on the provisions of section 79-701(5), R. S. Supp., 1955, which provides in part: "If for three consecutive years the enrollment of an existing Class II district shall be * * * less than ten pupils in the case of a district maintaining a two-year high school, such district shall not continue to operate * * * if such two-year high school shall be within fifteen miles on a reasonably improved highway of any high school."

It is on the above statute that defendant bases the contention that plaintiff is a nonoperative school and not entitled to free high school tuition benefits under section 79-4,103, R. R. S. 1943.

It is conceded that plaintiff is a Class II school district

and that its enrollment is less than 10 pupils in the high school grades.

The question which we are asked to decide requires the construction of the provision which is that the district shall not continue to operate if it is "within fifteen miles on a reasonably improved highway of any high school."

The nearest high school to Amelia is at Chambers. There are two roads between Amelia and Chambers. One road is to go west from Amelia along an improved road, formerly a part of the state highway system, then south, and then east along an improved state highway. That distance is about 17 miles. The other is to go east from Amelia a half mile, thence south 2 miles, and thence east to Chambers on the state highway. This distance is about 11 miles. In miles the second road is within the 15-mile requirement of the statute. The question is: Is it a "reasonably improved highway"?

Section 79-701, R. S. Supp., 1955, was introduced in the 1953 Legislature as LB 313 as an amendment to section 79-701, R. R. S. 1943. So far as material here, as introduced it provided "that no existing Class II district shall continue to operate if the high school enrollment in that district is * * * less than twelve pupils in districts maintaining a two-year high school."

The Education Committee reported the bill with an amendment providing that "if, for three consecutive years the enrollment of an existing Class II district shall be * * * less than ten pupils in the case of a district maintaining a two-year high school, such district shall not continue to operate * * * if such two-year high school shall be within fifteen miles of any high school." Nebraska Legislative Journal, 1953, p. 645.

The Education Committee, in its statement to the Legislature, said: "The bill is also amended so that no such district would be closed unless there was a high school within a 15 mile radius."

When the bill was considered on General File the

words "on a reasonably improved highway" were inserted following the words "fifteen miles." Nebraska Legislative Journal, 1953, p. 771.

This review of the history of the bill demonstrates a consistent purpose of the Legislature to relax the terms of the bill as proposed as to number of pupils enrolled, the period of time calculated as to the enrollment, the distance between schools, and finally as to the quality of the highway or highways involved in calculating distances. It evidences a legislative intent to protect the small enrollment high school and pupils from the results that would follow from the application of the strict provisions of the bill as originally introduced.

This brings us to a construction of the clause "a reasonably improved highway." Here the Legislature used words of common usage and understanding to express its intent. As was said by the Supreme Court of the United States in Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 1167: "The use of common experience as a glossary is necessary to meet the practical demands of legislation."

The books give us little help in reaching an answer to the meaning of the clause. Here we must draw upon common experience in reaching an understanding of the terms used.

We have expressed the rule as follows: "In the construction of a statute, effect must be given, if possible, to all of its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account, in order to determine the legislative will." Nacke v. City of Hebron, 155 Neb. 739, 53 N. W. 2d 564.

The word "highway" is one of variable meaning. We think it clear that the Legislature did not use the word in the sense of a highway designated as a part of the state highway system as defined in section 39-1302, R.

S. Supp., 1955. To so construe it would be to restrict its obvious meaning as used here.

The Legislature in section 39-226, R. S. Supp., 1955, provided that primary county roads shall include direct highways leading to and from rural schools where 10 or more grades are being taught. There the words highway and road are used somewhat interchangeably.

As here used, we think the word highway means a public road of general use by the public in travel from place to place. In fact the Legislature in section 39-210, R. R. S. 1943, uses the term highway in reference to graveling of a highway which connects any unincorporated village with a paved or graveled state or county highway. The road here involved fits that description. When "passable" it is of general use by the public. We conclude that the shorter road involved here is a highway within the meaning of section 79-701(5), R. S. Supp., 1955.

This brings us to the construction of the word "improved" which qualifies "highway" in the act. We think it is used here in the sense of being made better for travel by human effort.

This includes one or more of the elements of grading, elevating or lowering a roadbed, surfacing, drainage, and like betterments. The extent of the improvement required is indicated by the qualifying word "reasonably."

We think the word reasonably is here used in the sense of sufficiently. That is, the highway must be improved sufficiently to meet the normal demands put upon its use by children of school age required to attend school regularly. An element to be considered in this determination is the use of the automobile by school children as a common means of transportation. The Legislature has recognized that fact. It has provided in section 60-407(2), R. S. Supp., 1955, for probationary operator's licenses to minors between the ages of 16 and 20 years. In section 60-407(3) the Legislature has provided that a

minor over the age of 14 years (with certain exceptions) may be issued a limited permit to drive a motor vehicle to and from the school building where he attends school if he lives a distance of 1½ miles or more from such school.

The issues here relate themselves to the road east from Amelia one-half mile, thence south 2 miles to where it connects with the state highway. The land over which this road passes is over a water basin where flowing wells are common. The water table is near the surface. The soil is a light sand-powder, as described by one witness. It blows readily with the wind. The building and maintenance of improved roads under these conditions require grading and elevating of a roadbed, then covering its surface with clay, and then placing on top of that gravel or other hard surface material.

For the first half mile east of Amelia and a short distance to the south, the road had been graded and elevated recently preparatory to surfacing with clay and gravel. A county supervisor testified that he expected to get clay and gravel for and to put it on that portion of the road, and that without it the life of the grade would be about 90 days, the reason being that the uncovered sand in the grade would blow away in about that time.

At the south end of the north-and-south 2 miles is a short length of road about which no particular complaint is made. In between these two sections of the road on the north-and-south portion is a strip of road from 1 mile to 1½ miles in length that must meet the test of being a reasonably improved highway if the decision of the trial court is to be sustained.

This traveled portion of the road is described, without dispute, as being from 1 to 6 feet below the surface of the land on either side. Witnesses refer to it as a channel where the traveler is expected to move along the lowest part of the road. The reasonable inference is that this depressed roadbed has resulted from the light sand being blown away.

There is no evidence that any effort has ever been made to improve that part of the road. It affirmatively appears that for 15 years last past it has never been regraded or reshaped. It further affirmatively appears that the county is without funds to do it and has no present intention of improving this section of the road.

It further appears, without dispute, that this section of road, being below the surrounding land, fills readily with snow, blocking its use more quickly than an elevated road, and making snow removal more difficult. It is a road that the officials deem of secondary importance in removing snow when snow blocks occur.

It further appears that when the frost goes out of the road in the spring that this section has "no bottom" and its use by automobiles is impossible as a result on those occasions.

The road is without adequate drainage. In times of heavy rainfall water flows into the road from the surrounding land and has no outlet save when it rises above the level of the surrounding land. One witness testified that under those conditions the road has been impassable to automobiles for periods of from 1 hour to 3 days at a time.

Several witnesses testified that the total number of days in a year when the road would be impassable would be from 10 days to 3 weeks or more. No witness testified that it is more than a "passable" road at any time.

Other witnesses testified that during the time the road is impassable for any of the above reasons that it has been necessary either to use the longer road or to take children to school by the use of a tractor, driving out in the fields, sending them by horseback, or having them walk.

We find no fact basis in this record to support a finding that this length of road is a reasonably improved highway within the legislative intent. In fact it is not an improved highway in any sense. Man's use and na-

ture's forces have worsened instead of bettered it for travel.

The order of the defendant holding that plaintiff's high school is a nonoperative school is without statutory authority under section 79-701, R. S. Supp., 1955. The defendant here rests the validity of its order and the judgment of the trial court on that provision.

Accordingly the judgment of the trial court is reversed and the cause remanded with directions to render a decree in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RALPH W. SLOCUM, ADMINISTRATOR OF THE ESTATE OF MARY BOHUSLOV, DECEASED, APPELLANT, V. FRANK BOHUSLOV, APPELLEE.

82 N. W. 2d 39

Filed March 29, 1957. No. 34136.

1. **Life Estates.** The owner of a life estate is entitled to all the income from the property.
2. ———. If the life tenant acquires other property by investment of the income, such property is subject only to his disposition of it.
3. **Banks and Banking.** Section 8-167, R. R. S. 1943, was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit.
4. **Banks and Banking: Joint Tenancy.** If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner.
5. **United States: Contracts.** A United States savings bond is a contract between the federal government and the purchaser and Treasury Department regulations governing such bonds are incorporated into the contract by reference and are beyond the reach of state law to modify or destroy.
6. ———: ———. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract.

7. ———: ———. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond.
8. Trusts. The burden of establishing a constructive trust is upon the litigant who asserts the existence thereof by evidence that is clear, satisfactory, and convincing.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Robert A. Nelson and *Richard H. Williams,* for appellant.

John E. Mekota, for appellee.

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

BOSLAUGH, J.

Appellant seeks an adjudication that described personal property was owned by Mary Bohuslov at the time of her death; that appellant is entitled to the possession of it; that a trust be impressed on it in favor of appellant; and that an accounting be had of money used by appellee in the purchase of other designated property that is now occupied and used by him and of all income and amounts received by appellee from the property listed and described in this case as belonging to the deceased at the time of her death.

Frank Bohuslov, Sr., a resident of Lancaster County, died testate October 6, 1915. His heirs were Mary Bohuslov, his widow; Frank Bohuslov and Emil Bohuslov, his sons; and Christina Bohuslov, his daughter. The will of the deceased was admitted to probate and his estate was administered by proceedings had in the county court of Lancaster County. These proceedings terminated February 7, 1917. The deceased, by his will, gave all his property to his widow for her use and benefit during her life and the remainder equally to his three children. The children of the deceased were re-

spectively 21 years, 19 years, and 12 years of age at the time of the death of their father.

Mary Bohuslov, a resident of Lancaster County, died intestate August 4, 1953. Her children, Frank Bohuslov, Emil Bohuslov, and Christina Kraus, whose maiden name was Christina Bohuslov, were adjudged January 13, 1954, to be her heirs by the county court in which proceedings are pending for the administration of her estate. Appellant is the duly appointed and qualified representative of the estate of Mary Bohuslov, deceased.

Frank Bohuslov, Sr., owned the north half of Section 31, Township 9 North, Range 5 East of the 6th P. M., Lancaster County, Nebraska. He and his family were living on the land when he died. His widow and three children continued to do so and by their joint efforts operated the farm and carried on the activities appropriate to the land except Emil Bohuslov left and was at Sargent, Nebraska, during the months of December 1916 and January 1917; at Huron, South Dakota, during the months of September and October 1918; and at Crete, Nebraska, during the months of November and December 1918 and January and part of February 1919. They were industrious, diligent, and frugal. Mary Bohuslov, hereafter sometimes designated deceased, with the assistance of her daughter, did the housework and they did additional work on and about the farm. The income realized was put in one fund. There was no compensation as such paid to any of them. What they received was substantially limited to the necessities of life. The mother was in charge. She handled the finances, made all purchases, and paid all expenses. There was a mortgage of $2,700 on the farm. The indebtedness secured by it was paid and the mortgage discharged probably during the year 1917. This situation continued until March of 1920. About March 20, 1920, Emil, without warning to his older brother, departed, took the family automobile, and disposed of it. The other members of the family were left without means of trans-

portation. Emil went to California but this was not known at that time. He says the first time he communicated with his mother after he left in March 1920 was in April 1921. Appellee says Emil was not heard from until 1925. In any event he severed his residence on the home place and had nothing thereafter to do about or with any of its activities or concerns except he made three visits there, one in 1925, one in the summer of 1928, and the third and last in 1940. The mother continued to live at the same place for 13 years after that but he did not see or visit her, neither did he attend her funeral, though he asserts that their relationship was normal and affectionate.

The deceased in 1920 desired to be relieved of looking after matters concerning the property, finances, and operation of the farm and home and secured appellee to take over these responsibilities. She had handled these matters since the death of her husband. She did banking business at the City National Bank of Crete and at Denton as long as there was a bank there. She did the buying of necessary things and she paid the bills. In short, she took over where her husband left off and carried on until appellee, at her request, relieved her in the year 1920. He thereafter had charge of and conducted all the transactions and performed all things necessary or incidental to the affairs in which his mother or he was interested. He did, however, fully inform and consult with his mother about each matter before he acted concerning it through the years thereafter until her death.

Christina Bohuslov was married to Joseph J. Kraus in September 1925. She and her husband moved on a farm a few miles from the place where her mother and appellee resided. She was frequently at the home place. She had a normal relationship with her mother. She sold to appellee and she and her husband on March 21, 1942, conveyed to appellee by deed all her title and interest in the land owned by her father at the time of

his death, and she sold and conveyed to appellee on that date all her interest in the personal property belonging to her father at the time of his death or belonging to his estate. The consideration paid her by appellee for the property she sold and conveyed to him was $3,200. There is no indication in the record that she was not satisfied with that transaction. She was not consulted about and she had no part in the proceedings to administer the estate of her mother commenced by her brother Emil or in this litigation.

In the period of about March 1925 through April 1927 Emil received from appellee $3,416. The first remittance to Emil was $600 in March or April 1925. He could not say while a witness who signed the check representing that remittance but it was probably appellee as he claims since he had charge of all finances and had been making all payments since 1920. Emil on this account executed and delivered a note, dated January 2, 1928, payable to appellee or order, 12 months after date, at The City National Bank of Crete, with interest at 4 percent per annum, for the sum of $3,416. This note or any part of it has not been paid to appellee. Emil insisted that appellee buy his interest in his father's estate. He demanded $5,500 for it. If appellee did this he had to borrow a part of the amount. He consulted the City National Bank of Crete of which he was a customer. The bank refused to make a loan for that purpose because it considered the amount required out of reason when compared to the value of the property. The mother of appellee urged him to pay Emil the $5,500. "She said to give that to him. She told me, 'You get this money and give it to him, and he is going to leave us alone. He will be paid off.' " The mother asked appellee to approach the Crete State Bank and seek a loan. He did and he secured a loan from that bank and paid the $5,500 for which he took from Emil and his wife a deed dated November 18, 1931, for all his title and interest in the land owned by his father

at the time of his death, and a bill of sale dated November 18, 1931, from Emil for all his interest in the personal property. Emil received and has retained the consideration paid by appellee.

Appellee purchased the south half of the southeast quarter of Section 25, Township 9 North, Range 4 East of the 6th P. M., Seward County, Nebraska. The deed, dated February 17, 1920, was made to him as grantee. The deceased knew when this land was to be sold and she talked with appellee concerning it. She advised him to go over and buy it. He acted upon her advice and bought the land for $5,600. There was no objection or complaint from anyone at that time because the title to it was put in the name of appellee. He borrowed the money from the City National Bank of Crete and the State Bank of Denton to pay the purchase price. The former was given a first mortgage on the land and the note to the Denton bank was not secured. The notes were paid from the income realized from the farming operations carried on by appellee of the land owned by his father at the time of his death and the 80 acres of land purchased by appellee. The two places were used as a unit and the income from each was placed in one fund. Appellee conveyed the 80 acres of land bought by him to his mother by deed which was acknowledged November 22, 1928. It was promptly recorded in the public records of Seward County. The deceased conveyed the 80 acres of land to appellee by warranty deed dated December 5, 1929. It was recorded without delay in the proper public records. The deceased had full knowledge and realization of all the facts concerning this land and the transactions involving it. She participated in and approved what was done and the final result was exactly what she desired.

In the period from October 1942 through December 1952 appellee bought 47 United States bonds. They were issued and continued, as suggested and requested by the deceased, with Frank Bohuslov or Mary Bohuslov as

payees. The deceased had full knowledge as to all facts concerning them and she approved and acquiesced therein. The facts were her choice and as she wanted them. She saw many of the bonds and all the checks received in payment of interest on them. She made and kept her personal record of the bonds and knew exactly how many there were. There was a deposit account in the City National Bank of Crete in the names of Frank Bohuslov or Mary Bohuslov at the time of her death.

The district court found generally for appellee and against appellant; that appellant had no interest in and was not entitled to the possession of any of the property involved in this case except certificate No. 5578 representing 24 shares of stock of Nebraska-Iowa Packing Company in which appellee disclaimed any interest; and that a trust should not be impressed upon the property in favor of appellant. A judgment was rendered in harmony with the findings and the case was dismissed. A motion by appellant for a new trial was denied and he contests the correctness of the judgment by this appeal.

The essence of the claims of appellant is that the personal property involved herein, and described in detail in a copy of an inventory attached to and made a part of his amended petition, represents and resulted from the income of the life estate of Mary Bohuslov in the property given to her by the will of her deceased husband; that title to the property was owned by Mary Bohuslov at the time of her death; that it constitutes assets of her estate although possession and the legal title thereto may be held by appellee; that appellee has continued in the possession of and enjoyed all the income from all the personal property described herein as aforesaid since the death of his mother; and that deceased, an uneducated person without knowledge of business affairs and only slight knowledge of the English language, was the victim of fraud and undue influence perpetrated by appellee, and he thereby took title to the property in-

volved in his name and because thereof a trust should be impressed thereon in favor of appellant. Appellee denies the claims of appellant, pleads the statute of limitations, and asserts that he is rightfully in the possession and is the owner of the property by absolute title.

Appellant makes no claims herein for recovery of any personal property received by Mary Bohuslov from the estate of her deceased husband by virtue of the will of the deceased or for the value thereof. This is not important because appellee became the owner of all the property owned by his deceased father, except the life estate given to his mother therein, when he purchased and received conveyances therefor from his brother and sister.

The testator did not direct that his estate be held in trust for his widow, Mary Bohuslov. He gave her the full, unrestricted possession, use, enjoyment, and benefit thereof during the term of her natural life. She did not take a life estate in the property of the testator as trustee. She, as life tenant, was entitled to and owned by absolute title everything in the nature of income, profit, and gain realized or accrued from the property during her tenancy. The testator did not express or indicate a contrary intent by the language of his will. In Ellis v. Flannigan, 279 Ill. 93, 116 N. E. 618, the Illinois court said: "The devise of a life estate in property carries with it the unrestricted use of the income, and property purchased with the income is not subject to the terms of the will in the absence of some provision to that effect." In the opinion this language appears: "The testator declared his purpose to be to secure a sure and permanent support for his wife during her life. In carrying out this purpose he gave to her a life estate in all his property * * *. Being the owner of the life estate she was entitled to all the income from the property and was under no obligation to account for it to anyone. * * * The gift of the life estate carried with it the unrestricted use of the income * * *. If she

was able from the income of her husband's estate, either with or without her own earnings, to acquire other property, such property was not subject to the provisions of his will but was subject to her own disposition." See, also, In re Estate of Wecker, 123 Neb. 504, 243 N. W. 642; Milner v. Brokhausen, 153 Iowa 560, 133 N. W. 1068; Whitehill v. Whitehill, 211 Iowa 475, 233 N. W. 748.

The deposit account of $3,070.40 in the City National Bank of Crete was in the names of Frank Bohuslov or Mary Bohuslov at the time of the death of the latter. The deposit became the sole and absolute property of appellee, the surviving co-owner, at the time of the death of the other co-owner on August 4, 1953. The relevant part of section 8-167, R. R. S. 1943, is: "When a deposit in any bank * * * is made in the name of two * * * persons, * * * payable to either or to their survivor, * * * such deposit * * * may be * * * paid to either of said persons or to the survivor * * *." The statute was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary appears from the terms of the deposit. If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without such qualifying words, upon the death of one of the co-owners of the deposit it is payable to the surviving co-owner of the deposit. McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391; Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760; DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733.

Appellee, upon the death of his mother, became the sole owner of the United States savings bonds payable to and issued in the names of Frank Bohuslov or Mary Bohuslov and hereinbefore described. A United States savings bond is a contract between the federal government and the purchaser and Treasury Department regulations governing such bonds are incorporated into such

contract by reference and are beyond reach of the state law to modify or destroy. If such bonds are issued and registered in the names of two persons as co-owners, the rights of a surviving co-owner arise solely from the contract. The surviving co-owner of the bonds takes title thereto by reason of Treasury Department regulations incorporated in the contract between the government and the purchaser. 31 U. S. C. A., § 757c, p. 622; § 315.45, 31 C. F. R. (1949 Ed.); Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711; United States v. Dauphin Deposit Trust Co., 50 F. Supp. 73; In re Bartlett, 71 F. Supp. 514; Annotations, 168 A. L. R. 245, 173 A. L. R. 550.

The property involved herein was in the exclusive possession and control of appellee on the land operated by him, except the bonds and the deposit in the bank, when appellant made a list of it and filed it in the estate of the deceased as an inventory of the property of her estate. The petition of appellant upon which this case was tried concedes that title to the property is in appellee except the bonds were jointly in the names of appellee and the deceased. There is no proof that any of this property was on the land or in existence when appellee, at the importunity of his mother in the year 1920, took charge of the land and its operation, activities, and transactions incidental thereto.

His manner of operation was identical with what it would have been if he had owned all the land he used and no other person was interested therein or in his actions or transactions except he did consult with his mother with whom he lived and for whom he cared. The income from his operations and transactions was deposited for many years in his individual deposit account. He alone withdrew funds from it. He bought, sold, planted, and harvested as his judgment dictated. He acted in his name as an individual and a principal. He reported the property as his for assessment and taxation and he paid the taxes thereon. He made income tax returns in which all the income was reported as the income

of appellee. The deceased was listed therein and treated as a dependent. Appellee paid all expenses that accrued including those for the care, support, and comfort of his mother. The record is convincing that she knew and understood what was done by appellee; that she realized fully the effect and result thereof; and that she consented to, approved, and acquiesced therein. The record seems clear that appellee did exactly what his mother intended and desired. The essence of what transpired between the deceased and appellee was that the property should be his subject to his obligation to furnish his mother, at his expense, all her requirements for care and support throughout the remainder of her life. The evidence is that appellee gave his mother every attention, care, support, and comfort that he had the opportunity and capacity to do and that he never failed to respond to her desires and wants.

He lived on the home place with his mother from soon after the death of his father in 1915 until her death in 1953. He did substantially all the work required to carry on the farming operations except for some assistance for limited times in the busiest seasons. He labored from 12 to 13 hours, and many times longer, during the 6 work days of the week and a half-day on Sunday. In addition to his many farming duties he did much of the housework, including cooking. He was outside the State of Nebraska but once when he went into the State of Iowa for a limited time. He was never farther away from the home place in Nebraska than a trip to Omaha and one to Banner County. He never had a vacation of any kind or duration. He was about 60 years of age when his mother died and he was unmarried. His sole diversion, recreation, or entertainment was a visit to the motion picture theatre in Crete sometimes as much as twice a month at an admission expense initially of 25 cents. Later the admission charge was advanced to 50 cents and he looked upon this as an extravagance. He was

thrifty and frugal to a fault. He bought his last suit and a lightweight overcoat in 1929 and has bought none since. The suit was made in Cincinnati, Ohio. Years after its purchase it was returned to the maker to be repaired and overhauled. He repaired an automobile which had been abandoned as impossible of further use when his brother disposed of the Dodge car, the family automobile, in 1920 and appellee used the repaired car continuously for a period of 5 years thereafter as his only means of transportation. His present means of transportation is a 1948 Ford truck. He never had a corn-picker or a milking machine but he milked as many as 12 to 25 cows by hand. Appellee received no compensation as such for the labor and services he performed and rendered during the period of more than a third of a century between the death of his father and the death of his mother. There is uncontested evidence in the record that the reasonable value of these was more than the probable value of the property involved.

Appellant says that a trust should be impressed upon the property, the subject matter of this litigation, because the deceased was uneducated and had little knowledge of the English language, and appellee exerted fraud and undue influence upon her. Appellant asserts that appellee usurped the management of her business affairs; fraudulently took title in his name to the Seward County land and the personal property other than the bonds and the bank deposit; and fraudulently took title jointly in the names of Frank Bohuslov or Mary Bohuslov to the bonds and the deposit. These charges are unsupported by evidence. The deceased was not an uneducated person. She spoke the English language and the Czech language with equal ease and fluency. She took and read several publications including the Lincoln Daily Star, Nebraska Farmer, Capper publications, Journal Stockman, and others printed in English. She subscribed for and read one paper in the Czech language published in Chicago. She intelligently discussed

with others matters she had read in these publications. There is evidence of a bank official that when her husband came to the bank to transact business, the deceased was invariably with him and she generally transacted the business with which she and her husband were concerned; that she was a very competent woman; and that she was capable of transacting any ordinary business. There is much other evidence to the same effect concerning the qualifications and capabilities of the deceased to transact business.

The rule is well established and has been frequently applied as in Box v. Box, 146 Neb. 826, 21 N. W. 2d 868: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." See, also, Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912. However, the principle which is decisive of this case is stated in Peterson v. Massey, *supra,* in this manner: "The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing." Appellant has not satisfied the burden thus imposed. The charge of fraud is wholly unsupported. The only element of undue influence concerning which it may be said there is any evidence is opportunity to exert undue influence because appellee lived with his mother. There is a failure of proof as to each of the three remaining elements of undue influence. In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625. There is a failure of proof that appellee had any disposition or desire to improperly influence his mother, to act unjustly toward her, or that he did so.

The judgment should be and it is affirmed.

AFFIRMED.

BONNIE BELLE KOEHN ET AL., APPELLEES, V. ADELLA MARTHA KOEHN ET AL., APPELLANTS.
81 N. W. 2d 900

Filed March 29, 1957. No. 34143.

1. **Witnesses.** In construing section 25-1202, R. R. S. 1943, the testimony of a witness as to a transaction or conversation had by him with a person since deceased is inadmissible in any civil action or proceeding in the result of which such witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless and until the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation.
2. **Trial: Appeal and Error.** In an equity case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was introduced when there is relevant and competent evidence in the record to sustain the judgment of the trial court.
3. **Equity: Trial.** A court of equity will consider the purpose and not the form, and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained.
4. **Deeds: Mortgages.** A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage.
5. **Mortgages.** If the evidence shows that an instrument is intended by the parties to be security for a debt it is in equity, without regard to its form or name, a mortgage.

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

John Peetz, Jr., and *F. L. Balderson*, for appellants.

P. J. Heaton, Sr., for appellees.

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

MESSMORE, J.

This is an action in equity brought in the district court for Cheyenne County by Bonnie Belle Koehn in her own behalf and as guardian of David Darrell Koehn and Dean William Koehn, minors, and P. J. Heaton, Jr., administrator of the estate of Darrell William Koehn, deceased, as plaintiffs, against Adella Martha Koehn and William Koehn, her husband, defendants. The purpose of the action was to quiet title in Bonnie Belle Koehn, David Darrell Koehn, and Dean William Koehn, the only heirs at law of Darrell William Koehn, deceased, to certain real estate; that possession of the real estate be delivered to P. J. Heaton, Jr., administrator of the estate of Darrell William Koehn, deceased; and that the defendants be required to account for all rentals collected from said premises. Trial was had to the court. The court found that the deceased left surviving him as his only heirs at law his widow, Bonnie Belle Koehn, and his two minor sons, David Darrell Koehn and Dean William Koehn; and that the plaintiffs were entitled to have quieted in them the title to the real estate here involved and that possession thereof be delivered to the administrator of the estate of the deceased. The defendants filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the defendants have appealed.

The plaintiffs allege in their petition that at the time of his death, Darrell William Koehn was the owner of Lot 2, Block 1, Paine's Addition to Sidney; that the defendants were in control and possession of said premises and refused to relinquish possession of the premises to the plaintiffs; that the defendant Adella Martha Koehn claims title and right of possession in and to said premises by virtue of a deed delivered July 16, 1951; that the title to said premises was conveyed by Darrell

William Koehn and Bonnie Belle Koehn to Adella Martha Koehn; that William Koehn claims an interest and right of possession in the premises as the husband of Adella Martha Koehn; that the deed was in truth and fact a mortgage; that some time prior to July 16, 1951, the deceased executed and delivered a promissory note representing an indebtedness owing to the defendants; that to secure the promissory note Darrell William Koehn and his wife Bonnie Belle Koehn executed and delivered a deed to Darrell William Koehn and Adella Martha Koehn in survivorship with a distinct agreement and understanding and upon the condition that upon the payment of said debt Adella Martha Koehn would reconvey said premises to the grantors; that during the lifetime of Darrell William Koehn said indebtedness was paid in full and the interest of the defendants in the premises ceased; and that the defendants refused to reconvey said premises to the heirs of Darrell William Koehn, deceased.

The defendants allege in their answer that all rents collected by them were paid to the Sidney Federal Savings and Loan Association which holds a first mortgage on the premises; that the rents collected were paid to the association for the mutual benefit of all parties concerned; that the defendants have received no money as payment upon the indebtedness still existing for which a promissory note was made by Darrell William Koehn and given as security for money owing the defendants; and that there is due and owing the defendants by reason of such indebtedness the approximate amount of $3,693.75, including interest.

The defendants in their cross-petition, in substance, allege that if they have a mortgage only on the real estate described in the plaintiffs' petition, they are entitled to a strict foreclosure by reason of nonpayment of the indebtedness of Darrell William Koehn to them, as the deed was given as security for the debt. The amount of the indebtedness is set forth. The defendants

pray that the plaintiffs' action be dismissed and that title to the property described in the plaintiffs' petition be quieted in Adella Martha Koehn, subject only to the mortgage to the Sidney Federal Savings and Loan Association, or, in the alternative, the defendants be granted a strict foreclosure of the plaintiffs' equity of redemption and a judgment for any deficiency which may result by reason of such foreclosure.

The plaintiffs' reply to the answer and cross-petition was a general denial.

For convenience we will refer to the parties at times as they were designated in the district court; to Bonnie Belle Koehn as Bonnie; to the defendant Adella Martha Koehn either as Adella Koehn, or mother; to William Koehn as father; to Darrell William Koehn as Darrell or the deceased; and to P. J. Heaton, Jr., as administrator.

The secretary-treasurer and managing officer of the Sidney Federal Savings and Loan Association located in Sidney, hereafter called the loan company, who has charge of the records, testified that the loan company holds a mortgage on Lot 2, Block 1, Paine's Addition to Sidney, known as the Koehn property. The mortgage is dated July 19, 1951, and was for the sum of $6,500. The makers of the mortgage were Darrell Koehn, Bonnie Belle Koehn, William C. Koehn, and Adella Martha Koehn. The date of the distribution of the proceeds of the loan was October 5, 1951. This distribution consisted of checks which were issued and made payable as follows: Legal fees, or attorney's fees, $10; appraisal fee $10; abstracting and recording $14.25; check to the Thomas Lumber Company $2,348.12; check to Darrell Koehn for $3,250; and a check to Darrell and Adella Koehn for $867.63, making a total of $6,500. The amount due on the mortgage in July 1956 was $4,343.40. The loan company had received rental payments from the tenant on the premises which it applied to payment of taxes, interest, and insurance, and any excess there-

over was applied to the principal of the loan.

It was stipulated that the property was appraised August 25, 1951, at $10,000.

The administrator testified that the assets of the estate, by sale of the personal property, amounted to $904.71. The total claims filed against the estate amounted to $4,681.59. William Koehn and Adella Koehn filed a claim against the estate for $3,000, based on a promissory note. He had requested the parents of the deceased to turn over to him, as administrator, the personal property and effects belonging to the deceased at the time of his death, among which was a red Manila envelope containing some important papers, which he did not receive.

Bonnie Belle Koehn testified that she and Darrell were married August 22, 1948, and divorced in June 1954. The divorce had not become absolute at the time her husband was killed in a truck accident on November 4, 1954. She testified to the birth of the two minor children and that they were the beneficiaries of their father's insurance which had been collected for their benefit. At the time she was married to Darrell he owned Lot 2, Block 1, Paine's Addition to Sidney. There was a partially finished basement on the lot. During the period of their married life they built a house on the lot, which was completed in August 1951. She and Darrell did some considerable amount of work in the construction of the house. Later they procured a loan from the loan company. She furnished the administrator with a list of the personal property her husband owned at the time of his death, among which was a red Manila envelope containing his important papers. She was acquainted with the fact that Darrell's mother and father filed a claim for $3,000 against her husband's estate. This was for a note which represented the initial cost of the basement and a bill at the Cheyenne County Lumber Company. She did not sign the note. She further testified that she did participate in the ex-

ecution of a deed of this property to Darrell's mother, which was signed in an attorney's office; and that prior to signing the deed she had a conversation with Darrell and his mother, while the three of them were in a car en route to the attorney's office, in which she asked why the deed was going to be in Darrell's name and in his mother's name. She testified: "They told me it was to be sure we would pay them back the $3000. And I said, 'When it is paid then we will get it back in my name without any argument?' And Darrell said 'Yes', and Darrell's mother said 'Yes'." After that conversation she went to the attorney's office and executed the deed. She further testified as to payments made on the note. Darrell worked for his father part-time. He also worked for the fire department and for the police force, and in addition did some cement work. He had some back wages coming from his father as shown by time slips which she and Darrell went over and from which they made a computation and arrived at a figure of $800 or $900 they owed Darrell's parents. Darrell gave his mother $1,000, and Bonnie testified that she saw the receipt for this amount and that the receipt was among Darrell's personal belongings which were in the red Manila envelope. This computation was made about the time the loan was completed with the loan company. After the loan was completed, Darrell's parents did not make claim of ownership of the premises. They only did so after Darrell's death.

On cross-examination she testified that she was not present at the time the $3,000 note was made and delivered by Darrell to his folks, but Darrell told her about it the same day.

William Koehn testified, by deposition taken by the plaintiffs, that Darrell was not the owner of Lot 2, Block 1, Paine's Addition to Sidney; that Darrell and his mother were the owners; and that he bought the lot and later completed a basement house on it and made it livable. The property was purchased in 1948, and he

believed he paid $1,490 for it. He had a deed made out to Darrell. The house was completed in 1951. He engaged in cement work, gravel hauling, and excavating. Darrell did work for him, and was paid as anybody else who worked for him had been paid. He owed Darrell nothing. Darrell never paid him anything on the note. He further testified that he told Darrell the only way he could go ahead and build the house was to deed the property back to his mother and give him a note for the equity he had in the lot. It was at that time, or shortly after, that Darrell gave his father the note. He further testified that if Darrell had paid him, he would have let Darrell have the property, and that the deed was more or less a security measure. He further testified that he was never indebted to Darrell from 1948 up to the time of Darrell's death.

Adella Koehn, by deposition which was read in evidence by the plaintiffs, testified that on July 16, 1951, Darrell and Bonnie gave her a deed to Lot 2, Block 1, Paine's Addition to Sidney; that she had a conversation with Darrell, but not with Bonnie; that Darrell talked to Bonnie about the matter; and that the day they went to the attorney's office Bonnie was with them and made no objection in her presence to signing the deed. She further testified that she received no money from Darrell nor from the loan company; that she signed a note regarding the loan with the loan company, and Darrell took care of the money; and that the $3,000 note made out by Darrell was made out to both her and her husband.

Adella Koehn, the mother of the deceased, testified in her own behalf that she was the payee in the note given by her son; that she had received no payment on the note; and that in July 1951, a deed was executed and delivered giving her title as a joint tenant. This deed is in evidence and is the deed from Darrell and Bonnie to Darrell and Adella Koehn describing the premises involved in this action. She further testified that she never had any discussion with Bonnie in connection

with this transaction; that there was no agreement that if any indebtedness existed and was paid she would deed the property back; that since Darrell's death the rentals of the property have been paid to the loan company; and that she had been taking care of the property, seeing that it was rented, and maintaining the necessary repairs. She testified with reference to the repairs and the amounts expended therefor, and the accounting made with the loan company with reference thereto; and that Darrell lived with his parents at the time of his death.

On cross-examination she was requested by plaintiffs' counsel and by the court to produce the $3,000 note. The note was not produced. She further testified that it was a claim against Darrell's estate; that she owns the property here involved which she received by virtue of the deed for which she paid nothing; and that the day she and Darrell went to the attorney's office, Bonnie was in the car, but that she had no conversation with Bonnie.

The defendants contend that the trial court, over appropriate objections, erroneously permitted witnesses for the plaintiffs, having a direct legal interest in the result of the action, to testify with regard to certain transactions and conversations with deceased during his lifetime in violation of section 25-1202, R. R. S. 1943.

This is an equity case, and the cause is here for trial de novo.

Actions in equity, on appeal to this court, are triable de novo, subject, however, to the condition that when the evidence of material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. See O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403.

Section 25-1202, R. R. S. 1943, provides: "No person

having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

In construing section 25-1202, R. R. S. 1943, it was held in Mills v. Mills, 130 Neb. 881, 266 N. W. 759: "The testimony of a witness as to a transaction or conversation had by him with a person since deceased is inadmissible in any civil action or proceeding in the result of which such witness has a direct legal interest, when the adverse party thereto is the representative of such deceased person, unless and until the evidence of such deceased party, in regard to such transaction or conversation, shall have been taken and read in evidence by such representative, or unless the latter shall have first introduced a witness who shall have testified to such transaction or conversation." See, also, Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391.

The principal part of the testimony of Bonnie Belle Koehn objected to by the defendants as being in violation of section 25-1202, R. R. S. 1943, is in substance as follows: That on July 16, 1951, this witness, Darrell, and his mother were en route to an attorney's office for the purpose of having Bonnie and Darrell execute a deed conveying the real estate in question in survivorship to Darrell and his mother; and that while in the car Bonnie asked Darrell's mother why the deed was

being taken in her name, and it was explained to Bonnie that it was to make sure the $3,000 debt would be repaid to Darrell's parents, and when that was done the property would be reconveyed to Bonnie in her name, to which her husband agreed. Subsequent to this conversation, Bonnie went to the attorney's office and executed the deed.

The rule with regard to the admissibility of evidence in an equity case tried to the court is that the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted, when there is material, competent, and relevant evidence admitted sufficient to sustain a judgment of the trial court. See Rose v. Kahler, *supra*.

Referring to the testimony of the mother of the deceased given in her own behalf, she testified that she owned the property by virtue of the deed executed and delivered to her; in addition, she had not been paid any amount on the $3,000 promissory note made by her son Darrell. This testimony, for the most part received without objection, related to the vital issues here involved.

In the light of the foregoing authorities and in considering the evidence, we conclude that the trial court did not err, as contended for by the defendants.

With reference to whether the deed here involved is a deed absolute or a mortgage, we deem the following to be applicable to a determination of this question.

Section 76-251, R. R. S. 1943, provides: "Every deed conveying real estate, which, by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage. The person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every writing operating as a

defeasance, or explaining its effect as a mortgage, or conditional deed, is also recorded therewith and at the same time."

It is a well-settled principle that a court of equity will consider the purpose and not the form, and that the particular form or words of a conveyance are unimportant if the intention of the parties can be ascertained. See, Ashbrook v. Briner, 137 Neb. 104, 288 N. W. 374; Northwestern State Bank v. Hanks, 122 Neb. 262, 240 N. W. 281.

A deed of real estate, absolute in form, may be shown by parol to have been intended by the parties to it as security for a debt or loan, and as between such parties, at least, the instrument will be construed to be a mortgage. See Morrow v. Jones, 41 Neb. 867, 60 N. W. 369.

If an instrument is intended by the parties to be security for a debt it is in equity, without regard to its form or name, a mortgage. See Campbell v. Ohio National Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546.

The evidence in the instant case discloses that although the deed in question is absolute in form, it was intended by the parties as security for a debt, and as between such parties it will be construed as a mortgage.

The defendants contend that if the deed is construed as a mortgage, the evidence is insufficient to show payment of the note and they are entitled to a strict foreclosure.

The record discloses that the administrator made demand on the parents of the deceased for an envelope containing valuable papers belonging to the deceased. The administrator did not receive this envelope, so the papers pertinent to this case, if any, could not be produced. The testimony of Bonnie Belle Koehn is to the effect that after deducting the wages shown by the time slips and the $1,000 receipt signed by her husband's mother, which she saw for the last time in March 1954, there remained due on the note between $800 and $900 before the loan was obtained from the building and

loan association. The records of the loan company show that the mother and deceased son received $867.63 from the proceeds of the $6,500 loan; and that over and above all of the expenses of the loan, the materials paid for, and the payment to the mother and Darrell, the deceased received $3,250 in cash. It appears that the defendants made no attempt to exercise dominion over the property until after the son's death. We consider this evidence sufficient to determine that the son's debt to his parents was paid, and so find.

For the reasons given in this opinion, we conclude that the judgment of the trial court should be, and it is, affirmed.

AFFIRMED.

E. H. POWELL, ADMINISTRATOR OF THE ESTATE OF JENNIE I. STARKEY, DECEASED, APPELLANT, V. THE FARMERS STATE BANK, AURORA, NEBRASKA, A CORPORATION, APPELLEE.
82 N. W. 2d 260

Filed April 5, 1957. No. 34109.

1. **Trial: Appeal and Error.** The admissions, stipulations, and agreements of the parties, when finally determined and included in a pre-trial report and order rendered, certified, and filed by the trial court after a pre-trial hearing without objections appropriately taken thereto, are judicial admissions which need not be offered in evidence in order to be considered by the trial court or included in a bill of exceptions in order to be considered by this court upon appeal.
2. **Banks and Banking: Limitations of Actions.** A certificate of deposit made payable on the return of the certificate properly endorsed with no other stipulation fixing a specified or determinable future time after date for payment thereof is a demand certificate and the statute of limitations does not begin to run thereon until demand for payment is made.
3. ———: ———. On the other hand, a certificate of deposit made payable on the return of the certificate properly endorsed at a specified or determinable future time after date is a time certificate and the statute of limitations begins to run thereon

at the expiration of such time without the necessity of any demand for payment.

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

Edgerton & Powell, for appellant.

Charles F. Adams, for appellee.

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

CHAPPELL, J.

Plaintiff, E. H. Powell, as administrator of the estate of Jennie I. Starkey, deceased, brought this action against defendant, The Farmers State Bank, Aurora, Nebraska, a corporation, seeking to recover $700, the principal amount of an allegedly unpaid certificate of deposit issued to George Starkey by defendant on December 5, 1919, together with interest thereon at four percent for 1 year from the date thereof. A copy of the certificate was attached to and made a part of plaintiff's petition. Insofar as important here, it read: "* * * payable to the order of himself on the return of this Certificate properly endorsed. 6 or 12 months after date with interest at the rate of 4 percent per annum for the time specified only."

For answer, insofar as important here, defendant denied generally and alleged that plaintiff's alleged cause of action was barred by the statute of limitations. Plaintiff's reply was a general denial. There was a subsequent amendment thereto, but its allegations are not important here.

Motion of defendant for pre-trial hearing was sustained and such a hearing was duly held. Thereafter the trial court rendered, certified, and filed its pre-trial conference report and order without any objections thereto. If first recited at length the nature of plaintiff's theory of recovery and defendant's theory of defense. It then recited that the parties had stipulated

and agreed that certain facts hereinafter recited were true. It was also stipulated that jury trial was waived, and pursuant thereto the cause was tried to the court. Thereafter, in consideration of the pleadings, the stipulations in the report of the pre-trial conference, and evidence adduced, judgment was rendered finding generally in favor of defendant and against plaintiff. It found, insofar as important here, that the certificate of deposit as set forth in plaintiff's petition matured not later than one year after the issuance thereof, on December 5, 1919, and that the statute of limitations began to run not later than December 5, 1920, 12 months after issuance of said certificate. It then found and adjudged that plaintiff's cause of action had long since been barred by the statute of limitations, and dismissed plaintiff's action at plaintiff's costs. Thereafter, plaintiff's motion for new trial was overruled, and he appealed, assigning, insofar as important here, that the judgment was contrary to the evidence and law, and that the trial court erred in finding and adjudging that plaintiff's action was barred by the statute of limitations. We conclude that the assignment should not be sustained.

In that connection, there is no bill of exceptions as such, and defendant argued that the only issue presented for determination by this court was the sufficiency of the pleadings to support the judgment. We do not agree. Revised Rules of the Supreme Court of the State of Nebraska, p. 33, entitled: "2. Pre-Trial Procedure: Formulating Issues," provide in part: "(a) In any civil action in the district court after issues have been joined the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider (1) The simplification of issues; * * * (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; * * * (6) Such other matters as may aid in the disposition of the action.

"The court shall at the time of the pre-trial hearing

make a record of the proceedings which recites the action taken at the conference, the amendments allowed to the pleadings, and the amendments made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; that counsel shall forthwith acknowledge their assent thereto, or, in the alternative, state into the record any and all objections they may have thereto; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

As we construe such rule, the admissions, stipulations, and agreements of the parties, when finally determined and included in a pre-trial report and order rendered, certified, and filed by the trial court after a pre-trial hearing without objections appropriately taken thereto, are judicial admissions which need not be offered in evidence in order to be considered by the trial court or included in a bill of exceptions in order to be considered by this court upon appeal.

Therefore, in the light of the pleadings, the pre-trial conference report and order, and authorities hereinafter cited, we dispose of plaintiff's assignment, bearing in mind that: "Findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury, and judgment thereon will not be disturbed unless clearly wrong." Barnes v. Davitt, 160 Neb. 595, 71 N. W. 2d 107.

The pre-trial conference report and order thereon, as made by the trial court, recited substantially the following stipulated and agreed facts: That E. H. Powell was the duly appointed and acting administrator of the estate of Jennie I. Starkey, deceased, and defendant is a banking corporation organized and existing under the laws of the State of Nebraska, with its principal place of business at Aurora, Nebraska; that Jennie I. Starkey was sole beneficiary of the estate of George Starkey, deceased, and the certificate of deposit in question, if

valid and collectible, would have been part of his estate and would have been part of the assets of the estate of Jennie I. Starkey, deceased; and that demand for payment of such certificate was made by plaintiff administrator on December 24, 1954, which payment was refused. In that connection, it will be noted that George Starkey died May 19, 1923, and such demand was first made more than 35 years after issuance of the certificate on December 5, 1919, and more than 34 years after December 5, 1920.

It was also agreed that in 1933 defendant was closed and not permitted to reopen until a waiver had been obtained from 85 percent of the depositors in such bank, and that later, at request of the Department of Banking, additional capital was demanded and supplied by assessment on the outstanding stock; that as a part of that transaction a portion of defendant's assets were transferred to a depositors' committee; that the remaining assets were retained in defendant, and the depositors as of March 4, 1933, were paid 50 percent of their deposits by defendant; that on March 4, 1933, defendant was taken over by the Department of Banking, and on March 14, 1933, defendant was permitted to reopen for business as a restricted and limited banking institution, but was not permitted to release any of the deposits made therein prior to March 4, 1933; that on the latter date George Starkey and Jennie I. Starkey, also known as Mrs. George Starkey, had on deposit in defendant, under the name of "Mr. and Mrs. George Starkey," a savings account in the principal sum of $4,177.18, which, together with accrued interest, totalled $4,258.52; that defendant continued to remain in the custody of the Department of Banking and do a restricted and limited banking business by and with consent of such department until February 24, 1934, when defendant made available to Jennie I. Starkey 50 percent of the aforesaid $4,258.52, or $2,129.26, which was subsequently withdrawn from defendant by her over the succeeding

years. There is no stipulation or contention that the certificate of deposit involved herein was presented or included in such amounts.

It was also agreed that on or about June 14, 1933, the trustee of the depositors' committee issued participation certificate No. 494 to "Mr. and Mrs. George Starkey" in the amount of $2,129.26, delivered same to Jennie I. Starkey, and subsequently thereto said trustee paid to Jennie I. Starkey and she respectively received dividends upon such participation certificate in 1934, 1935, 1936, 1938, and 1943, which totalled $1,068.88. That such last dividend was so received on February 13, 1943, after which Jennie I. Starkey surrendered the participation certificate to defendant's trustee. Further, it was agreed that Jennie I. Starkey had actual, bona fide, and continuous residence in Aurora from December 5, 1919, the date of the certificate of deposit involved, until her death on May 13, 1954; that she was a customer of defendant bank prior to March 4, 1933, and continued to be such until her death, during which time she left valuable papers in the custody of defendant and continued her banking business in person on defendant's premises. There is no evidence that she was incompetent at any time during such period.

As we view it, a determination of the issues depends upon whether the certificate of deposit in question was a demand or time certificate. We decide that it was the latter, and that the statute of limitations has barred plaintiff's right of recovery.

As hereinafter observed, the certificate of deposit involved was a negotiable instrument. In that connection, section 62-107, R. R. S. 1943, provides in part: "An instrument is payable on demand (1) where it is expressed to be payable on demand or at sight or on presentation; (2) in which no time for payment is expressed." On the other hand, section 62-104, R. R. S. 1943, provides in part: "An instrument is payable at a determinable future time within the meaning of this

act which is expressed to be payable (1) at a fixed period after date or sight, or (2) on or before a fixed date or future time specified therein, * * *." In that connection, long before as well as after the adoption of such sections, this court has so defined and classified certificates of deposit as either demand or time certificates dependent upon the reasonable construction and effect of all and every part of the related provisions contained therein.

In First Nat. Bank of Rapid City v. Security Nat. Bank, 34 Neb. 71, 51 N. W. 305, 33 Am. S. R. 618, 15 L. R. A. 386, the certificate respectively dated October 8, 1887, read in part: "* * * payable to the order of himself on the return of this certificate properly endorsed. * * * This certificate payable 3 months after date with 6 per cent interest per annum for the time specified." In that case, this court said: "Counsel for the defendant in error insist that the certificates are only payable upon their return and presentation to the maker, properly indorsed * * *. This contention is based upon the phrase, 'on the return of this certificate properly indorsed,' used in the printed form of the certificates. If they contained no other stipulation as to time of payment, there would be ground for debate that they did not become due until payment was demanded, * * *. Authorities are to be found which sustain such a doctrine, but the decisions are not all one way. * * * By their terms they are payable three months after their date. Clearly that is the meaning of the words stamped across the face of the instruments. They are capable of no other reasonable construction. The holder could not have lawfully demanded payment before the expiration of the three months, and had suit been instituted before such time had elapsed, it would have been prematurely brought. The words 'on the return of this certificate properly indorsed,' when read in connection with the other stipulations, do not control the time of payment, nor was it indispensable to a recovery that the

certificates should have been previously presented to the maker duly indorsed. To hold that the tender of a certificate properly indorsed is a condition precedent to maintain an action thereon would defeat a recovery upon a lost certificate, and would prevent a third person from becoming the owner of a certificate payable to the order of the payee, unless indorsed. Such a rule would be unsound in principle and contrary to the weight of the decisions. (Cassidy v. First Nat. Bank, 30 Minn. 86; Citizens Natl. Bank v. Brown, 11 N. E. Rep. (Ohio), 799.)

"Construing together all the conditions of the instruments in suit, and giving effect to every part, as we must, they are payable three months after their date, to the payee, or to the person by him transferred. (Brett v. Ming, 1 Fla. 447; Hunt v. Divine, 37 Ill., 137.)

"In the case last cited the certificate was in the following form: 'BANKING HOUSE OF E. T. HUNT & CO., SYCAMORE, ILL., March 9, 1861. C. M. Chase, Esq., has deposited in this bank two hundred and eighty dollars and fifty cents in currency, subject to the order of himself, and payable in like funds on return of this certificate three months after date. E. T. HUNT & CO.'

"It was held that it was payable absolutely three months after its date, and that a return of the certificate was not a condition precedent to the recovery. The similarity of the certificate in the Illinois case to the ones we are considering, entitled that decision to great weight as a precedent here."

In Kirkwood v. First Nat. Bank of Hastings, 40 Neb. 484, 58 N. W. 1016, 42 Am. S. R. 683, 24 L. R. A. 444, the certificate dated December 4, 1890, read in part: "* * * payable to the order of self, * * * on return of this certificate properly indorsed. * * * With interest at six per cent if left six months; no interest after six months." In that opinion this court said: "It has, indeed, been frequently said that the stipulation for the return of the certificate adds nothing to the instrument.

It is merely the expression of a rule which applies to all negotiable paper, and an action may be maintained without a previous presentment. This question was thoroughly considered in the case last cited. As to the requirement that it should be properly indorsed, it would seem that an indorsement by the payee would not be necessary. A 'proper' indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original payee, no indorsement would be proper or at least necessary; if presented by another, 'proper indorsement' to show his title would be requisite. We do not think that this provision operates as a condition destroying the negotiability of the instrument. * * * In First Nat. Bank v. Security Nat. Bank, supra, an instrument payable upon the return of the certificate properly indorsed, but bearing across its face the language, 'This certificate payable three months after date with six per cent interest per annum for the time specified,' was held to be payable three months after date. There the language was absolute and the construction given was undoubtedly correct. We should here follow the rule adopted in that case and so construe the certificate as to give effect to every part. It would seem that the result would be to reach an analogy to instruments payable 'on or before' a certain date, which are due at the expiration of the time so fixed and not before. (Mattison v. Marks, 31 Mich., 421; Daniel, Negotiable Instruments, sec. 43.)"

In Jacoby v. Dvorak, 111 Neb. 683, 197 N. W. 428, so far as same can be ascertained from oral testimony appearing in the opinion, the certificates involved were respectively dated May 3, 1915, payable 12 months from date on return of the certificates properly indorsed. In that opinion this court said: "A material question necessary to be considered is when, if at all, the certificates in question matured so as to start the statute of limitations. There is considerable difference of opinion in the

decisions as to whether a certificate substantially in the language of those under consideration matures so as to start the statute until a demand of payment has been made. Negative of this proposition has been held in Pennsylvania, Gardner's Estate, 228 Pa. St. 282; Brown v. McElroy, 52 Ind. 404. And it is quite generally held that the statute will not begin to run until after demand in those cases where the certificate does not fix any definite time of payment; * * *. Also, where the certificate is payable upon is return properly indorsed, no time being stated, it is held to be the same as a general deposit, against which the statute will not run until demand. Elliott v. Capital City State Bank, 128 Ia. 275. See, also, Sharp v. Citizens Bank, 70 Neb. 758. But in Thompson v. Farmers State Bank, 159 Ia. 662, it was held that a certificate payable 'six months after date' matured at that time and the statute then began to run." After citing with approval First Nat. Bank v. Security Nat. Bank, *supra,* and Kirkwood v. First Nat. Bank, *supra,* this court went on to say: "Without pursuing the discussion further, we think it results from these decisions that the law of this state must be declared to be that where a certificate of deposit is payable at a certain date say three, six, or twelve months, it matures at the expiration of the time stated and the cause of action accrues at maturity. It follows that the statute of limitations commences when the cause of action accrues."

In Diss v. State Bank, 141 Neb. 146, 3 N. W. 2d 89, the certificate involved was dated December 22, 1923, but was not presented until December 2, 1939, and we concluded that action thereon was barred by the statute of limitations. The certificate provided in part: "'* * * payable to the order of self * * * on the return of this Certificate properly indorsed with interest at 4 per cent. per annum if left 6 months. * * * No interest after maturity.'" In that opinion this court said: "Obviously, it was a time deposit wherein the bank agreed to pay

interest on the amount left for a period of six months. The plaintiff contends that the certificate must be returned properly indorsed, and that it had not been, in which event the certificate remained, with the interest in full force and effect. With this contention we cannot agree. The specific language of the certificate of deposit is plain. It matured more than 15 years prior to the time it was presented for payment by the administrator of the estate." See, also, Towle v. Starz, 67 Minn. 370, 69 N. W. 1098, 36 L. R. A. 463.

In Thompson v. Farmers State Bank, 159 Iowa 662, 140 N. W. 877, 44 L. R. A. N. S. 550, cited with approval in Jacoby v. Dvorak, *supra,* the certificate dated October 28, 1896, was presented for payment on October 11, 1909, and payment was refused. It provided in part: "'* * * payable to the order of same * * * on the return of this certificate properly indorsed, six months after date, with interest at six per cent per annum.'" That opinion quoted with approval from First Nat. Bank v. Security Nat. Bank, *supra,* and Kirkwood v. First Nat. Bank of Hastings, *supra.* Citing other authorities, the opinion went on to say: "There is no escape from the conclusion that, as the certificate was payable at a time specified, the right of action then accrued and as the statute of limitations then began to run more than ten years had elapsed when this action was commenced, and the action was barred as the court rightly determined."

In Barsness v. Burkee, 176 Minn. 355, 223 N. W. 298, the certificates, respectively dated October 26, 1925, and December 3, 1925, read in part: "* * * payable to the order of self * * * on the return of this certificate properly endorsed 6 or 12 months after date, with interest at 4 per cent per annum. No interest after maturity." Payment of neither certificate was demanded within 6 months after issuance. On June 21, 1926, payment was demanded and refused. Demurrer to plaintiff's petition was sustained by the trial court, and upon appeal such order was af-

firmed, saying: "The theory of the action requires a construction of the term used in each certificate, '6 or 12 months after date.' The language in our view permits of but one construction. The certificate holder was entitled to payment of the one certificate at the end of 6 months if he chose to have it. Unless he did, the certificate was a 12 months' certificate, and he was not entitled to pay until the expiration of that period. The cases are few and not all direct. Our construction finds support in Citizens Bank v. Jones, 121 Cal. 30, 53 P. 354; Songer v. Peterson, 114 Kan. 900, 220 P. 1060; Merchants Res. State Bank v. Peterson, 117 Kan. 186, 230 P. 1056.

"The plaintiff claims that the custom of banks in the vicinity * * * was to pay certificates of deposit when presented, though before maturity. The language of the certificate is clear, and the contract made by the certificate is definite. We judicially know that banks often, and to a considerable extent, pay certificates of deposit before due, sometimes paying interest which has accrued and sometimes not paying it; but no custom avoids the explicit contract made by the certificate. If it did, a time certificate would be a demand certificate."

In 9 C. J. S., Banks and Banking, § 316d, p. 644, citing authorities, it is said: "Certificates of deposit are ordinarily payable at the bank of issuance, and are payable at the time expressly or impliedly stipulated by the parties. * * * The time of payment of a certificate of deposit will depend on the contract between the parties. It may be payable at a fixed day or at a fixed time after date, but such instruments are usually payable on demand and are so payable when no time is expressed. * * * A certificate expressly made payable at the expiration of one 'or' another of two stated periods is payable at the expiration of the shorter period if the depositor so elects." See, also, 7 Am. Jur., Banks, § 491, p. 351, citing, among other authorities, First Nat. Bank v.

Security Nat. Bank, *supra,* and Kirkwood v. First Nat. Bank, *supra,* from this jurisdiction.

As stated in Annotation, 23 A. L. R. 12, citing cases from Georgia, New Mexico, and Pennsylvania: "Some certificates of deposit contain a provision that the certificate is payable to the order of the depositor a stated time after date, on return of the certificate properly indorsed. It is the view of some courts that such a certificate is not due absolutely on the expiration of the time stated, but only on return of the certificate and demand for payment; consequently, that the Statute of Limitations does not begin to run until such demand."

On the other hand, as stated in Annotation, 23 A. L. R. 14, citing cases from Iowa, New York, Texas, and Illinois: "On the contrary, other cases hold that the statute runs from the expiration of the date specified." We have adhered to the latter rule, citing authorities from Iowa and Illinois.

In dealing with the statute of limitations, we have held, citing Citizens Bank of Humphrey v. Fromholz, 64 Neb. 284, 89 N. W. 775, that: "As between a bank and its customers, either on a check and deposit account or as holders of demand certificates, there is no promise to pay until demand is made, and consequently a demand is necessary to put the statute in operation." Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N. W. 50.

On the contrary, we have held, as observed in authorities heretofore cited, that where a certificate of deposit provides that it is payable at a specified or determinable future time after date, the statute of limitations runs from the expiration of such time without the necessity of any demand for payment. The latter rule seems entirely logical. To hold otherwise would require us to overrule authorities from this state heretofore cited, give the specified or determinable future time for payment after date provided in the certificate no force or effect whatever, and permit the payee or timely endorsee to trifle with simple contractual language forever and a

day, without any limitation of the right as well as of the remedy.

As we view it, the certificate of deposit involved in the case at bar was a time certificate, and the statute of limitations began to run against liability thereon when it was eventually due and payable on December 5, 1920, 12 months from its issuance on December 5, 1919. No demand for payment having been made until more than 34 years thereafter, we conclude that the statute of limitations had long since barred plaintiff's right of recovery. In that situation, it would serve no purpose to discuss other questions presented in briefs of counsel.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiff.

AFFIRMED.

WENKE, J., dissenting.

I dissent from the holding of the majority of the court that the "Certificate of Deposit" No. 4624, issued by The Farmers State Bank, Aurora, Nebraska, on December 5, 1919, is barred by the statute of limitations.

The certificate is as follows:

"THE FARMERS STATE BANK $ 700.00
AURORA, NEBRASKA, 12/5/1919 No. 4624
George Starkey has deposited in this Bank
seven Hundred Dollars only only only Dollars,
payable to the order of himself
on the return of this Certificate properly endorsed.
6 or 12 months after date with interest at the rate of
4 percent per annum *for the time specified only.*
George Wanek Cashier.
CERTIFICATE OF DEPOSIT
Not Subject to Check."
(Emphasis is mine.)

This court has held in Citizens' Bank of Humphrey v. Fromholz, 64 Neb. 284, 89 N. W. 775, that: "* * * as between a depositor and a bank, the statute of limitation

does not begin to run until a demand is made for the money on deposit." And the same is true as to a demand certificate. Sharp v. Citizens Bank of Stanton, 70 Neb. 758, 98 N. W. 50. As stated in Sharp v. Citizens Bank of Stanton, *supra*: "As between a bank and its customers, either on a check and deposit account or as holders of demand certificates, there is no promise to pay until demand is made, and consequently a demand is necessary to put the statute in operation." Consequently, if the deposit here involved falls into either of these classes the statute of limitations would not have started to run until demand for payment was made on December 24, 1954. On the other hand, if the certificate of deposit matured at the end of either 6 or 12 months from the date of its issuance, as the majority holds it did, then the statute of limitations would apply. Jacoby v. Dvorak, 111 Neb. 683, 197 N. W. 428. As stated therein: "A bank certificate of deposit payable 12 months after date upon return of the certificate properly indorsed matures at the expiration of the 12 months, and the cause of action thereon then accrues so as to start the statute of limitations."

The time fixed for the payment of a certificate of deposit must necessarily depend upon the terms thereof but is payable on demand unless a time for payment is expressly provided for therein. See Section 62-107, R. R. S. 1943. As therein provided: "An instrument is payable on demand (1) where it is expressed to be payable on demand or at sight or on presentation; (2) in which no time for payment is expressed."

If any doubt exists as to the meaning of the language used in the certificate such doubt should be resolved in favor of the appellant as it was prepared by the appellee and appellant had no part in selecting the language used therein. People's State Bank v. Smith, 120 Neb. 29, 231 N. W. 141; Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295. This principle is particularly applicable since appellee is authorized to deal with the

general public and accept the deposit of their funds, a public service.

To me the certificate expressly provides that it is payable on demand to George Starkey, or his successors, upon return of the certificate to the bank properly endorsed subject, however, to the condition that the bank is not obligated to pay interest at 4 percent in excess of 12 months no matter how long the money may be left with it. See language of the certificate that I have emphasized. If this construction is correct then appellant's cause of action did not arise until December 24, 1954, when demand was made upon the bank and it refused to pay.

With the possible exception of Kirkwood v. First Nat. Bank of Hastings, 40 Neb. 484, 58 N. W. 1016, 42 Am. S. R. 683, 24 L. R. A. 444, I do not think the cases of this court, cited in the majority opinion, support the conclusion therein reached for the terms thereof are not the same as that of the certificate here involved. In First Nat. Bank of Rapid City v. Security Nat. Bank, 34 Neb. 71, 51 N. W. 305, 33 Am. S. R. 618, 15 L. R. A. 386, the certificates expressly provided: " 'This certificate payable 3 months after date with 6 per cent interest per annum for the time specified' "; in Jacoby v. Dvorak, *supra,* the certificate was "payable 12 months after date"; and in Diss v. State Bank, 141 Neb. 146, 3 N. W. 2d 89, the certificate issued contained the following language: "* * * with interest at 4 per cent per annum if left 6 months. Nov. 30, 1923. No interest after maturity." By their express terms the certificates involved in those cases were payable at a certain date or length of time after the date of their issuance. That, to me, is the meaning of the quoted language from each of those cases but such is not the situation here for no comparable language is contained in the certificate issued by appellee to George Starkey.

This dissent does not mean the author thereof would necessarily arrive at a different conclusion that that

reached by the majority, for appellee has raised the defenses of presumption of payment, laches, and estoppel. Whether or not any or all of those defenses are maintainable I do not decide. I only disagree with the majority in their construction of the language used in the certificate of deposit which was issued by appellee to George Starkey on December 5, 1919.

BOSLAUGH, J., joins in this dissent.

WILLIAM R. PATRICK ET AL., APPELLANTS, V. CITY OF BELLEVUE, APPELLEE.
82 N. W. 2d 274

Filed April 5, 1957. No. 34119.

1. **Municipal Corporations.** A city, in establishing and maintaining a free dump where the residents of the city are privileged to dispose of garbage, waste materials, and miscellaneous debris, performs a governmental function.
2. **Constitutional Law: Municipal Corporations.** Temporary damage to land of an individual caused by the establishment and maintenance of a public improvement by a city for a public use is such a damage as is required to be compensated by Article I, section 21, of the Constitution.
3. ———: ———. If private property is damaged for a public use by a city, the Constitution requires just compensation must be made the owner of the property although the city may have been performing a governmental function and notwithstanding the use was not and did not create a nuisance.
4. ———: ———. The fact that the city is not liable for the negligence of its officers, agents, or employees when the city is engaged in the performance of a governmental function does not exempt it from liability for damage to private property which could have been done under its powers of eminent domain.
5. ———: ———. Private property damaged by a city for a public purpose without an actual taking thereof is required by the constitutional provision to be justly compensated.
6. **Constitutional Law: Pleading.** It is not indispensable that the constitutional provision be set out or its existence alleged in the statement of a cause of action if the litigant otherwise pleads and proves a right of recovery because of it.
7. **Crops: Damages.** The measure of damages to a growing crop

that is destroyed by the wrongful act or omission of another is the value of it at the time of the destruction.

8. ———: ———. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness.

9. ———: ———. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed in part, and in part reversed and remanded.*

William R. Patrick and *Smith & Smith*, for appellants.

John E. Rice and *Dixon G. Adams*, for appellee.

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

BOSLAUGH, J.

The purpose of this action was to enjoin appellee from maintaining and operating its public city dump in such a manner as to cause many different and objectionable kinds of waste materials to be transported to and deposited upon lands of appellants and to recover damages for loss of the use of the land and loss of crops thereon caused by the deposit of the objectionable materials from the dump upon the land. The order of the trial court dismissing certain parties out of this case during the trial became final in that court. The contesting parties on this appeal are appellants and the city of Bellevue, designated appellee.

The following is the substance of the petition of appellants:

Appellants owned the real estate described. Appellee had for 3 years or more used a ravine located on Tax Lot 8-B in Section 35 about one-half mile east of the land of appellants as a public garbage dump in which had been deposited garbage accumulated daily in the

city of Bellevue consisting of many kinds of objectionable materials and miscellaneous insoluble substances. The ravine was part of a natural drainage course for surface waters for a large watershed contiguous thereto which in times of rainfall or melting snow flowed westerly in the drainage course to State Highway No. 75, which is immediately adjacent to the east line of the land of appellants; normally to and through a culvert in the highway; and southerly in the road ditches paralleling the highway. There was on or about June 22, 1949, a rainstorm in the area during which large quantities of waste materials of the character above referred to were carried and transported from the dump in the drainage course to the culvert which was obstructed and closed thereby and because thereof floodwaters and waste materials from the dump were diverted across the highway to and upon the lands of appellants, inundating 15 acres of growing corn thereon and creating a condition which prevented further cultivation of the crop and caused its total loss. The flooding of the land impaired the utility thereof. Within 4 years of the commencement of this case large quantities of material placed in the dump of the kinds herein referred to were carried to and spread upon pasture land of appellants by waters flowing in the drainage course. They have prevented cultivation or the mowing or clearing of the land of willows and noxious weed growths and have destroyed the utility of about 40 acres thereof for any useful or profitable purpose. The proximate result of the acts of appellee has been damage to appellants in the sum of $2,500.

The parts of the foregoing appropriate to the second cause of action of the petition were included therein by reference. It was further stated therein that parts of the land were leased for the year 1949 for a crop share rental of two-fifths of the crops produced. The acts of appellee destroyed the utility of 15 acres of the land and the crop thereon and caused the tenants damage in the

amount of $50 per acre. They expended time and labor in the preparation and planting of the crop and for seed and cultivation thereof before the flooding by the waters which were of the reasonable value of $150. The cause of action of the lessees was assigned to appellants. Appellants ask that appellee be enjoined from maintaining and operating the city dump referred to in the foregoing and sought judgment for damages in the sum of $3,400.

A supplemental petition stated an additional claim of damage. The substance thereof is the following: The appellee has since June 1949 continued to dump large quantities of waste materials in the ravine and on the premises used as the city dump. A heavy rain in that locality on or about May 8, 1950, caused large quantities of waste material from the dump to be washed to and upon the lands of appellants and large quantities of floodwaters to be diverted thereon because of the obstruction of the culvert in the course of drainage with the result that the utility of the lands was destroyed for any useful or gainful purpose and appellants were thereby damaged in the sum of $1,500 for which they also ask judgment.

The district court found that appellants were not entitled to recover damages from appellee because the maintenance by it of a free dump site for the city and its inhabitants was the performance of a governmental function and not a corporate or proprietary function and the city was not liable therefor since no issue of maintenance of a public nuisance was involved. The city at the trial withdrew resistance to granting an injunction because the dump had been discontinued at the location complained of by appellants. The court granted a permanent injunction as appellants prayed and dismissed the case as to the damage claims of appellants. The motion of appellants for a new trial of the issue as to damages was denied. This appeal is from the judgment dismissing the damage claims of

appellants and the denial of their motion for a new trial.

Appellants were at the times important to this case the owners of Tax Lot 9 in Section 35, Township 14 North, Range 13, and 130 acres in the northern part of the northeast quarter of Section 3, Township 13 North, Range 13, known as the McLane place, in Sarpy County. There were about 19 acres in Tax Lot 9 which adjoined State Highway No. 75 on the west and lies north of a railroad overpass. The McLane place lies south of the overpass and Tax Lot 9 and adjoins the state highway on the west. A culvert across the highway is located in the southern part of Tax Lot 9 and immediately east of the McLane place.

Appellee leased Tax Lot 8-B in Section 35, Township 14 North, Range 13, Sarpy County, in November 1948 and established a free land fill public dump area thereon for the inhabitants of the city to deposit their refuse and waste materials. It was about one-fourth of a mile northeast of the culvert in the highway. The drainway extended past the dump to and through the culvert. The only natural drainage in the area from the dump site was to the culvert, across the highway, and south in a ditch along the west side of the highway past the McLane place. This means of drainage of surface waters had been sufficient prior to June 22, 1949, to protect the land of appellants from flooding. The dump was maintained and used from November 1948 until 1951. Appellee built a dike with step-downs on each side for diverting the water around the main dump area and to prevent carriage of debris by drainage waters. There was no complaint made to appellee prior to June 22, 1949, of any materials from the dump having been washed down to, on the highway, or over it and into the land adjoining the highway.

A rainstorm occurred in that area on that date variously described as a 2-to-3 inch rainfall in a couple of hours and not unusual; as 2 inches or better in a couple of hours but causing no flooding elsewhere; as heavier

than usual; and as so heavy that there was not 10-foot visibility for 20 minutes. The dike or dam in the ravine was broken by the force of the water, materials from the dump were washed down the ravine to the culvert, and the passageway of it was closed. The water and debris backed towards the north a distance of some 200 to 400 feet from the culvert, flowed across the highway onto the land of appellants, and was the proximate cause of damage to them.

The issue of damages was resolved against appellants by the trial court on the basis that appellee in maintaining a free dump site for itself and its inhabitants was performing a governmental, as distinguished from a proprietary, function and was not liable to appellants for any damages sustained by them. This is the defense primarily relied upon by appellee. It has not been determined by this court that such an activity by a municipality is a governmental function. There is respectable authority that the furnishing of facilities for the disposal of garbage and other waste materials by a city for the use of its inhabitants is a governmental function.

In Gordon v. Murray City, 106 Utah 582, 151 P. 2d 193, the court said: "A city, in collecting and disposing of garbage, acts for the public health and is discharging a governmental function."

The statement in Bruce v. Kansas City, 128 Kan. 13, 276 P. 284, 63 A. L. R. 325, is as follows: "Be that as it may, and notwithstanding many authorities to the contrary, we find ourselves in good company when we hold squarely, as we feel compelled to do, that in the maintenance of a free municipal dump where the public were privileged to dispose of waste materials and miscellaneous rubbish and in the burning of such rubbish as was combustible the city was exercising a governmental function * * *."

The court in Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. 1030, in speaking of the status of the city in providing a means for the disposal of garbage,

said: "In that respect, it is like the fire, health, or police departments of cities. In such cases, 'the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law, for the general welfare of the inhabitants or of the community.' "

In 18 McQuillin, Municipal Corporations (3d ed.), § 53.46, p. 267, it is said: "While diversity of judicial views still prevails, late cases generally hold, with some exceptions, that the functions of cleaning of streets, the collection of garbage, and the establishment and maintenance of dumping grounds and incinerators are governmental, rather than proprietary, exercised by the municipality as an administrative agency of the state or for the public in the interest of public health and general welfare * * *." See, also, Annotation, 63 A. L. R. 332.

The acceptance of this doctrine is not decisive of the problem presented by this case. The proof is that appellee provided the dump and maintained it for a public use and that the real estate of appellants was temporarily damaged as a consequence of its existence and use. The hypothesis of appellants is that if a city provides a dump for waste materials, it is for the public and for a public use; that if the city thereby obstructs the natural flow of drainage water which results in damage to the owners of private property by the deposit of debris and floodwaters from the dump, just compensation must be made by the city for the damage; that thereby the private property of the owner is damaged for public use by the city; and that the mandate of the Constitution requires that compensation be made by the city to the owner notwithstanding it was engaged in a governmental function and the use may or may not have been a nuisance.

The fact that the damage suffered by the property

owner was temporary is not important. In Gledhill v. State, 123 Neb. 726, 243 N. W. 909, the state had constructed a temporary bridge across a watercourse on a highway in the place of a steel bridge which had been washed out. Many piles were driven in the watercourse and a sudden thaw caused ice to break up and lodge against the piling resulting in an ice gorge or dam which flooded the water back onto the land of the claimant, causing damages. The action was for the recovery of damages. In deciding the temporary damages were recoverable by virtue of the constitutional provision this court declared: "The fact that the damage in this case was of a temporary nature and caused only by a temporary bridge constructed for the use and convenience of the public does not prevent a recovery. 1 Nichols, Eminent Domain (2d ed.), p. 309, says: 'An entry on private land may constitute a taking, though temporary in its nature and for only a temporary purpose. * * * Accordingly it is held that land or other property cannot be actually put to use by public authority for a temporary purpose without compensating the owner.' * * * In line with this authority and the amendment to our Constitution by the adding of the words 'or damaged,' where one's land is damaged temporarily for public use by the construction of a public improvement by the state, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution." Pierce v. Platte Valley Public Power & Irr. Dist., 143 Neb. 898, 11 N. W. 2d 813, confirms this: "Where one's land is damaged temporarily for public use in the acquiring of an easement by a public corporation for the construction of a transmission line, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution."

The liability for damage of the character described in this case because of the constitutional provision has been considered and discussed in several decisions of this court. Gledhill v. State, *supra,* is one in which this

language appears: "The property of the plaintiff and his assignors was damaged without actual taking by the construction of this temporary public improvement. * * * The bridge constructed was the cause of the damage to the plaintiff and his assignors who owned land upstream from the bridge. The evidence in this case is overwhelming that the beginning of the flood was caused by the floating ice cakes in the ditch being held at the bridge. From this point the ice and water backed up for a considerable distance until the ditch was filled, when it overflowed the land and destroyed the dikes which had been constructed at private expense by the landowners. * * * The bridge was so constructed that it obstructed the flow of ice and water and caused the flood. * * * The finding of the trial court that this temporary highway bridge was the cause of this flood and the consequent damage is the only finding possible from the evidence in this case. Is the damage resulting from the construction of this bridge such as would entitle the plaintiff to just compensation? The property of the plaintiff and his assignors was damaged without actual taking by the construction of a temporary public improvement. Since the insertion of the words 'or damaged' in section 21, art. I of the Constitution of 1875, it has been the well-settled law in this state that one whose property was damaged without actual taking was entitled to just compensation. * * * The constitutional provision embraces the damages which affect the value of a person's property and include such damages as were sustained in the case under consideration. No good reason suggests itself which would prevent the plaintiff recovering the damages sustained in this case." The facts in that case were quite similar to those in the present case. It is persuasive authority that appellants are within the protection of the constitutional provision as to any damage caused them by the acts of appellee complained of herein.

In Scully v. Central Nebraska Public Power & Irr.

Dist., 143 Neb. 184, 9 N. W. 2d 207, this court remarked significantly concerning the Gledhill case in this manner: "It appears from a careful reading of the case that the plaintiff's property rights had been directly invaded by the state through the improper construction of this temporary bridge, by reason of which the plaintiff sustained property damage by the flooding of his land, which was special damage not suffered by the public at large."

Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154, referred to a situation reflected by these facts: Defendant had acquired a right-of-way across land adjoining that of plaintiff on the south and had erected thereon a canal for the transportation of water. South of the right-of-way was a drainage canyon whose outlet to the north crossed the right-of-way and entered onto part of plaintiff's land. Defendant erected a concrete flume from south to north across its right-of-way. Plaintiff claimed that prior to the construction of the flume the water diffused over her land and irrigated it but that afterwards the water entered her land in a narrow channel and damaged it. It is said in the opinion in that case: "One of the incidents of taking property by eminent domain is that not only is the condemnor liable to compensate for the taking but also is liable in this jurisdiction, by virtue of section 21, art. I of the Constitution of the state, for consequential damage to other property in excess of the damage sustained by the public at large. * * * (Many authorities cited.) In City of Omaha v. Kramer, supra, (25 Neb. 489, 41 N. W. 295, 13 Am. S. R. 504) the following significant statement is found: 'Section 21, article I, of the constitution of this state provides that, "The property of no person shall be taken or damaged for public use without just compensation therefor." The section above taken, except the words "or damaged," was in the constitution of 1867. Under that constitution, * * * if none of his real estate was taken for public use he could recover nothing, although

his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well known rule that, in the construction of remedial statutes three points are to be considered, viz., the old law, the mischief, and the remedy, and so to construe the act as to suppress the mischief and advance the remedy, is to be applied. 1 Blackstone Com., 87. Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration.' * * * It therefore follows that although the portion of the right of way on which the flume was constructed is not over and across the lands of plaintiff yet she may have her action against the defendant for damages. * * * The wrong and damage was in violation of the Constitution."

In Schmutte v. State, 147 Neb. 193, 22 N. W. 2d 691, is this language: "Section 21, article I, of the Constitution prohibits the state from damaging property for public use without compensation. * * * The fact that the state is not liable for the negligence of its officers, agents, and employees does not excuse it from liability for the taking or damaging of property which was or could have been done under its powers of eminent domain. * * * One whose property is damaged without actual taking is entitled to just compensation."

It is stated in Gruntorad v. Hughes Bros., Inc., 161 Neb. 358, 73 N. W. 2d 700: "In Austin v. Village of Tonka Bay, 130 Minn. 359, 153 N. W. 738, the court discussed and cited numerous cases and then said: 'The above cases are all against cities; none of them is against a county. But the logic of all of them is to the effect that the municipality which invades the right conferred upon the property owner by the Constitution must respond in damages therefor.'" There are many authorities cited in support of that statement.

In Jacobs v. City of Seattle, 93 Wash. 171, 160 P. 299, L. R. A. 1917B 329, the court declared: "The disposal

of garbage may be a proper governmental function, granted by legislative enactment; but, conceding it to be so, the function must be exercised with due regard to constitutional limitations. Our constitution (art. 1, § 16) explicitly provides that private property shall not be damaged for public use 'without just compensation having been first made, or paid into court for the owner.' The complaint in this case sets forth the injury to the property of appellants arising from the erection, maintenance and operation of respondent's plant for the disposal of garbage on land adjoining that of the appellants * * *. The complaint does not seek to charge negligence of the respondent or its employees in the performance of governmental duties, in which case the municipality might be absolved from liability. The first cause of action is founded on the higher ground of the taking or injury to property without just compensation. The authorities sustain the right of recovery in such cases."

The causes of action for damage presented in this case are within the reach of the constitutional provision that the property of no person shall be taken or damaged for public use without just compensation therefor. The decision of the district court to the contrary may not be sustained.

Appellee complains that the case was brought and presented to the district court on the basis of negligent or wrongful acts by joint defendants and after the close of the trial appellants attempted to change their theory of the case to one that appellee was liable in damages because of the constitutional provision prohibiting damage to private property for public use without just compensation therefor. Appellants did not plead that the city was negligent, that it had created or was maintaining a nuisance, or the constitutional provision above recited. Appellants did plead the establishment and maintenance of the dump, the rainstorm, and the damages claimed to have resulted therefrom. They were not required to make reference to the constitutional pro-

vision in their pleadings to have the benefit of it if the facts proven were sufficient to justify the application of it for their benefit. Gledhill v. State, *supra*; Snyder v. Platte Valley Public Power & Irr. Dist., *supra*.

The record shows that 19 acres of corn were totally destroyed by flooding of the land on June 22, 1949. It was a growing, unmatured crop. There was evidence that the land was very productive and in prior years had generally produced a good crop of 50 to 60 bushels of corn per acre. There is no evidence as to the amount of corn that was produced on adjoining land or land in that vicinity during the year 1949. There was an estimate, based upon doubtful foundation, that the 19 acres would probably have produced 1,000 bushels that year if the growing corn had not been destroyed. The measure of damages to a growing crop that is destroyed by wrongful act or omission of another is the value of it at the time of destruction. Gable v. Pathfinder Irr. Dist., 159 Neb. 778, 68 N. W. 2d 500. Damage based upon the value of an unmatured crop is analagous to profits lost and is governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damage based on the destruction of an unmatured crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it had matured. Gledhill v. State, *supra;* Ricenbaw v. Kraus, 157 Neb. 723, 61 N. W. 2d 350. The proof is not sufficient to permit a determination, with reasonable certainty, of the value of the crop of corn that it is alleged was destroyed. Appellants claim that the utility of a part of what is spoken of as the McLane place was destroyed during a period of 3 years. The quantity of the land affected is not shown with reasonable certainty. It is variously referred to as comprising an area from 20 to 40 acres. There is no competent or sufficient evidence as to the amount of the loss to the owners within any legal measure of damage. A determination of the

issue of damage in this court as it is presented would be conjectural and speculative. The record will not permit a determination of the issue by this court.

The judgment granting a permanent injunction in this cause should be and it is affirmed. The judgment as to all other matters should be and it is reversed and the cause is remanded to the district court for Sarpy County for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

RUSSELL ROMANS, APPELLEE, V. ROY BOWEN, APPELLANT.
82 N. W. 2d 13

Filed April 5, 1957. No. 34134.

1. **New Trial.** A verdict and judgment thereon will be vacated and a new trial granted on an application of a party aggrieved by reason of newly discovered evidence only if the evidence is material and could not with reasonable diligence have been discovered at the time of the trial, which evidence would probably change the result substantially and favorably to the applicant.
2. **Appeal and Error.** Under rule 8 a2(4) of the Revised Rules of the Supreme Court, assignments of error relied upon for reversal and intended to be urged are required to be separately numbered and paragraphed.
3. ———. Ordinarily only errors so separately numbered and paragraphed and which have been discussed will be considered on review by the Supreme Court.
4. ———. The Supreme Court may, at its option, notice plain errors not assigned.

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

Ronald K. Samuelson, Ernest Raun, and *Keith Hopewell,* for appellant.

Don S. Farrens, for appellee.

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

YEAGER, J.

This is an action at law by Russell Romans, plaintiff and appellee, against Roy Bowen, defendant and appellant, to recover an alleged balance of $1,575.20 due under a settlement of accounts made on March 15, 1954, between the parties growing out of a written agreement covering a joint farming and feeding operation of hogs and cattle on the land of the defendant, which was followed by an oral agreement for a feeding operation of hogs and to some extent the production of crops thereon. The action relates only incidentally to production of crops.

On trial of the case a jury returned a verdict in favor of the plaintiff and against the defendant for $1,400. Judgment was rendered on the verdict. A motion for new trial was filed and in due course overruled. From the order overruling the motion for new trial the defendant has appealed.

The assignments of error set forth as grounds for reversal are (1) that the order overruling defendant's motion for new trial is contrary to law, and (2) that it is not supported by and is contrary to the evidence.

The only point asserted or argued in the briefs however is that the court erred in refusing to grant a new trial on the ground of newly discovered evidence.

As ground for action the plaintiff pleaded that on or about March 26, 1953, the parties entered into an agreement whereby the plaintiff was to feed and care for hogs being prepared for market and that as compensation he was to receive 10 percent of the proceeds of sale, and whereby he was to feed and care for cattle then being prepared for market and that for this he was to receive 25 percent of the net profit; that on or about July 1, 1953, the parties entered into an oral agreement by the terms of which plaintiff was to receive a one-half interest in 26 brood sows belonging to the defendant, and a one-half interest in the 1953 fall and the 1954 spring pigs from the sows; that the plaintiff

would farm certain land of the defendant the crops from which would be shared equally between the parties; and that except for certain items of account including plaintiff's interest in cattle and his interest in pigs sold, all accounts were fully settled from time to time prior to March 15, 1954. The allegations to this extent present the background for the basis upon which the action is predicated.

The true basis for the action as pleaded is as follows: On March 15, 1954, the defendant prepared a statement of account of the unsettled items of the parties as follows:

"a. Due the defendant from the plaintiff the sum of $1,128.14 for feed and vaccinating;

"b. Due the defendant from the plaintiff the sum of $650.00 for brood sows purchased;

"c. Due the defendant from the plaintiff, the sum of $565.00 for a press drill and lister purchased from the defendant;

"d. Due the plaintiff from the defendant the sum of $3888.23 for the plaintiff's share of hogs sold for the parties by the defendant in his name and for plaintiff's share of hogs retained by the defendant;

"e. Due the plaintiff from the defendant the sum of $54.98 for the plaintiff's share of hay on the farm; and

"f. Due the plaintiff from the defendant the sum of $175.13 for the plaintiff's share of oats on the farm."

Plaintiff alleged that on the account as thus stated the defendant, on January 17, 1955, paid $200, thus leaving a balance due and owing in the amount of $1,575.20. The prayer was for judgment in this amount.

To the petition the defendant filed an answer wherein he denied generally the allegations of the petition, except that he admitted that he owed $30.11 being a balance due on the purchase of oats of the value of $175.13 and of hay of the value of $54.98 on which he had paid $200. He offered to confess judgment in the

amount of $30.11. For reply the plaintiff filed a general denial.

The record of the evidence discloses that the existence of the two contracts and the alleged contents thereof are not disputed. Likewise beyond dispute the parties negotiated a settlement of the accounts on March 15, 1954. The evidence of the plaintiff however fails to disclose the prepared statement or any other of like import which he has pleaded as the basis of his cause of action.

The evidence of plaintiff discloses that on March 15, 1954, the parties got together in the home of the defendant for the purpose of settling their accounts; that on that date on information furnished by them, a son of the defendant made a computation of the accounts and on the basis of the computation a settlement was made; that at that time the defendant receipted for payment by plaintiff of three separate items as follows: $1,128.14, $650, and $565; that the same day the plaintiff gave to the defendant a receipt for $4,108.34, being $3,888.23 for hogs, $54.98 for hay, and $175.13 for oats; that by instrument dated March 15, 1954, the following certificate was delivered to defendant: "March 15, 1954 To Whom it May Concern: This is to certify that I, Roy Bowen and Russell Romans, have met on this date and made full settlement on cattle, hogs, oats & hay to this date in full satisfaction to all parties concerned. (Signed) Genevieve Romans." The plaintiff testified that this was signed by his wife. The execution and delivery of these instruments is not brought into question. No memoranda of the computation made by the son or of the data upon which it was based are in evidence.

There is no evidence whatever of any statement made on March 15, 1954, that after the settlement of that date the defendant was indebted to plaintiff in the amount of $3,888.23 or of any other amount. To the contrary according to the documents which the plaintiff has exhibited in evidence no amount was due.

According to plaintiff's testimony after this settlement had been made he became dissatisfied. Whether or not any specific demand for payment was thereafter made upon the defendant has not been made certain. In any event this action was commenced. On the trial no effort was made to prove the existence of the statement which was the alleged basis of the cause of action. Plaintiff attempted to prove as a basis for recovery that he was entitled to receive the amount claimed as payment for corn furnished for the feeding of hogs in excess of the amount furnished by the defendant.

His evidence in this connection related either to matters without the settlement or to a deficiency in the amount embraced in the receipt for $4,108.34. Under neither theory does the evidence support the issues made by the pleadings. No objection however has been made by the defendant to this departure.

The parties, under the oral agreement, were engaged upon an enterprise whereby each was to furnish one-half of the expense of care and feed of pigs and sows and to share equally in the profits. No question of profits is directly involved here. The pertinent question is only one of feed.

It is but a matter of reason and logic to say that the question of whether or not the defendant owed the plaintiff anything for feed depended upon the amount of feed each furnished and the value thereof. The record is devoid of any evidence from which any reasonable conclusion may be arrived at in this respect.

In this respect the plaintiff rested his right of recovery on evidence that he furnished a quantity of corn for the animals fed and that for one-half the value thereof the defendant was indebted to him. The quantity was not made certain. The plaintiff adduced no competent evidence as to value. His testimony in this regard failed to take into consideration any specific contribution of feed to the enterprise by the defendant.

In essence therefore the plaintiff's case at the time he

rested depended upon evidence not of an accounting for feed pursuant to the contract alleged but solely upon proof that he had furnished feed.

At the close of plaintiff's case the defendant failed to move for a directed verdict, which would have afforded the court the opportunity to pass as a matter of law on the question of whether or not the evidence was sufficient to sustain a cause of action. It will be interpolated here that likewise no such motion was made at the close of all the evidence.

The defendant then adduced his evidence. In the view taken it does not become necessary to review this evidence herein, but only to say that the defendant gave no testimony that he was indebted to plaintiff in any amount. By answer he admitted that he owed $30.11. It however becomes necessary to discuss an exhibit which was offered in support of the motion for new trial. It is this exhibit that the defendant says was newly discovered evidence which entitled him to a new trial.

The exhibit is the following: "July 17, 1953. Corn by measure owned by Roy—2221.4 bu. Sold to Russell Romans 1110.7 bu. Settlement to be made on return of hogs according to agreement agreed to between parties hereto. (Signed) Roy Bowen (Signed) Russell Romans." The instrument is dated about 17 days after the oral contract was made.

The defendant by affidavit asserted that this exhibit was discovered after the trial and that the failure to discover and adduce it was not the result of lack of due diligence. He urges that if it had been adduced the result of the trial would have been more favorable to him.

A reasonable basis, on the record made in this case, for the contention that if the exhibit had been adduced the result would have been different is not apparent. The only conceivable purpose it could have had on its face would have been to show that on the date it bore the plaintiff owed the defendant for 1110.7 bushels of corn

for which settlement was to be thereafter made.

Arguendo the defendant says that the exhibit could have had a bearing favorable to him in proof of the matters which were included in the settlement of March 15, 1954. Suffice it to say that the defendant is not claiming anything beyond that which he says he was entitled to at that time. The plaintiff has not contended that it was not so included. It could not therefore have added to any basic contention of the defendant.

The rule applicable is that a verdict and judgment thereon will be vacated and a new trial granted on an application of a party aggrieved by reason of newly discovered evidence only if the evidence is material and could not with reasonable diligence have been discovered at the time of the trial, which evidence would probably change the result substantially and favorably to the applicant. City Savings Bank v. Carlon, 87 Neb. 266, 127 N. W. 161; Erwin v. Watson Bros. Transfer Co., 129 Neb, 64, 260 N. W. 565; Miller v. Olander, 133 Neb. 762, 277 N. W. 72; Hahn v. Doyle, 136 Neb. 469, 286 N. W. 389; In re Guardianship of Carstens, 151 Neb. 425, 37 N. W. 2d 581. The showing of the defendant in the light of the record made and the controlling principles will not permit the granting of a new trial in this case on the ground of newly discovered evidence.

We think however that there should be a reversal of the judgment in this case and that a new trial should be granted. To do this it becomes necessary to respond to the exception contained in rule 8 a2(4) of the Revised Rules of the Supreme Court. This provision is as follows: "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."

As pointed out the defendant by assignments of error said that the order overruling the motion for new trial

was contrary to law and to the evidence. The assignments were in no wise discussed in the brief.

The plaintiff's evidence fails to sustain a right of recovery in the amount prayed for in the petition or in the amount awarded by the verdict either on the theory presented by the petition or by the evidence. The plaintiff has failed to furnish evidence from which a result may be calculated and a finding made that the defendant is indebted to him in any definite amount or for that matter in any amount.

To allow this verdict and judgment to stand in the light of the failure of the plaintiff to prove the essentials of a right of recovery would be a patent perversion of established rules of law and, under the evidence, a miscarriage of justice. In this light and in the light of the power granted by the rule of this court which has been referred to it is determined that the judgment should be and it is reversed and the cause is remanded with directions to grant a new trial.

REVERSED AND REMANDED.

RALPH MCCAULEY, APPELLANT, V. DON HARRIS, DOING BUSINESS AS HARRIS SALES COMPANY, APPELLEE.
82 N. W. 2d 30

Filed April 5, 1957. No. 34141.

1. **Workmen's Compensation.** A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
2. ———. Before compensation can be awarded an employee under our law it is required that he prove, by a preponderance of the evidence, that his injury and disability, if any, were caused by an accident arising out of and in the course of his employment.
3. ———. Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability.

4. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set out nor does it permit a court to award compensation where the requisite proof is lacking.
5. ———. A compensation award cannot be based on possibilities, probabilities, or speculation and if an inference favorable to the claimant can only be reached on the basis thereof then he cannot recover.

APPEAL from the district court for Box Butte County: EARL L. MEYER, JUDGE. *Reversed and remanded with directions.*

Wade H. Ellis, for appellant.

Stubbs & Metz, for appellee.

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

WENKE, J.

This is a workmen's compensation case appealed from the district court for Box Butte County. Ralph McCauley began this action on September 1, 1955, by filing his petition in the Nebraska Workmen's Compensation Court against Don Harris, doing business as Harris Sales Company. On November 10, 1955, a member of that court awarded McCauley $28 a week for 8 weeks on the basis of his having suffered temporary total disability for that length of time from and after May 10, 1955. In addition thereto he was awarded necessary medical care in at least the amount of $59. McCauley thereupon waived his right to rehearing before the full compensation court and appealed directly to the district court for Box Butte County. The district court awarded McCauley the sum of $283 in full satisfaction of all disability and necessary medical expenses, being $28 a week for 8 weeks of temporary total disability and $59 for necessary medical services. McCauley filed a motion

for new trial and, from the overruling thereof, perfected this appeal.

In his petition for rehearing filed in the district court appellant alleges that as a result of a sprained ankle and a resulting coronary condition he was totally disabled from May 10, 1955, for a period of 13 weeks and thereafter partially permanently disabled to the extent of 50 percent. Based thereon he asks for whatever he may be entitled to under the Nebraska Workmen's Compensation Act.

An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record. Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

Appellant, 47 years of age, was employed by appellee as a bakery goods routeman in Alliance, Box Butte County, Nebraska. For these services he was being paid at the rate of $70 a week plus certain commissions. About 6:40 a.m. on Monday, May 9, 1955, while on the job, appellant severely sprained his right ankle in the course of his employment. It happened when he jumped from a platform or wooden dock at the rear of appellee's warehouse in Alliance which was being used for the loading of delivery trucks. The dock was between 4½ and 5 feet high and had no stairs, steps, or other means for getting on or off. The injury suffered by appellant resulted when his right foot landed on a round stick which caused it to turn and throw him to the ground.

Appellant continued on the job and made his deliveries. In doing so he had to get in and out of the delivery truck to get the bakery products and in some instances had to go up and down stairs to deliver them to customers. Some of the cartons of bakery goods which he delivered weighed as much as 25 pounds. His sprained ankle began to hurt so between 10:15 and 10:30 a.m. he consulted Dr. John S. Broz, a local doctor, about it. Dr. Broz examined and X-rayed it but found no fractured bones, only sprained ligaments. Appellant went home for lunch at which time his wife put a cold pack

on his swollen ankle. After lunch appellant returned to his job. However, about 3:30 p.m. appellant again went to see Dr. Broz. Dr. Broz then advised appellant to go home, rest, elevate his right foot, and treat the swollen ankle with alternating hot and cold packs. This he did. At this time the ankle was badly swollen and was becoming discolored.

Appellant did not feel good on Tuesday, May 10, 1955, so he stayed home. He spent most of his time that day resting. He did so either in bed or on a davenport, sitting up very little. About noon, or shortly thereafter, he started to have some pain in his chest in the area of his heart. These pains were not severe at first, in fact he was able to sit at the table and eat his evening meal. Shortly after 11:15 p.m. that night, when he attempted to go to the bathroom, appellant was stricken with a severe coronary occlusion. As a result Dr. Broz was called immediately. He arrived about 11:45 p.m., found appellant in a very critical condition, and gave him a hypodermic. Thereafter Dr. Broz called for an ambulance and had appellant removed to St. Joseph's hospital where he remained for some 36 days, the first 10 or more of which were spent under an oxygen tent. On June 15, 1955, he was released from the hospital but remained in his home under a doctor's care.

On August 8, 1955, appellant was permitted to return to work on his former job, although directed to take it easy and slow up. This he did. For over a month he only supervised the job and thereafter he worked regularly but it now takes him about 2 hours longer each day to perform the same duties he formerly did.

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

Before compensation can be awarded an employee under our law it is required that he prove, by a preponderance of the evidence, that his injury and disabil-

ity, if any, were caused by an accident arising out of and in the course of his employment. Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394; Feagins v. Carver, *supra*.

As stated in Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51: "Such facts must be proved by the claimant by sufficient evidence leading to the direct conclusion, or by a legitimate legal inference therefrom, that such an accidental injury occurred and caused the disability. There must be shown a causal connection between an accident suffered by the claimant and the cause of his disability." See, also, Gilcrest Lumber Co. v. Rengler, 109 Neb. 246, 190 N. W. 578, 28 A. L. R. 200; Jones v. Yankee Hill Brick Manuf. Co., *supra*.

In this respect, we said in Jones v. Yankee Hill Brick Manuf. Co., *supra*: "The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant shall prove his right to compensation within the rules above set forth nor does it permit a court to award compensation where the requisite proof is lacking." See, also, Feagins v. Carver, *supra*.

The evidence adduced establishes appellant suffered a severe injury to his right ankle as the result of an accident arising out of and in the course of his employment by appellee. The question is, has appellant established a causal connection between the accident resulting in a severely sprained ankle and the coronary occlusion, the latter being the cause of his permanent disability? In this respect the medical testimony is the key factor. A compensation award cannot be based on possibilities, probabilities, or speculation and if an inference favorable to the claimant can only be reached on the basis thereof then he cannot recover. Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658; Murray v. National Gypsum Co., 160 Neb. 463, 70 N. W. 2d 394; Jones v. Yankee

Hill Brick Manuf. Co., *supra*; Feagins v. Carver, *supra*. As stated in Jones v. Yankee Hill Brick Manuf. Co., *supra*: "An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence."

Dr. Friedrich W. Niehaus of Omaha, Nebraska, a specialist in internal medicine and cardiology, completely examined appellant on July 25, 1955, at his office. He found appellant was then suffering with intercostal neuralgia but found that several months before he had had a coronary occlusion. In answer to questions based on appellant's injury and his continuing to work on May 9, 1955, Dr. Niehaus testified it could have caused the coronary occlusion but thought it very highly probable it did not, that is, he could not see how it could have been a precipitating cause. He went on to testify that its happening therefrom would be a very, very remote possibility and did not think there was any connection between the two. His overall view is very well expressed in his report as follows: "It is extremely doubtful, in fact untenable that a sprained ankle would be the precipitating factor in a coronary occlusion. It seems to me the two conditions are coincidental and not related." Dr. Niehaus emphasized the fact that the lapse of time between the injury and the symptoms leading to the coronary occlusion made the ankle injury become less significant.

Dr. Thomas D. Fitzgerald, an associate of Dr. Broz in the Broz Clinic at Alliance, observed appellant in the hospital on and after either May 12 or 13, 1955. He testified it was difficult to say just what causes any coronary; that it was conceivable, if the shock of the pain was sufficient, that that could actually have caused it; that appellant's injury and his continuing to work could have aggravated the original condition; that there is the possibility that that could have caused a weak heart condition several days after the original shock; but that he would think more about it if it had happened at 3

in the afternoon (Monday) rather than 28 hours later.

Dr. Broz testified that he felt the sprain to appellant's ankle definitely precipitated the coronary occluson stating it resulted from the sprained ankle and the extra burden or overload placed on him when he kept on working. However, we think Dr. Broz's evidence is considerably weakened because he was under the mistaken belief that appellant's chest and heart pains had started by 3:30 p.m. on Monday, when, as a matter of fact, they did not start until after noon on Tuesday. This conclusion is based on the significance that both Drs. Niehaus and Fitzgerald placed on the lapse of time as it relates to causal connection.

We have come to the conclusion that it would be very speculative to permit appellant to recover for his condition resulting from the coronary occlusion as the evidence adduced shows that it is only a possibility that it resulted from the accident to appellant's right ankle and his continuing to work thereon for the balance of the day on which he received the injury.

The question then arises, does the evidence adduced support the award rendered by the trial court? There is no question but what appellant is entitled to be paid for the temporary disability he suffered because of the sprained ankle but there is nothing in the evidence adduced to show what that was, nor do we think the record supports any award for necessary medical expense arising from the sprained ankle to the extent of $59. We think the extent of such medical expenses, as shown by the record, is $12.

We reverse the judgment rendered by the district court with directions that the appellant be given an opportunity to adduce evidence to show what length of time the sprained ankle alone would have kept him temporarily off the job and that he be awarded temporary total disability for that length of time in accordance with the Workmen's Compensation Act together with the sum of $12 for medical expenses. In all other re-

spects appellant's claim should be denied. Costs are taxed to appellant.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, PLAINTIFF, V. CITY OF YORK ET AL., DEFENDANTS.

82 N. W. 2d 269

Filed April 5, 1957. No. 34156.

1. **Constitutional Law.** The prohibition contained in Article XIII, section 3, Constitution of Nebraska, relating to the giving or loaning of credit in aid of any individual, association, or corporation, applies to the State and all political subdivisions thereof.
2. **Municipal Corporations: Taxation.** Municipal revenue bonds are obligations of a city even though they are not general obligations and not subject to payment through the exercise of the taxing power.
3. **Constitutional Law: Municipal Corporations.** Money derived from the sale of municipal revenue bonds is public money.
4. **Constitutional Law.** Public money may not be expended for a private purpose whatever its source may be.
5. **Constitutional Law: Municipal Corporations.** The purchase of land by a municipality and the erection of an industrial plant thereon for lease to a private corporation for private gain and profit, by issuing revenue bonds to be paid solely from rentals, is not for a public purpose.
6. ———: ———. The building and leasing of industrial plants, and their leasing to private concerns for use for private profit or gain, financed by municipal revenue bonds payable solely from rentals, as authorized by sections 18-1601 to 18-1613, R. R. S. 1943, violates Article XIII, section 3, of the Constitution, prohibiting giving or loaning credit in aid of an individual, association, or corporation.

Original Action. *Demurrer overruled.*

Clarence S. Beck, Attorney General, and *Clarence A. H. Meyer,* for plaintiff.

Cline, Williams, Wright & Johnson and *Wallace W. Angle,* for defendants.

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

CARTER, J.

This is an original action brought by the State of Nebraska on the relation of the Attorney General, at the direction of the Governor pursuant to section 84-205 (9), R. R. S. 1943, to enjoin the defendants from proceeding under section 18-1601 to section 18-1613, R. R. S. 1943, because of its constitutional invalidity. The defendants filed a general demurrer to the petition. The sole question before the court is whether or not the petition states a cause of action.

The defendants are the city of York and its mayor and city councilmen. The petition alleges that the city, acting through the members of the city council, entered into an agreement with the York Cold Storage Company and the York Packing Company, that upon the completion of certain industrial buildings to be constructed by the York Cold Storage Company, the city would purchase the same by issuing revenue bonds pursuant to the authority contained in section 18-1601 to section 18-1613, R. R. S. 1943, hereinafter called the Act. The petition also alleges that upon the purchase of the industrial buildings, the city proposes to lease them to the York Packing Company as a packing plant for the slaughtering of hogs.

Plaintiff asserts that the Act is violative of Article XIII, section 3, of the Constitution of this state, which provides: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation."

It is here contended that the prohibition contained in the foregoing constitutional provision applies only to the State as an entity and has no application to political subdivisons thereof. We do not concur in this view. Political subdivisions of the State exist at the will of the State exercised through the Legislature. For us to

say that the State may not loan its credit to an individual, association, or corporation, but that it might create a political subdivision and authorize it to do that which the State itself is prohibited from doing would be, to say the least, a very anomalous situation. It would permit the State to do by indirection the very thing it could not directly do, a theory which has been consistently condemned by this court. Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317; Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. It is clear that the framers of our Constitution had in mind a prohibition against giving or loaning the credit of the State or any subdivision thereof for a purely private purpose. This supports the fundamental principle that public moneys may not be used for private purposes. To impose such a prohibition as a matter of constitutional policy on the State, only to have its beneficent purpose thwarted by a refinement of definition not contemplated by its framers, would be to avoid the very purpose for which it was intended. It is not the function of courts to thus rewrite constitutional provisions to avoid their plain effect. It is the plain intention of this provision that state government, including political subdivisions thereof, shall not extend credit in aid of private persons and private enterprises. It is a prohibition, also, to protect the State and its political subdivisions against reckless financial involvement in private enterprises supposed to serve the public good but which are in fact dominated by private interest. We conclude that the prohibition contained in Article XIII, section 3, Constitution of Nebraska, applies to the State and all political subdivisions thereof.

It is contended, also, that the provision has no application in the present case for the reason that the credit of the city was not given or loaned. It is argued that the revenue bonds were not general obligations of the city and that they would not become a charge against its general credit or taxing powers. It cannot be questioned

that the revenue bonds are payable solely out of revenues derived from the leasing of the project to be financed by the bonds so issued. This court has so limited the liability of a city on this type of bond. Kirby v. Omaha Bridge Commission, 127 Neb. 382, 255 N. W. 776. Is the issuance of revenue bonds in the manner prescribed by the Act an extension of the credit of the city?

It is true that the revenue bonds are not a general liability of the city and they are not subject to payment through the exercise of the taxing power. But they do cast burdens upon the city with reference to their issuance and payment. The city and its officers are charged with the duty of fixing and collecting the rentals from which the revenue bonds are to be paid. This necessitates the execution of leases, the fixing of rentals, the taking of chattel mortgages on equipment to secure the payment of rent, the providing of insurance coverage, and the determination of payments to be made in lieu of taxes. It imposes duties and responsibilities upon the city and its officers on matters which are private rather than public in character. The issuance of the bonds in the name of the city for the payment of the cost of the project evidences the fact that the credit of the city has been extended. The city is the payer of the bonds and it is primarily liable for their payment. The bonds become the obligations of the city. The fact that the means of payment is limited does not make it any less so. A failure of payment is a default by the city. The constitutional prohibition does not infer that the credit of the State or its political subdivisions may be given or loaned except when a general liability exists. The prohibition clearly provides that the credit of the State may not be given or loaned to an individual, association, or corporation under any circumstances. When the State or a political subdivision thereof becomes a payer of a revenue bond or any other evidence of indebtedness which

is to be used in the accomplishment of a private as distinguished from a public purpose, the credit of the State has been given or loaned contrary to Article XIII, section 3, of the Constitution. If evidences of indebtedness by interested private persons are inadequate and revenue bonds of the city are sufficient, either the credit of the city has been extended or their purchasers are victims of a base delusion. It seems clear to us that the revenue bonds are issued by the city in its own name to give them a marketability and value which they would otherwise not possess. If their issuance by the city is an inducement to industry, some benefits must be conferred, or it would be no inducement at all. Such benefits, whatever form they may take, necessarily must be based on the credit of the city. The loan of its name by a city to bring about a benefit to a private project, even though general liability does not exist, is nothing short of a loan of its credit. The use of the city as the payer of the bonds is intended to give respectability to them because of the general acceptability of cities as a source of bond issues in financial markets. It is a loan of the credit of the city within the meaning of the constitutional prohibition.

The defendants cite cases from other states upholding the constitutionality of similar acts. Faulconer v. City of Danville, 313 Ky. 468, 232 S. W. 2d 80; Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629; Holly v. City of Elizabethton, 193 Tenn. 46, 241 S. W. 2d 1001. These cases are based on what we deem fundamental fallacies of reasoning. The first is that a revenue bond for which a city is not generally liable is not within the prohibition against the State giving or loaning its credit. The second is that the issuance of such revenue bonds for the construction of industrial plants for private users is a valid exercise of the proprietary powers of a municipality. The third is that the issuance of revenue bonds for the construction of industrial buildings for private use is for a public purpose.

We have already discussed the first point and we shall give it no further consideration here. With respect to the second point, we point out that the exercise of proprietary powers is limited by the rule that the subject sought to be included in the exercise of a proprietary power must bear a reasonable relation to the public convenience and welfare. In other words, it must relate to the public good as distinguished from a purpose dominated by private interest. This point is closely related to the question whether the issuance of revenue bonds by a city to construct an industrial plant for the slaughtering and processing of hogs is for a public purpose. We hold that it is not. We think the reasoning of the court involving a similar statute in State v. Town of North Miami (Fla.), 59 So. 2d 779, points the way to the correct conclusion.

In the last-cited case the court said: "This Court has approved special acts of the Legislature authorizing advertising programs, the acquisition of land, for golf courses, parks, playgrounds and recreational and hospital centers. The Court has also approved special acts authorizing the construction of buildings which served a public purpose and many other acts authorizing counties and municipalities to acquire property and make improvements to public property which served a public purpose. In none of the cases decided by this Court since the adoption of our present Constitution have we approved any special legislative acts which authorized any of the political subdivisions or governmental units of the State to acquire property and erect buildings thereon for the exclusive use of a private corporation for private gain and profit.

"Every new business, manufacturing plant, or industrial plant which may be established in a municipality will be of some benefit to the municipality. A new super market, a new department store, a new meat market, a steel mill, a crate manufacturing plant, a pulp mill, or other establishments which could be named

without end, may be of material benefit to the growth, progress, development and prosperity of a municipality. But these considerations do not make the acquisition of land and the erection of buildings, for such purposes, a municipal purpose. * * * Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system." We deem the foregoing to be most persuasive reasoning and a statement of controlling principle.

We summarize as follows: The constitutional prohibition against the State as to giving or loaning its credit to an individual, association, or corporation is applicable to all subdivisions of the State. The issuance of revenue bonds by a city, although the city is not generally liable for their payment, is an obligation of the city even though the source and method of payment is restricted. The money realized from revenue bonds is public money and it may not be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It is not material what such undertakings may be called, or what forms are devised to conceal their main purpose, or how worthwhile they may appear to be, when the question of constitutionality is presented, their substance will be examined. The financing of private enterprises with public funds is foreign to the funda-

mental concepts of our constitutional system. To permit such encroachments upon the prohibitions of the Constitution would bring about, as experience and history have demonstrated, the ultimate destruction of the private enterprise system. We have not overlooked the fact that the Legislature determined that the Act was for a public purpose. While such a legislative declaration is entitled to great weight, it is not conclusive. There are limits beyond which the Legislature cannot go. It cannot authorize a city to spend public money, or lend or give away, directly or indirectly, its credit or property for a purpose which is not a public one.

The purpose of the statute, and the contract in the present case springing therefrom, is to assist a private corporation that is engaged in an enterprise for profit. It is true, of course, that the city may be benefited by the location of the company in the city. It may produce employment for citizens of the community. It may tend to balance a locally restricted economy. But general benefit to the economy of a community does not justify the use of public funds of the city unless it be for a public as distinguished from a private purpose. This is simply a case where the city is attempting to use the powers, credits, and public moneys of the city to purchase land and erect industrial buildings thereon for the use of a private corporation for private profit and private gain. It serves no public or municipal purpose. The Act purports to grant powers to cities which are beyond the authority of the Legislature to confer.

This court, in Oxnard Beet Sugar Co. v. State, on rehearing, 73 Neb. 66, 105 N. W. 716, dealt with a problem somewhat similar to the one we have before us. The court said: "The legislature cannot appropriate the public moneys of the state to encourage private enterprises. The manufacturing of sugar and chicory is a private enterprise, and the public money or credit

cannot be given or loaned in aid of any individual, association or corporation carrying on such enterprises. Const., art. XII, sec. 3."

To permit legislation of this character to stand in the face of constitutional prohibitions would constitute a death blow to the private enterprise system and reduce the Constitution to a shambles in so far as its protection of private enterprise is concerned. The contract pleaded in the petition is void and the Act upon which it is based is a plain violation of the letter and spirit of Article XIII, section 3, of the Constitution of this state. The demurrer to the petition is therefore overruled.

DEMURRER OVERRULED.

TOM J. CRAWFORD, WHOSE REAL AND TRUE NAME IS THOMAS J. CRAWFORD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

82 N. W. 2d 1

Filed April 5, 1957. No. 34158.

1. Forgery. To utter and publish a forged instrument is to offer to pass it to another with intent to prejudice, damage, or defraud, declaring or asserting directly or indirectly by words or actions that it is good.
2. ———. In a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery.
3. ———. To sustain a conviction for forgery, it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority.

ERROR to the district court for Otoe County: JOHN M. DIERKS, JUDGE. *Reversed and remanded with directions.*

Robert L. Morrissey and *Otto H. Wellensiek*, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for defendant in error.

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

CHAPPELL, J.

An information filed in the district court for Otoe County charged in substance that on March 12, 1956, in Otoe County, defendant, Thomas J. Crawford, having in his possession and custody a certain forged bank check, well knowing that it was forged, did knowingly, falsely, and feloniously utter and publish same as true and genuine with intent to prejudice, damage, and defraud. Defendant, while represented by counsel, was tried to a jury upon his plea of not guilty. His motions to dismiss the information and direct a verdict of not guilty, made at conclusion of the State's evidence and again at conclusion of all the evidence on the ground that the State had failed to meet the burden of proof and prove beyond a reasonable doubt the charge alleged in the information, were overruled and the jury found defendant guilty as charged. Defendant's motion for new trial was overruled and sentence was pronounced. Thereafter he timely filed in this court his petition in error and transcript. Insofar as important here, defendant assigned that the trial court erred in overruling his motion to dismiss the information and for directed verdict made at the conclusion of the State's evidence. We sustain the assignment.

We have established that to utter and publish a forged instrument is to offer to pass it to another with intent to prejudice, damage, or defraud, declaring or asserting directly or indirectly by words or actions that it is good. Robeen v. State, 144 Neb. 910, 15 N. W. 2d 69.

We have also well established that in a prosecution for uttering and publishing a forged instrument, knowing it to be forged, a conviction cannot be sustained without proof of the forgery. Further, to sustain a

conviction for forgery it is not sufficient for the State to show that the signature is not that of the party whose name is used, but it must also affirmatively be shown that the signing was made without his authority. Berg v. State, 157 Neb. 863, 61 N. W. 2d 837. Such rules are applicable and controlling here.

Evidence adduced by the State was substantially as follows: That on March 12, 1956, about 2:30 or 3 p. m., defendant came into the Otoe County National Bank. A lady teller who had never seen defendant before motioned or requested him to come to the bank teller window where she was employed. Defendant then came over to her window and presented the check involved. Thereupon she "asked him if he wanted cash" and he said "Yes." She did not ask him his name and there was no other conversation by any one with defendant. She then took the check to another teller's window, but he knew nothing about it, so she took it over to another teller's window and asked him if he knew about it. That teller took the check in his hands, looked up, and defendant waved at him. He had been a teller in that bank 5 years, was somewhat familiar with the genuine signature of the drawer of the check involved, having accepted for payment checks written by her several times on previous occasions. His opinion was that the signature of the drawer on the check was not her genuine signature. During and after showing the check to the other two tellers, defendant just remained standing there in the lobby and the lady teller took the check and went back to the bookkeeping department for several moments. When she returned to her window, defendant had left the bank without having been paid any money on the check. She had been a teller and bookkeeper for 7 years in that bank and had been familiar with the genuine signature of the drawer all of that time. Her opinion was that the signature of the drawer on the check was not her genuine signature.

The sheriff of Otoe County testified as a witness for

the State that defendant had been in the county jail from April 2, 1956, and was still there at the time of his trial on September 9 and 10, 1956. The sheriff knew defendant's son, whose name was Eugene Crawford, and who used the initials "E. J." Crawford. The sheriff testified in substance that on May 14, 1956, when he took defendant's lunch up to him in the jail, defendant wanted the sheriff to call his daughter who lived at Plattsmouth and have some money sent down. He also said that he and his son came to Nebraska City and parked east of the bank or east of a drug store around the corner; that his son gave him the check involved and told him to go to the bank and get it cashed; that he did so to help his son who needed the money, and when the girl went to check up on it he left the check there and told a man teller that he had to go and check the meter on his truck. He then went back out to the car and they left Nebraska City. No evidence was adduced by the State that defendant ever wrote any part of the check.

The person whose name appeared upon the check as drawer testified substantially as follows while a witness for the State: That on February 20, 1956, a man named J. E. Crawford came to her home in Nebraska City wanting to inspect her house for termites; that she permitted him to enter the basement for that purpose; and that he reported to her that there were termites and he would treat her house for termites if she would let him do it right away. He did such work and she paid him therefor. She did not see defendant on March 12, 1956, but on that date about 2 p. m., J. E. Crawford returned to her home and wanted her name, so she wrote her name and address on a piece of paper and gave it to him. Calling her attention to exhibit No. 1, the check involved, which had been received in evidence, the witness was asked and answered as follows: "Q * * * Did you give this check to anyone? A No, not that I know of. Q And did you write that check? A No, I did not.

Q And is it your signature? A No, it is not." In that connection, she was not asked and did not testify that her signature was made without authority, and there is no evidence whatever, either direct or circumstantial, in this record affirmatively showing that the signature on the check was made without her authority. Also, the trial court gave no instruction whatever to the jury upon that necessary element.

In the light of rules heretofore set forth, we may assume, without deciding, that the evidence was sufficient if believed that the signature on the check was not that of the drawer, but that is not sufficient in the absence of any affirmative showing that the signing was made without authority. Authorities relied upon by the State are entirely distinguishable upon the facts and law.

We conclude that the trial court should have sustained defendant's motion to dismiss, and directed a verdict for defendant at the conclusion of the State's evidence. Contrary to the State's contention, such conclusion makes it unnecessary for us to consider any evidence adduced in defendant's behalf, or to determine any other assigned errors.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM A. TOWNER, APPELLANT, V. WESTERN CONTRACTING CORPORATION ET AL., APPELLEES.
82 N. W. 2d 253

Filed April 5, 1957. No. 34171.

1. **Pleading.** When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary.

2. **Workmen's Compensation.** Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause.
3. ———. If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury.
4. ———. Where the first accident was not a proximate cause of the second accident, the second accident constitutes an independent intervening cause.
5. ———. In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

APPEAL from the district court for Cedar County: ALFRED D. RAUN, JUDGE. *Affirmed.*

Kenneth M. Olds and *Slaughter & Brady,* for appellant.

Frederick M. Deutsch, for appellees.

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

SIMMONS, C. J.

This is a workmen's compensation case. Plaintiff alleges that he was an employee of the defendants when on August 3, 1954, he suffered an accident to his back resulting in a herniated and ruptured disc; that the injury was not discovered until September 1955; that he underwent an operation in October 1955; and that he suffered temporary total and permanent partial disability therefrom. He seeks compensation, hospital and medical expenses, and attorney's fees under the Workmen's Compensation Act.

The defense, so far as important here, is that the injury and disability resulted from an accident in

the course of plaintiff's employment in September 1955, when plaintiff was the employee of other parties who have a different insurance carrier.

The matter was heard before one judge of the compensation court, resulting in a dismissal of the plaintiff's cause. The matter was appealed to the district court and again resulted in a dismissal of plaintiff's cause. Plaintiff appeals here.

We affirm the judgment of the trial court.

The cause is here for trial de novo on the record. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51.

Preliminary to a statement of the evidence there are other matters which must be determined. In their answer in the district court, defendants denied generally, pleaded the statute of limitations, pleaded that plaintiff had sustained an accidental injury on September 20, 1955, while no longer an employee of the defendants, and alleged that said second accidental injury was the sole and proximate cause of any disability of plaintiff. Plaintiff moved to strike the allegation in defendants' answer as to the September 1955 injury. The basis of this motion was that it was an affirmative defense which had not been pleaded in the compensation court and was the raising of a new issue.

The trial court sustained the motion. The cause went to trial on the general denial and plea of the statute of limitations.

The court admitted evidence of the second injury based on statements of the plaintiff as admissions against interest.

The trial court held that plaintiff had failed to sustain his burden of proof.

As will appear in the discussion of the evidence, the question of the admissibility and consideration of the evidence of the second injury is important to a determination of the questions presented here.

Plaintiff's contention is that the evidence as to the second injury was erroneously admitted, and should

not have been considered by the trial court and cannot be considered here.

Plaintiff argues here that section 48-176, R. R. S. 1943, requires that the defendant by answer either admit or deny the substantial averments of the petition; that he "shall state the contention of the defendant with reference to the matters in dispute"; and that the quoted language required the defendant to plead the second injury in the compensation court if it was to be relied upon as a defense.

The concluding phrase of the sentence in section 48-176, R. R. S. 1943, is "as disclosed by the petition." Plaintiff quotes the clause. He then quits reading too quickly. Section 48-173, R. R. S. 1943, sets out the contents of a petition for compensation concluding with "also stating the matter or matters in dispute and the contention of the petitioner with reference thereto."

At most, the defendants would be required only to state their contentions with reference to the matters in dispute "as disclosed by the petition."

Here the plaintiff did not state the second injury and its results as a matter in dispute, nor his contentions in reference thereto. The statute has no application here. We need not construe it further than to reach that conclusion.

It is suggested in the briefs that the foundation of the trial court's ruling on the motion to strike and the contention that the fact of a second injury was an affirmative defense which had to be pleaded rests upon our decision in Otoe Food Products Co. v. Cruickshank, 141 Neb. 298, 3 N. W. 2d 452, 142 A. L. R. 816. We there held: "Where an employer alleges that a second injury, other than one suffered by the employee in the course of his employment, constituted the proximate cause of the loss of sight of the employee's right eye, such allegation is affirmative, and the employer has the burden of proving the same with reasonable certainty, and, by his failure to so prove, compensation will be

based upon the injury received by the employee in the course of his employment."

An analysis of that case shows that it was misconstrued. In that case the employer was the plaintiff. The employer alleged that the employee had received an eye injury and that he had been paid temporary total disability compensation and medical expenses. The employer then alleged a second accident and injury and that the second accident was not suffered in the course of employment by the plaintiff. The second accident and injury as the proximate cause of the employee's loss of vision was the basic fact put in issue by the plaintiff employer. We held correctly that it was an affirmative allegation which the employer was required to prove to sustain his petition. The decision does not hold that a second injury is an affirmative defense which has to be pleaded if relied upon.

The long-established rule is: "When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony of the plaintiff in support of his petition. For such purposes no other allegations in the answer are necessary." Alberts v. Pickard, 148 Neb. 764, 29 N. W. 2d 382.

In that case the petition alleged the sale of an automobile to a minor. We held that under a general denial evidence to the effect that the minor was not the purchaser of the automobile was admissible.

The rule above was stated originally in Broadwater v. Jacoby, 19 Neb. 77, 26 N. W. 629. The defendant purchased hogs from plaintiff's wife. Plaintiff claimed ownership of the hogs and sued for conversion. We held that evidence of the defendant that tended to contradict the allegations of the petition that plaintiff was not the owner of the hogs was competent under a general denial.

Wiedeman v. Hedges, 63 Neb. 103, 88 N. W. 170, was an action to recover the value of material sold by the plaintiff to the defendant. The answer was a general

denial. Defendant offered evidence that the material was sold to a partnership of which defendant was a member. We held the evidence offered by defendant to be admissible under a general denial as controverting and rebutting facts which the plaintiff was required to establish.

Hughes Co. v. Farmers Union Produce Co., 110 Neb. 736, 194 N. W. 872, 37 A. L. R. 1314, was a suit upon accounts. The action was against defendants as partners. The answer was a general denial. The defense was that the named defendants were in fact a corporation de facto. We held that the evidence as to a de facto corporate existence was admissible as tending directly to contradict the allegations of the petition.

So here we hold that evidence of the accident and resulting injury of September 1955 as the proximate cause of plaintiff's disability was admissible under the general denial. It tends directly to contradict the allegations of the plaintiff's petition that the accident of August 1954 was the cause of his injury and present disability. That evidence is for consideration here.

The fact situation here is not in serious dispute.

The plaintiff at the time of the hearing was 34 years of age. He had some time prior to the first accident, later referred to herein, suffered from "charlie horses" or muscle cramp in his legs. There is evidence that could relate these incidents to beginning after he had played football in his high school days. At any rate he testifies that they occurred not frequently, but prior to August 3, 1954. At that time plaintiff was an employee of the defendants as a carpenter. A rock slide occurred and a rock hit his lower back causing bruises and muscle injury. He was examined by defendants' doctor, and normal X-rays were taken. No severe injury was found. He was found to be able to resume his regular employment and did so for the following 6 or 8 weeks. He did not again ask for medical care although he had treatments by a chiropractor for a few

times. He was then "laid off." During the following months he lost weight rapidly and then regained it by private medical treatment. We find no contention that the loss of weight had anything to do with his present disability.

He began work as a carpenter in March 1955 for a different employer, not a party to this proceeding. He worked as a carpenter and carpenter foreman for this second employer until September 21, 1955. During this period the frequency and severity of the "charleyhorse" trouble increased somewhat but was in nowise disabling.

On September 21, 1955, a scaffold fell on plaintiff striking his right thigh above the knee. It was not disabling. This accident was not reported to the plaintiff's employer. However, pain developed after the accident in his leg and back. Plaintiff went to the doctor September 22, 1955, with severe and disabling pain. He was hospitalized September 24, 1955, and during the period of the examination gave the doctor the history of the accident of September 21, 1955. It was noted in his history on the hospital records and the physician testified to the fact that plaintiff told him of it. Plaintiff does not deny the statement or the fact of the second accident.

On Sepember 30, 1955, a myelogram revealed disc trouble in his lower back. On October 13, 1955, an operation was performed on plaintiff. The doctors found that he had a herniated disc and a ruptured disc.

Plaintiff made a normal recovery from the operation. It was followed by temporary total disability and there is a claim of partial permanent disability. The doctors who testified did not entirely agree on the differences between a herniated disc and a ruptured disc. They did substantially agree that a herniated disc may be congenital, caused by defective structure in the bones of the spine, or caused by trauma. They agreed that a herniated disc may be a condition of long stand-

ing and not necessarily disabling or revealing of its presence.

They agreed also that a ruptured disc makes its presence known almost immediately and often by severe and quite disabling pain.

Plaintiff's expert witnesses testified that in their opinions the accident of August 3, 1954, set up the groundwork of the herniated disc that later developed into the disabling situation of September 1955.

Defendants' expert witness doubted if the injury of August 3, 1954, had anything to do with the disc condition. He also held that the accident of September 21, 1955, "could be the precipitating factor," followed as it was by the disability. He further testified that a ruptured disc could occur without a previously existing herniated disc.

Plaintiff's doctor, who examined plaintiff in September 1955, testified that in his opinion the injury of August 3, 1954, would be a cause of pain in his back and legs "if he sustained a ruptured intervertebral disc." He further testified that, absent "other history of injury," based on the history given him, it was his opinion that plaintiff was suffering from a ruptured or herniated disc from sometime in 1954. On cross-examination one of plaintiff's doctors testified that a ruptured disc usually gives rather quick symptoms and that he doubted that the ruptured disc was caused by the accident of August 3, 1954. He further testified that the accident of September 21, 1955, "undoubtedly produced acute changes * * * That made it impossible for" plaintiff to work. He concluded with the opinion that "the injury of September 1955 was a very probable contributing factor and caused the rupture of the disk (sic)"; that the August 1954 injury "laid the groundwork so that another accident could create the total disability"; and that the rupture of the disc created the total disability.

The evidence shows, at most, that plaintiff suffered

an accident on August 3, 1954, which resulted in a herniated disc condition in his back; that this situation existed in March 1955 when he went to work for an employer, not a party to this action; and that it continued up until September 21, 1955, when he suffered the accident that was the cause of the disability for which he seeks compensation.

The question is: Must the 1954 employer respond and pay compensation benefits under the Workmen's Compensation Act?

Plaintiff relies on the rule stated in Tippett & Bond v. Moore, 167 Okl. 636, 31 P. 2d 583: " 'Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributed to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. * * * If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury.' "

We adopt the rule. It, however, requires amplification as to the determination of what constitutes "an independent intervening cause."

The Supreme Court of Michigan answered that question in Brinkert v. Kalamazoo Vegetable Parchment Co., 297 Mich. 611, 298 N. W. 301. In that case, as here, the first accident set up the condition which was aggravated to the point of disability by the second accident. The two accidents were not associated in any way except that they both contributed to the same end. The rule established by that case is that where the first accident was not a proximate cause of the second accident, the second accident constitutes an independent intervening cause.

Here it is manifest that the first accident did not cause the second accident. The disability, as dis-

tinguished from the condition, resulted from the second accident.

Plaintiff relies on Otoe Food Products Co. v. Cruickshank, *supra*. There we concluded that the second accident under the facts was not an independent intervening cause of plaintiff's loss of vision.

Plaintiff relies further on Tippett & Bond v. Moore, *supra*, and Deep Rock Oil Corp. v. Betchan, 169 Okl. 42, 35 P. 2d 905.

The above decisions must be analyzed in the light of the fact that the appellate court was required to accept the findings of fact made by the commission if supported by competent evidence.

In Tippett & Bond v. Moore, *supra*, the commission found that the second "occurrence" was a "recurrence of the original injury." The appellate court found competent evidence to support the finding and affirmed the award.

In the Deep Rock Oil Corporation case there was an accident with resulting compensable injury. There was a later "incident" which the employer claimed was a subsequent and noncompensable injury. The court held that: "Not every incident following an injury which physically aggravates it can be treated as a responsible intervening agency." The court affirmed the order of the commission, as sustained by the record, in disregarding the second incident as a responsible cause. In doing so, the court relied upon Head Drilling Co. v. Industrial Accident Commission, 177 Cal. 194, 170 P. 157. In that case the employee had sustained a severe fracture of his leg in a compensable accident. While convalescing at home, in an attempt to save himself from a fall, the employee struck the injured leg against a piece of furniture and the broken bone separated. The court held that this was a result to have been reasonably anticipated and was a proximate result of the original injury. The court found support in the evidence for that conclusion and sustained the award. Our decision in the

Otoe Food Products Company case is consistent with this decision.

In its decision the California court referred to Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24. In that case the employee received a broken arm in July 1914 and was paid compensation. Several weeks later the bone separated as a result of careless use of the arm or by new accident. The commission allowed compensation without regard to the fact that the additional disability arose from a subsequent intervening cause. The court held that there was no evidence to sustain the award as made, and annulled it.

This distinction is made clearer in the cases that followed in the Oklahoma court.

In Rialto Mining Co. v. Perry, 200 Okl. 474, 196 P. 2d 687, the employee was operated on for a hernia and had recovered. He later entered the defendant's employ and suffered a hernia which came through the scar of the operation. The evidence was conflicting as to whether the hernia was a recurrence of the original hernia or due to an independent or intervening cause. The court on appeal ordered the commission to determine that fact.

In Sutton & Sutton v. Courtney, 203 Okl. 590, 224 P. 2d 605, the employee on July 15, 1949, slipped and fell causing injury and pain to his right hip. On the following day, while working on a job covered by a different insurance carrier, he felt pain in his back. He suffered a ruptured intervertebral disc. The physicians were not in agreement as "to the time the injury occurred." The commission held that the disability was caused by the first incident. The court held that the evidence sustained the finding and affirmed the award.

In Sigler v. Tillery & Jones (Okl.), 292 P. 2d 423, the employee sustained an injury to his back on April 23, 1953. He was operated on for a spinal injury and paid compensation. On September 18, 1954, while working for another employer in lifting and stacking truck tires

"something popped in his back." The commission held that the employee's condition was the result of a new accident on September 18, 1954. The court on appeal held that the finding was supported by the record, and affirmed the award.

Plaintiff also relies upon Continental Casualty Co. v. Industrial Commission, 63 Utah 59, 221 P. 852. The commission found that the second accident was not a recurrence of the injury caused by the first accident. On appeal the court held that the finding was not supported by any substantial evidence and vacated the order. The court held that the second accident was a recurrence of the first injury.

Plaintiff relies further on Jarrett v. Travelers Insurance Co. (Tex. Civ. App.), 66 S. W. 2d 415. That case was an appeal by the employee from an unsatisfactory award. In that case there were two accidents on two different dates. The court held that the award included compensation for the injury occasioned by the two accidents. The question here does not seem to have been presented or decided in that case.

Plaintiff further relies on Phillips v. Holmes Express Co., 190 App. Div. 336, 179 N. Y. S. 400. That decision rests on the finding that "nothing would have occurred on" the day of the second accident but for the first accident. The case is consistent in result with Brinkert v. Kalamazoo Vegetable Parchment Co., *supra*. Such a finding cannot be made here. In fact the evidence is conclusive that the accident of September 21, 1955, had no relationship to the accident of August 3, 1954.

When analyzed the plaintiff's cases sustain the rule that there must be a causal relationship between the first accident and injury and the second accident in order to sustain an award such as is sought here.

The rules are: "In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an acci-

dent arising out of and in the course of his employment. * * * An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence." Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394.

The necessary conclusion is that plaintiff has not met the requirements of the burden of proof.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF ALL NEBRASKA RAILROADS. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. HERMAN BROS., INC., ET AL., APPELLANTS.
82 N. W. 2d 395

Filed April 12, 1957. No. 34040.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.
2. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
3. ———: ———. Upon appeal to this court from a decision of the railway commission involving charges of a railway company or other common carrier, this court will consider that the rates fixed by the commission are just and equitable and constitute prima facie evidence of that fact.
4. **Carriers.** Within the contemplation of section 75-402, R. R. S. 1943, the lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the service under investigation.
5. **Public Service Commissions: Carriers.** Section 75-410, R. R. S. 1943, specifically authorizes the railway commission to put into effect certain rates when an emergency exists. The commission,

in doing so, exercises its legislative authority to regulate rates as authorized, to declare an emergency, and to prescribe the time when such rates shall become effective.

6. ———: ———. Where the state railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside.

7. ———: ———. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment.

8. ———: ———. Only unjust discrimination or undue preference under substantially similar circumstances and conditions is that which is unlawful and prohibited.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Robert E. Powell, for appellants.

J. A. C. Kennedy, R. D. Neely, Guy C. Chambers, G. C. Holdrege, and *J. W. Weingarten,* for appellees.

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

MESSMORE, J.

This is an appeal from an order of the Nebraska State Railway Commission, hereinafter called the commission, in which the commission approved and allowed to become effective certain proposed rail rates governing the transportation of petroleum and petroleum products from points of origin in the State of Nebraska to points of destination in this state, when such traffic moves in intrastate commerce. The appeal was perfected by Herman Bros., Inc., and other highway motor carriers who filed a protest and request for formal hearing in opposition to an application filed with the commission by the Chicago, Burlington & Quincy Railroad Company and other railroad companies carrying such products as freight.

On November 21, 1955, the appellees made application in writing to the commission requesting permission to

establish, effective December 1, 1955, intrastate in Nebraska, rates on petroleum and its products published in tariff 448. The proposed rates were based generally 1½ cents per 100 pounds less than truck rates for distances of 75 miles and more, and on truck rates for less than 75 miles, except when present rail rates were lower than present truck rates, such rail rates were to be maintained.

On November 23, 1955, the appellants filed a pleading titled "Protest and Request for Formal Hearing" before the commission, in which the appellants alleged that the proposed rates were unreasonably low, were noncompensatory, unlawfully prejudiced the appellants and deprived them of traffic to which they were rightfully entitled, and would not foster sound economic conditions in motor transportation. The prayer was that the application be denied.

On December 28, 1955, the matter came on for hearing before the commission upon the application of appellees and the protest of the appellants, and hearing was had to the commission.

On December 30, 1955, the commission entered its order granting the appellees, which were all Nebraska railroads, namely: Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; Chicago, Saint Paul, Minneapolis and Omaha Railway Company; Missouri Pacific Railroad Corporation in Nebraska; and Union Pacific Railroad Company, authority to apply the rates, rules, and charges as set forth in Western Trunk Line Tariff 448 regarding shipments of petroleum and petroleum products moving in Nebraska intrastate traffic. It was further ordered that an emergency existed, and the said order should become effective January 1, 1956.

On January 11, 1956, appellants filed a motion for rehearing. On March 12, 1956, the commission issued its order overruling the motion for rehearing. From

the order overruling the motion for rehearing, appeal was taken by the protestants to this court.

The record discloses that on or about October 20, 1955, the appellees, with other western trunk line rail carriers, filed with the Interstate Commerce Commission freight tariff 448 naming specific carload rates in cents per 100 pounds from 14 rail shipping points in Kansas, Iowa, Nebraska, Missouri, and Minnesota to all rail stations in Nebraska for the rail transportation in tank cars of petroleum oil and its products, to become effective December 1, 1955.

The rates proposed for Nebraska intrastate rail carriage are those set forth in tariff 448, and are the same rates that were made effective by that tariff on interstate traffic on December 1, 1955. The Nebraska rail shipping points from which rates were proposed were Omaha, Superior, Doniphan, Scottsbluff, and South Omaha, where, except at South Omaha, pipe-line terminals or refineries are located.

The rates shown in tariff 448 are generally 1½ cents per 100 pounds less than truck rates on gasoline for distances of 75 miles and over. For distances under 75 miles, the rates are the same as the truck rates, except in cases where the existing rail rate was already lower than the truck rate, then the existing rail rate was not changed. The proposed rates were not subject to current Ex Parte 175 increases, except the rates from Omaha and South Omaha. The rates from other points like Doniphan, Superior, and Scottsbluff were not made subject to that increase because the appellees were trying to meet truck competition and the trucks do not have any Ex Parte 175 increases on their rates. The proposed rates constitute reductions from existing rail rates.

Official motor vehicle truck tariff No. 5 was used in ascertaining the truck rates. That tariff states rates in cents per gallon, and to ascertain the rate in cents per 100 pounds, a weight of 6.6 pounds per gallon was used,

carried to 3 decimal points. The truck rate on gasoline was used as it was lower than the truck rate on heavy oils, and gasoline constitutes the bulk of the traffic. Appellees were endeavoring to meet the competition of the truck rates on the commodity that was moving in the greatest volume. The rail rates on gasoline are normally on a higher basis than rail rates on the heavier oils, while the reverse is true of truck rates, and in meeting truck competitive rates appellees reduced the rail rate on gasoline and made the reduced rate applicable to both gasoline and heavier oils. Since the average rail loading carload on the heavier oils is 33.8 tons compared with 27.2 tons on gasoline, appellees could not justify a higher rate on the heavier oil.

Since the reduced rates on interstate traffic to Nebraska points had been in effect since December 1, 1955, from Council Bluffs and Sioux City, Iowa, and the Kansas City, Missouri, districts and a terminal at Omaha involving an interstate movement and intrastate rates to Nebraska points from Doniphan, Superior, and the other Omaha terminal had not been reduced, shippers from the latter were being discriminated against and it was necessary that this discrimination be removed by reducing the intrastate rates to the basis already established for interstate movement as set out in tariff 448. The interstate rates from Omaha, Council Bluffs, and other out of Nebraska origin points were approximately 1½ cents lower than the intrastate rate from Nebraska shipping points for the same distances.

In the transportation of petroleum products by rail in Nebraska and elsewhere in competition with appellant highway carriers, appellees are at a disadvantage in that the rail customer is required to provide by ownership or lease the rail cars, whereas all equipment is furnished by the truck carrier; and the rail shipper must clean the rail cars, whereas cleaning of truck equipment is performed by the truck carrier. The rail shipper must keep records and accounts of rail car movements, but

no such accounting is required of the truck customer. Rail service is slow as compared with truck service. Shippers must load and consignee unload rail shipments without assistance from rail carrier, whereas the truck driver usually assists in loading and unloading. The rail customer must provide large storage facilities and maintain larger inventories, all of which requires a larger capital investment than the truck customer who requires smaller storage facilities and smaller inventories. Rail customers must generally provide and maintain track facilities where none is required for truck service. Rail carriers cannot make off-track deliveries as can the highway trucks.

In 1940, 780,000 tons of gasoline were consumed in Nebraska of which appellees transported 374,000 tons, or 48 percent. By 1953, the total consumption of gasoline in this state increased to 1,755,000 tons of which the appellees transported 100,000 tons, or 5.7 percent. Appellees' originated tonnage in Nebraska declined from 233,939 tons of gasoline in 1940, to 52,736 in 1953; and 56,493 tons of fuel, road, and residual oils in 1941, to 14,515 in 1953. Appellees' terminated tonnage declined from 374,401 tons of gasoline in 1940, to 99,532 tons in 1953; and from 166,986 tons of fuel, road, and residual oils in 1940, to 92,097 tons in 1953.

In 1950, the appellees, with other western trunk line carriers, filed a tariff with the Interstate Commerce Commission establishing rates on petroleum effective February 1st on interstate traffic between points in Colorado, Wyoming, South Dakota, Nebraska, and Kansas 1½ cents per 100 pounds under the truck rates for all distances. Appellees intended to extend this basis of rates between all points in the territory tributary to Nebraska, if the rates thus proposed were allowed to go into effect, in an effort to establish rail rates on a competitive basis with highway carriers.

The proposed reduced rates were protested by highway motor carriers and suspended pending hearing

thereon in a proceeding before the Interstate Commerce Commission known as I. & S. docket No. 5853. That commission, after hearing (289 I.C.C. 457), decided on June 30, 1953, that the proposed rates of 1½ cents per 100 pounds under truck rates were necessary and proper for distances of 75 miles or more, but denied the reduction for distances less than 75 miles.

The protesting motor carriers brought suit to set aside the decision of the Interstate Commerce Commission. On November 1, 1954, a three-judge federal court sustained the order of the commission. Ward Transport v. United States, 125 F. Supp. 363. The United States Supreme Court affirmed the lower court on April 4, 1955. Ward Transport v. United States, 348 U. S. 979, 75 S. Ct. 570, 99 L. Ed. 762. Following that decision, tariff 448 was prepared and filed. The rates therein proposed were delayed by the litigation described from 1950 to the fall of 1955. The rates appearing in tariff 448 and allowed to go into effect by the Interstate Commerce Commission were in accord with that commission's ruling in I. & S. docket No. 5853, and the rates published in tariff 448 reflect the same formula approved by the Interstate Commerce Commission in its decision concerning I. & S. docket No. 5853.

The average operating cost of the different appellees of transporting freight traffic per car-mile ranged from 21.72 cents on the Union Pacific Railroad to 35.16 cents on the Chicago, Saint Paul, Minneapolis and Omaha Railroad. The additional cost of handling additional cars on present trains is imperceptible. In the event additional trains are required, the added cost is estimated at less than 50 percent of the above cost figures. The proposed rates will yield revenue per car-mile exceeding the average operating cost per car-mile of each of the appellees and by a greater margin the estimated added cost of handling additional traffic, if required. Where reductions in the existing rates occur, the revenue per car-mile from the proposed rates is from approximately

60 to 80 cents and generally exceeds 50 cents. The costs per car-mile as shown by exhibit No. 11 are system figures, and if the traffic involved in this case will produce car-mile revenue in excess of such costs, such traffic will be contributing to net revenue and therefore will be compensatory.

Consumption of gasoline in Nebraska has increased materially from 1951, so that the average consumption exceeds 500 million gallons annually. The proposal of appellees to establish rates of 1½ cents per 100 pounds under the truck rates amounts to about $500,000 annually on that quantity of fuel.

No witnesses testified for the appellants.

The appellants make reference to testimony in which they claim that at numerous points of destination to which reduced rates are proposed, no bulk plant or storage facilities for petroleum products are located on rail sidings; that in numerous instances the proposed rail rates do not adhere to the formula of being 1½ cents per 100 pounds less than the truck rates for distances beyond 75 miles; that in some instances the proposed rail rates are four or more cents per 100 pounds less than the presently existing truck rates on gasoline; and that as shown by the testimony of one of appellees' witnesses with reference to the transportation of heavier fuels, such as tractor fuel, distillate, burning oils, etc., the proposed rail rates would, in a great majority of cases, be much more than 1½ cents per 100 pounds less than the existing motor carrier rates on the same commodities.

The appellants assign as error: (1) That the order of the commission dated December 30, 1955, is unlawful, null, and void, in that the same provides that said order shall become effective within less than 10 days from the date said order was mailed to all parties at interest, contrary to the laws of this state; (2) that the commission's order of December 30, 1955, which authorizes and approves the rates, rules, and charges set forth in west-

ern trunk line tariff 448, is arbitrary, unreasonable, and contrary to law for the reason that the order is based on insufficient competent evidence and is devoid of lawful findings that said rates are not preferential and unjustly discriminatory; (3) that the order of the commission is arbitrary, unreasonable, and contrary to law in that there is no finding by the commission that the rates, rules, and regulations proposed to be established are reasonable and compensatory, there being no sufficient competent evidence that the same are reasonable and compensatory; and (4) that the order of the commission is arbitrary, unreasonable, and contrary to law in that said order would destroy rather than develop and preserve a highway transportation system properly adapted to the needs of commerce in Nebraska, and destroys rather than improves the relations between, and coordination of, transportation by motor carriers and other carriers as contemplated by the laws of this state.

In considering the assignments of error necessary to a determination of this appeal, we deem the following authorities pertinent.

Section 75-403, R. R. S. 1943, provides, in substance, that upon appeal prosecuted by any railway company or common carrier from a decision involving charges of such railway company or common carrier mentioned in such decision, the courts of this state will consider that the rates fixed by the commission are just and equitable and constitute prima facie evidence of that fact.

As stated in Farmers Union Livestock Commission v. Union P. R. R. Co., 135 Neb. 689, 283 N. W. 498: "This court is committed to the rule that a rate put into effect by order of the railway commission has the force of a statute on the subject. Unless held to be unreasonable and arbitrary by the courts, it expresses the only reasonable rate governing the subject-matter contained in the order."

In Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb.

562, 272 N. W. 756, it was held: "Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights. * * * On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made."

The appellants contend that the commission is precluded by law from making any order issued by it effective on less than 10 days notice. In this connection, the appellants make reference to the following sections of the statutes.

Section 75-405, R. R. S. 1943, provides, in substance, that if any railway company, common carrier, or person affected thereby, shall be dissatisfied with the decision of the commission affirming, revising, annulling, or modifying any rate or rates complained of in the original schedule, or any subsequent schedule, which may be the subject of investigation, or with the decision of the commission with reference to any rate, classification, rule, charge, order, act, or regulation made or adopted by them, such dissatisfied railway company, common carrier, or person affected may institute proceedings in the Supreme Court to reverse, vacate, or modify the order of which complaint is made.

The pertinent part of section 75-406, R. R. S. 1943, is in substance as follows: The procedure to obtain such reversal, modification, or vacation of any such order or regulation made and adopted shall be governed by the provisions in force with reference to appeals from the district courts to the Supreme Court; provided, no motion for a new trial shall be required to be filed, but instead a motion for rehearing shall be filed within 10 days after the mailing of a copy of such order to the per-

sons affected, and the time for appeal shall run from the date of the ruling of the commission.

The pertinent language contained in section 75-415, R. R. S. 1943, is in substance as follows: The order or orders, together with the findings of fact and the conclusions of the commission based thereon, shall be reduced to writing and spread upon the record, and a copy thereof, with the date when the order or orders shall go into force and effect, shall be furnished to the party who complained, and any other person or persons directly interested therein, and such order or orders shall go into force and effect at such time as is, within the discretion of the commission, just and reasonable; provided, always, no order or orders shall go into force and effect within 10 days after the mailing of such notice to the persons affected thereby.

The appellants argue that the order of the commission dated December 30, 1955, to become effective January 1, 1956, involving the rates in question was not mailed to any of the parties at interest until January 7, 1956, or 1 week after such order was purportedly in full force and effect, therefore, until receipt of the official order of the commission these appellants, or any other interested party to the proceedings, had no official notice of the action taken by the commission in connection with this matter.

The appellants contend that the effective date of said order should be stayed until such time as the commission has finally passed upon the motion for rehearing which was timely filed in accordance with the provisions of section 75-405, R. R. S. 1943, and was not decided by the commission until March 12, 1956; that in view of section 75-415, R. R. S. 1943, above, the order entered by the commission could not under any circumstances have become effective prior to January 17, 1956, which was 10 days after said order was mailed to the parties at interest in this proceeding; and that consequently the order of the commission dated December 30, 1955, is in

direct violation of section 75-415, R. R. S. 1943, and is null and void.

We make reference to section 75-410, R. R. S. 1943, which in substance provides that to prevent interstate rate wars and injury to the business of the citizens of the state, railway companies or common carriers, or in case of any other emergency to be judged by the commission, it shall be the duty of the commission, notwithstanding section 75-409, R. R. S. 1943 (which section relates to rate order, injunction, and conditions precedent), to temporarily alter, amend, or suspend any existing freight rates, tariffs, schedules, orders, and circulars of any railway company or common carrier, or part thereof, in this state, and to fix freight rates where none exist, which emergency rate or rates shall apply to any one or more or all railway companies or common carriers in this state, and shall take effect at such time, and remain in force such length of time, as may be prescribed by the commission. Such emergency rates, tariffs, schedules, orders, and circulars shall be subject to review upon a hearing before the commission and courts of competent jurisdiction in this state, as herein provided for other schedules of rates fixed by the commission.

Pursuant to section 75-410, R. R. S. 1943, and the authority granted therein, the commission found, as stated in its order of December 30, 1955, that an emergency existed necessitating that the rates set forth in tariff 448 become effective on intrastate commerce on January 1, 1956.

Section 75-410, R. R. S. 1943, is a section of the statutes which specifically authorizes the commission to put into effect rates such as set forth in tariff 448 when an emergency exists. The commission was exercising its legislative authority to regulate rates as authorized, to declare an emergency, and to prescribe the time when such rates should become effective. That such emergency existed is shown when it appears that identical rates were in effect on interstate traffic in Nebraska, and

it was necessary to establish the same rates on intrastate traffic to prevent discrimination against intrastate shippers. The order of the commission could have been superseded under section 75-408, R. R. S. 1943. The record discloses no attempt on the part of the appellants to do so. We find the appellants' assignment of error to be without merit.

The appellants contend that the commission, in approving rates of railway companies and other common carriers, is charged with the duty of seeing that such rates so approved are reasonable, not preferential, or unjustly discriminatory.

The appellants cite section 75-208, R. R. S. 1943, which provides in substance that the commission shall have the power, and it shall be its duty, to make all necessary classifications, and to fix all necessary rates, charges, and regulations to govern and regulate the freight and passenger tariffs of railway companies and common carriers, the power to correct abuses and prevent unjust discrimination, extortions, and overcharges in rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by having the penalties inflicted as provided in sections 75-310 and 75-311, R. R. S. 1943.

The appellants argue that the witness for the appellees testified to the effect that in establishing the proposed rates the railway lines based the same on the rates being charged by motor carriers for transportation of gasoline, which rates, in numerous instances, are lower than the rates charged by motor carriers for transportation of heavier commodities such as distillate, fuel oil, and other similar products; that in numerous instances the rates herein proposed are not subject to a recent 15 percent general increase which applies to most other traffic being handled in this state by rail carriers for interstate application, therefore, such rates would be preferential to shippers of petroleum products in this state, and discriminatory against shipments of other com-

modities which contain the 15 percent increase in rates; that the railroads, in many instances, have named rates to points of destination where there are no bulk plants located on rail sidings, and as a result no traffic actually will move from said points using said rates; that in the above instances receivers of petroleum products at points where no rail storage or unloading facilities are provided are discriminated against for the reason that the receivers of petroleum products who do not have bulk plants or storage facilities located by rail right-of-ways would not be able to take advantage of the proposed rail rates, and as a consequence they would be forced to pay transportation charges by motor vehicle on the movement of gasoline in Nebraska intrastate commerce, which would be 1½ cents per 100 pounds higher than receivers of petroleum products who could obtain the same by way of rail movement; and that on a shipment of heavier fuels such as distillates, and other similar commodities, receivers by railroad would have a greater advantage over the receivers of these same commodities by way of motor vehicles because of the fact that in most instances the rates proposed by the railroads in this proceeding on the movement of so-called heavier fuels amounted to more than 1½ cents per 100 pounds below the presently existing motor carrier rates on similar commodities.

Section 75-209, R. R. S. 1943, is referred to. This section provides in substance that it shall be the duty of the commission to fairly and justly classify all freight and property of whatsoever character, and to fix to each class or subdivision of freight a reasonable rate, for each railway company or common carrier. It further provides that said classifications shall be the same for all railway companies or common carriers.

Appellants contend this section of the statutes was not followed; that nowhere in the commission's order of December 30, 1955, is there any finding to the effect that the rates proposed are reasonable, compensatory

rates, and that the evidence does not sustain such a finding; that while a witness for the railroads stated that in his opinion the rates are compensatory, the railroads did not attempt to introduce any cost figures which would show the cost of handling this type of traffic, thus, the record being deficient in this respect, it does not enable the commission or any interested person to determine with any degree of accuracy whether or not the rates proposed are reasonable rates, and further, whether or not said rates are compensatory; that the rates set forth in tariff 448 are proposed merely for competitive reasons and bear no relationship to the cost of handling the traffic; and that the mere fact that the involved rates are based entirely on the rates established and prescribed by the commission for transportation by motor vehicle, which is an entirely different mode of transportation, is conclusive on this point.

Appellants further contend that by the establishment of the proposed rail rates on the basis of a differential of 1½ cents per 100 pounds below the lowest rates of motor carriers for the transportation of gasoline, the commission has destroyed rather than attempted to preserve the inherent advantages of motor carrier transportation contrary to the public interest, and has worsened relations between motor carriers and rail carriers; and that the order of the commission will tend to adversely affect the traffic and revenue of the motor carriers of petroleum products in this state and destroy, rather than preserve, a highway transportation system properly adapted to the needs of commerce of this state, contrary to legislative policy. Therefore, the order, which is the subject matter of this appeal, is arbitrary and unreasonable, and is null and void.

It is apparent from the evidence that the appellees have not been on a competitive basis with the motor carriers as shown in the decline of the tonnage of gasoline carried by the appellees as against that carried by

appellants or those engaged in the same business. In this connection, the following applies.

Section 75-402, R. R. S. 1943, provides in part: "The lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the services under investigation."

The interstate rates shown in tariff 448 are published and charged for the identical service in interstate transportation that the appellees proposed and the commission authorized for intrastate service in this state.

Where the state railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside. See Farmers Union Livestock Commission v. Union P. R. R. Co., *supra*.

In addition, with reference to the proposed rates, the appellees and other western truck line carriers in 1950 filed a tariff with the Interstate Commerce Commission establishing rates 1½ cents per 100 pounds under truck rates applicable to petroleum and its products for all distances between points in Colorado, Wyoming, South Dakota, Nebraska, and Kansas. The motor carriers protested this application which resulted in investigation and suspension docket No. 5853 before the Interstate Commerce Commission in which that commission approved the proposed rates for distances of 75 miles or more, but not for lesser distances, on June 30, 1953. See 289 I. C. C. 457. In its decision the Interstate Commerce Commission said: "The record is convincing that in the territory here considered the railroads cannot successfully compete with the motor carriers at equal rates, and that the proposed rates are not lower than necessary to meet the truck competition and are compensatory, except for the shorter hauls." The protesting motor carriers then brought suit in the United States district court

for Colorado to set aside the commission's decision, before a three-judge court which upheld the decision of the commission. See Ward Transport v. United States, 125 F. Supp. 363, which was decided November 1, 1954. On April 4, 1955, the United States Supreme Court affirmed the decision of the lower federal court. Ward Transport v. United States, 348 U. S. 979, 75 S. Ct. 570, 99 L. Ed. 762.

Other cases relating to other areas are not important or material in the instant case unless the Interstate Commerce Commission reverses its decision in I. &. S. docket No. 5853 and prescribes some other formula of rates to be followed.

As indicated by the authorities heretofore set out, the commission was not required to make any specific finding as to whether the rates were reasonable or preferential.

In the light of the evidence and the foregoing authorities, the contention of the appellants that the proposed rates were not just, reasonable, and compensatory is without merit.

The appellants contend that the proposed rates are discriminatory.

In 13 C. J. S., Carriers, section 377, on page 843, relating to circumstances justifying discrimination in rates, the rule is stated as follows: "Although a common carrier is bound to carry at equal rates for all customers in like condition, * * * mere discrimination does not render a rate illegal; only such rates as are unreasonably or unjustly discriminatory are inhibited. In other words, mere inequality of charge does not necessarily constitute undue or unreasonable preference or advantage, and cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or other transportation conditions. Further, any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge, since common carriers are only bound to give the same terms to all persons alike, under the same conditions

and circumstances. Accordingly, no claim of illegality can be sustained if, in view of all the circumstances, the discrimination is fair and reasonable, and not inconsistent with the public interest, and, subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, * * *."

Any rate that is competitive discriminates to some extent against a competitor, but that does not make the rate unlawful for the reason that only unjust discrimination or undue preference under substantially similar circumstances and conditions is that which is unlawful and prohibited.

The proposed rates in many instances are not subject to Ex Parte 175 increases of 15 percent because the rates were intended to meet the appellants' competition, whose rates have not been increased. The fact that such increases had been made effective on other commodities by appellees does not establish unjust discrimination. Neither does the fact that the proposed rate on heavier oils will be more than 1½ cents per 100 pounds below the truck rates on the same commodity. The claim of the appellants that the proposed rates prefer shippers and receivers who have rail shipping facilities and thus discriminates against those who have no such facilities is without merit. To any person who is in a position to use the service offered, such service is available to him.

The complaint of the appellants that the commission made no finding whether the rates were reasonable and not discriminatory is without merit. The law of this state does not require the commission to make such a finding. Should any unlawful discrimination exist or develop now or in the future, it is subject to correction on complaint made to the commission, supported by evidence. Until then undue preference or unlawful discrimination are not to be presumed. The appellants'

assignment of error of undue preference and unlawful discrimination cannot be sustained.

We fail to find by the evidence anything that would destroy the inherent advantages of motor transportation, or that would tend to destroy the highway system of this state by making effective the rates shown in tariff 448. There is no apparent violation of section 75-222, R. R. S. 1943, which section relates to the legislative policy of the state regulating motor carriers and referring generally to transportation within the state.

The appellants assign as error a denial of their motion for continuance to a later time in order to enable them to present evidence in opposition to the appellees' application. This motion was overruled by the commission. The appellants present no argument in their behalf, or discussion in support of this assignment of error. It need not be discussed.

The record disclosing competent and relevant evidence in support of the findings of the railway commission upon the questions of fact presented, and, no violation of any rule of law or constitutional right appearing, nor that the action of the commission was arbitrary or unreasonable, this court will not substitute its judgment for that of the railway commission, and its order should be, and is, affirmed.

AFFIRMED.

IN RE APPLICATION OF ALL NEBRASKA RAILROADS. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES, V. HERMAN BROS., INC., ET AL., APPELLANTS.
82 N. W. 2d 405

Filed April 12, 1957. No. 34041.

1. **Public Service Commissions.** Courts should review or interfere with administrative and legislative action of the railway commission only so far as is necessary to keep it within its jurisdiction and protect legal and constitutional rights.

2. **Public Service Commissions: Appeal and Error.** On appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
3. ———: ———. Upon appeal to this court from a decision of the railway commission involving charges of a railway company or other common carrier, this court will consider that the rates fixed by the commission are just and equitable and constitute prima facie evidence of that fact.
4. **Carriers.** Within the contemplation of section 75-402, R. R. S. 1943, the lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the service under investigation.
5. **Public Service Commissions: Carriers.** Where the state railway commission specifically adopts the rates and charges fixed by the Interstate Commerce Commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside.
6. ———: ———. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment.
7. ———: ———. Only unjust discrimination or undue preference under substantially similar circumstances and conditions is that which is unlawful and prohibited.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Robert E. Powell, for appellants.

J. A. C. Kennedy, R. D. Neely, Guy C. Chambers, G. C. Holdrege, and *J. W. Weingarten,* for appellees.

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

MESSMORE, J.

This appeal is directly related to a companion case, No. 34040, Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., *ante* p. 247, 82 N. W. 2d 395. While these cases were heard on separate records, in many respects the

principles involved are identical, and the issues in the two cases are so closely related that the argument of the appellants in opposing the orders issued by the Nebraska State Railway Commission, hereinafter referred to as the commission, are very similar. We have considered the two cases together, but deem it necessary to render separate opinions in connection with the same due to a different order of the commission affecting a different point of origin in this state to other stations in this state.

This appeal is from the order of the commission in which the commission approved and allowed to become effective certain reduced rail rates governing the transportation of petroleum and petroleum products in tank carloads from the point of origin, Kaneb, Nebraska, to 103 specified points of destination in this state, which traffic moves in intrastate traffic. The appeal is directed to the commission's order of February 7, 1956, approving the rates and charges proposed by Nebraska railroads, and as to the confirmation of said order by the opinion, findings, and order of the commission dated March 12, 1956, overruling appellants' motion for rehearing.

On December 29, 1955, Nebraska railroads filed an application with the commission for authority to revise rates from Kaneb, Nebraska, to Nebraska destinations, the rates proposed in the Western Trunk Line Tariff 448 to take the place of present rates.

On December 30, 1955, Herman Bros., Inc., and other Nebraska motor carriers filed a complaint and request for formal hearing before the commission. The commission set the matter for hearing on January 23, 1956. On February 7, 1956, the commission, by its order, authorized the proposed rates contended for by the applicants to be applied March 1, 1956. The appellants filed a motion for rehearing on February 21, 1956. Argument was had before the commission on the motion for rehearing on March 12, 1956. This motion was overruled on the same date. From the order overruling the mo-

tion for rehearing, the appellants have appealed.

We have reviewed the evidence in the companion case, No. 34040, and make reference to the evidence insofar as the same may be pertinent in the instant case. However, we deem some review of the record necessary in the instant case relating to the subject matter of this appeal as to the commission's order of February 7, 1956.

The record discloses that there is a pipe-line terminal at Kaneb, Nebraska, which is located 2 miles north of Geneva. Rail shipping facilities were constructed and completed at this pipe-line terminal. The commission authorized intrastate rail rates on petroleum on the same basis that the rail rates were then in effect from other rail shipping points in this state by order of the commission dated December 16, 1955. At that time the appellees' application to the commission, filed November 21, 1955, for permission to establish rates on petroleum from other rail shipping points in Nebraska to all Nebraska stations 1½ cents per 100 pounds under the truck rates on gasoline for distances of 75 miles or more, and rates no lower than the truck rates for distances less than 75 miles, was pending before the commission.

The Interstate Commerce Commission established rates, as shown in Western Trunk Line Tariff 448, on the same basis as the proposed rates requested by the rail carriers in their application before the commission, filed November 21, 1955. Such rates by the Interstate Commerce Commission became effective December 1, 1955, for interstate transportation in Nebraska pursuant to a decision of the Interstate Commerce Commission, I. & S. docket No. 5853, 289 I.C.C. 457. The Nebraska State Railway Commission granted appellees permission to establish such rates January 1, 1956, between such rail shipping points in this state, namely Omaha, South Omaha, Superior, Scottsbluff, and Doniphan, and Nebraska stations as published in tariff 448.

The proposed rates from Kaneb are set forth in a

schedule made a part of the appellees' application, and named rates to only 103 Nebraska stations because a shipper requested the rates to only the stations named. The appellees assert that if any shipper requests rates from Kaneb to other stations, the appellees will make proper application to the commission to establish such rates; and that the appellees limited the application of the rates to the stations requested in order to establish them as expeditiously as possible.

As previously stated, substantially the same facts set forth in our opinion in case No. 34040 involving appellants' appeal from the order of the commission authorizing the rates as set forth in tariff 448, effective January 1, 1956, are pertinent to this case. No useful purpose would be accomplished by again restating such facts.

The appellants refer to evidence to the effect that the proposed rail rates are, in some instances, to some degree more than 1½ cents a 100 pounds below the truck rates on heavier fuels.

The appellants also point to evidence in connection with the proposed car-mile earnings which is set forth in exhibit No. 1, stating that the car-mile earnings are figured on the absolute short-line mileage between point of origin and destination, rather than on the actual route of movement; that said car-mile earnings do not take into consideration switching costs or other costs of operation such as empty movement of tank cars; that no shipper appeared in support of appellees' application; also to evidence on behalf of appellants to the effect that the proposed reduced rail rates from Kaneb, and from other points of origin involved in the companion case No. 34040, were considerably less in the majority of cases than the existing rates of the motor carriers, this being true with reference to a comparison of the proposed rail rates from the various origins with the motor carrier rates on the heavier fuels.

The appellants introduced comparisons and analyses

of rates proposed by the appellees which they contend show that such proposed rates in the case at bar have no relation whatever to actual movements by way of rail, and will produce discrimination and inequalities.

There is other evidence of the appellants to the effect that even in instances where rail carriers have established rates lower than truck rates in any given area, the price of the commodity to the ultimate consumer has not been reduced; that while the number of rail tank cars suitable for the transportation of petroleum products has increased slightly since before World War II, the amount of such products has increased from about 2½ to 3 million barrels of crude oil per day prior to the war, to slightly less than 8 million barrels a day at the present time, and as a consequence the tank car fleet of this country is being operated at near maximum capacity; that if the differential theory of the appellees is approved it would have a tendency to increase competition by unregulated private carriers, which would act to the detriment of the motor common carriers and would not benefit the railroads; that the motor carrier rates from the Kaneb pipe-line terminal to points of destination in Nebraska were originally established by the motor carriers voluntarily, and based on the cost of motor carrier operation and not rail costs; and that in the past motor carriers have lost some traffic which they had handled previously when the railroads reduced rates below the existing motor carrier rates, and thus disrupted the parity of rates as between the two modes of transportation.

In this appeal it is not disputed that the commission granted the appellees permission to establish, effective January 1, 1956, similar rates from all Nebraska rail shipping stations except Kaneb to all Nebraska stations; nor is there dispute that similar rates became effective December 1, 1955, on interstate traffic from all rail shipping points in adjoining states to Nebraska stations and also between Nebraska stations when the Interstate

Commerce Commission did not suspend rates as set forth in tariff 448. It is not disputed that the aforesaid rates, including the proposed rates from Kaneb, were formulated in exact accord with the formula approved by the Interstate Commerce Commission in I. & S. docket No. 5853, 289 I.C.C. 457.

The granting of the application would place Kaneb rates on the same basis as other shipping points with respect to interstate rates as well as intrastate rates.

Section 75-402, R. R. S. 1943, provides in part: "The lowest rates published or charged by any railway company for substantially the same kind of service, whether in this or another state, shall, when introduced in evidence, be accepted as prima facie evidence of a reasonable rate for the services under investigation."

In this connection, we make reference to the citations of authorities in the opinion in case No. 34040 dealing with prima facie evidence.

We find nothing in the appellants' pleading or evidence tending to show why Kaneb should not be accorded rail rates in effect on the same basis from similar rail shipping points, and the appellants did not argue anything of that nature in their brief in the instant case. In fact, appellants' argument is almost in its entirety a repetition of their argument made in case No. 34040, wherein they contended that the rates were discriminatory against highway motor carriers; that the commission made no finding that the rates would not be discriminatory; that the proposed rates were not shown to be compensatory; and that they deprived appellants of a vested right under section 75-222, R. R. S. 1943. We have discussed and determined these matters in our opinion in case No. 34040.

With reference to the proposed rates from Kaneb, Nebraska, being discriminatory against shippers and appellants, the appellants cite the rate of 6 cents to Ong for a distance of 22 miles, a rate of 6 cents to York for a distance of 50 miles, a rate of 11 cents to Lincoln

for a distance of 60 miles, and a rate of 9 cents to Fairbury a rail distance of 124 miles. The highway distance to Fairbury is not shown, but is under 74 miles. Exhibit No. 1 discloses the truck rates from Kaneb to Ong to be 5.758 cents; to York 5.909 cents; to Lincoln 10.758 cents; and to Fairbury 9.091 cents. Thus, the proposed rates of 6 cents to Ong and York, 11 cents to Lincoln, and 9 cents to Fairbury are approximately the same or higher than the appellants' rates to the same points. Certainly, the appellants are not in a position to complain about such rates. Again, the appellees, in formulating the rates to these points were not permitted to go below the truck rates on gasoline for distances of less than 75 miles. That is the reason given by the appellees that the proposed rail rates are approximately the same as the truck rates to those points.

Exhibits Nos. 1 and 6 show that in most instances the revenue per car-mile under the proposed rates will yield more than double the operating cost per car-mile of handling freight traffic of the several appellees. For instance, the Chicago & North Western Railway Company shows a cost per car-mile of 33 cents; the Chicago, Saint Paul, Minneapolis & Omaha Railway Company, 35.16 cents; the Chicago, Burlington & Quincy Railroad Company, 24.96 cents; the Chicago, Rock Island & Pacific Railroad Company, 25.06 cents; the Union Pacific Railroad Company, 21.72 cents; and the Missouri Pacific Railroad Company, 27.70 cents. The appellants' argument is that these are system figures, but there is no reason why these figures should not be accepted as evidence of cost of handling freight traffic. Certainly, rates that show such yield of revenue per car-mile must be, and are, compensatory.

With reference to the fact that the proposed rates on heavier oils will be more than 1½ cents per 100 pounds below truck rates on the same commodities, this creates no basis for objection to the permission granted. We have previously, in our decision in the companion

case, discussed this issue. The fact that the proposed rates are from Kaneb to only 103 Nebraska stations instead of to all stations furnishes no basis for proper objection. As heretofore stated, if shippers request rates to other stations in Nebraska in addition to the 103 stations referred to, the appellees undoubtedly will request permission to establish similar rates to other stations.

We find no evidence in the instant case of unjust discrimination or undue prejudice, and we cannot assume such to be existent. In any event, the rates authorized by the commission are subject in the future to the right of any one claiming unjust or unlawful discrimination or undue prejudice to complain to the commission and present evidence in support thereof.

With reference to other decisions cited by the appellants on the basis of which they argue that because the Interstate Commerce Commission has refused to allow rail carriers a differential of 1½ cents per 100 pounds in other areas, as indicated by the decisions cited by the appellants, or similar differentials in other commodities, the question of whether such a differential should be allowed in Nebraska or in the area tributary thereto is open for determination.

We have heretofore referred to I. & S. docket No. 5853, 289 I.C.C. 457, which refers to this area. This decision of the Interstate Commerce Commission was sustained by the federal courts in Ward Transport v. United States, 125 F. Supp. 363, affirmed in 348 U. S. 979, 75 S. Ct. 570, 99 L. Ed. 762, following which the appellees filed tariff 448 with the Interstate Commerce Commission naming interstate rates to and between stations in Nebraska constructed in accordance with the formula prescribed in I. & S. docket No. 5853, and the Interstate Commerce Commission allowed tariff 448 to go into effect December 1, 1955, as published. Other cases relating to other areas are not important or material in the instant case until the Interstate Commerce

Commission reverses its decision in I. & S. docket No. 5853 and prescribes some other formula to be followed.

We conclude that the order appealed from is valid and within the authority of the commission, is not arbitrary or unreasonable, and should be and is affirmed.

AFFIRMED.

MINNIE NELSON ET AL., APPELLEES, V. CHRIS RASMUSSEN ET AL., APPELLANTS, IMPLEADED WITH MARTHA RASMUSSEN ET AL., APPELLEES.
82 N. W. 2d 418

Filed April 12, 1957. No. 34154.

1. **Wills.** A will, made and left in the custody of the testator, that cannot be found after his death is presumed to have been destroyed by him with the intention of revoking it.
2. **Judgments.** A determination by the proper county court in a proceeding brought and prosecuted therein in accordance with sections 30-1701 to 30-1704, R. R. S. 1943, that the deceased died more than 2 years before the filing of the petition, that he died intestate, and that named persons are his heirs is, after it becomes final, binding and conclusive on all persons.
3. **Banks and Banking.** Section 8-167, R. R. S. 1943, was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary is expressed by the terms of the deposit.
4. **Banks and Banking: Joint Tenancy.** If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without those or similar qualifying words, upon the death of one of the co-owners of the deposit it becomes the sole property of and is payable to the surviving co-owner.
5. **Banks and Banking: Trusts.** A joint deposit in a bank in the name of two persons is not, upon the death of one of them, conclusive of the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving owner holds the legal title to the deposit in trust for the third party.
6. **United States: Contracts.** A United States savings bond is a contract between the federal government and the purchaser, and Treasury Department regulations governing such bonds are in-

corporated into the contract by reference and are beyond the reach of state law to modify or destroy.

7. ———: ———. If a United States savings bond is registered in the names of two persons as co-owners, the rights of the surviving co-owner arise solely by contract.

8. ———: ———. A surviving co-owner of a United States savings bond takes title thereto as sole owner by reason of Treasury Department regulations incorporated in the contract between the federal government and the purchaser of the bond.

9. Trusts. If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.

10. ———. The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing.

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

P. F. Verzani and *Mark J. Ryan,* for appellants.

Warner & Shokes and *Free & Free,* for appellees.

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

BOSLAUGH, J.

Appellees seek a determination in this cause that a designated bank deposit and described United States savings bonds were the property of Martha Rasmussen at the time of her death and that Chris Rasmussen be required to account for the deposit and the bonds or the proceeds of and income from them to the representative of the estate of Martha Rasmussen. The judgment of the district court was favorable to appellees. It is presented to this court for review by an appeal.

Chris M. Rasmussen, a resident of Dakota County and the owner of the real estate described in the petition in this case, died intestate December 9, 1939. He was

survived by Martha Rasmussen, his widow; Hans Rasmussen, Axel Rasmussen, Rasmus Rasmussen, Walter Rasmussen, and Chris Rasmussen, his sons; and Minnie Nelson, Elizabeth Hansen, Sena Jensen, and Ella Jepsen, his daughters. Ordinary administration of the estate of the deceased was not had but a limited and circumscribed administration thereof was commenced in the county court of that county more than 2 years after the death of the deceased and it was prosecuted to a conclusion as authorized by the statutes of this state. §§ 30-1701 to 30-1704, R. R. S. 1943. The court on March 25, 1950, found therein the facts required as a prerequisite of the validity of such a proceeding; that deceased was the owner of the real estate referred to above; that the widow, the sons, and the daughters of the deceased were his heirs; and that the real estate descended to the widow one-third thereof and to each of the children two twenty-sevenths thereof.

Hans Rasmussen, a resident of Harris County, Texas, died April 16, 1947, survived by Martha Rasmussen, his widow; Russell Rasmussen, his son; and Robinette Qualls, his daughter. It was found and adjudged by the county court of Dakota County on March 25, 1950, in proceedings duly brought and prosecuted therein, as provided by law, that the widow and children of the deceased were his heirs and that the interest of the deceased in the real estate descended to them an undivided one-third thereof to each. The decrees of March 25, 1950, in the matter of the estate of Chris M. Rasmussen, deceased, and in the matter of the estate of Hans Rasmussen, deceased, each became final as rendered.

Martha Rasmussen, the widow of Chris M. Rasmussen, died intestate May 2, 1952, a resident of Dakota County. She was the mother of the children of Chris M. Rasmussen. They survived her except Hans Rasmussen. His widow and children survived his mother. Mark J. Ryan was appointed, qualified as, and is administrator of the estate of Martha Rasmussen, deceased, by pro-

ceedings duly instituted and now pending in the county court of Dakota County.

The real estate in South Sioux City was the homestead of Chris M. Rasmussen and his wife, Martha Rasmussen, from 1938 until the death of the former. The widow occupied and used it as her home until her death. She leased and collected the rents from, paid the taxes on, and the maintenance expenses of, the three farms owned by her husband when he died from the time of his death until her death. The term deceased will be used to designate Martha Rasmussen, widow of Chris M. Rasmussen, except when she is described as mother or by her name. The term appellant or Chris will be employed to identify Chris Rasmussen, the youngest son of the deceased, sometimes named as Chris M. Rasmussen, and who is one of the appellants.

The real estate owned by Chris M. Rasmussen at the time of his death, except that in South Sioux City, was sold and conveyed by his heirs, except Hans Rasmussen, and by the heirs of Hans Rasmussen, deceased. The respective spouses of the grantors who were married joined in the deeds. Walter Rasmussen was the purchaser of 160 acres of the land; Jorgen F. Nelson, husband of Minnie Nelson, bought 80 acres of the land; and Rasmus Rasmussen became the owner of the remaining 160 acres of the land. The net proceeds of the sale of the land were paid to, received, and have since been retained by the owners of it in the proportion of the ownership of each. The possession of the land was surrendered to the purchasers when the sale thereof was completed.

The net share of the deceased was $17,697.59. A deposit of $5,600 was made in her account subject to check in the Nebraska State Bank of South Sioux City which account she had maintained therein since April 4, 1944. On or about May 23, 1950, $12,000 was invested by Martha Rasmussen in United States savings bonds, series G, and they were registered in the name of and

made payable to Martha Rasmussen or Chris Rasmussen.

Chris M. Rasmussen, his wife, and appellant lived on a part of the land the father owned until the year 1938. They moved to South Sioux City at that time and lived there until the death of the father in the year 1939. Thereafter Chris and his mother occupied the family home until the death of the mother in 1952. Martha Rasmussen, the deceased, rented the land her husband owned when he died. The rental for two of the farms was cash and the rental of the other was a share of the crops raised thereon. The rentals were received or collected by the deceased until the time of her death. She paid the taxes on the real estate. Matters concerning the home were conducted by the deceased and her son Chris until her health became impaired. Thereafter her daughters and daughters-in-law were in the home frequently and assisted in the care of the deceased and the home on week days and Chris did this at night and on Sunday. He was unmarried and lived at home as he had always done. He was 49 years of age in 1956. A sister of Chris who lived near the home of her mother testified she had always visited her mother quite often—about once or twice a week. She testified that she had no personal knowledge that Chris transacted any business for her mother. She did say that when her mother was sick Chris got groceries and if there were taxes that had to be paid he paid them. Another sister testified that her mother talked about business with and sought advice from Chris with respect to business affairs. She gave no facts to support this conclusion except she said if her mother had money to deposit sometimes Chris did it and sometimes her mother did it herself, and that when her mother was sick Chris wrote checks on her account. She did not say what the checks were for or to whom they were payable. Appellant said that the only checks he wrote on his mother's account were for groceries and in this respect he was without direct challenge. He did make

deposits in the account of his mother in the bank when she was not going to the bank and he was. There was testimony to the effect that a person had seen the deceased in the bank on a few occasions after about January 1, 1949, but he could not specify when. His recollection was that Chris was with his mother at these times.

The deceased, a native of Denmark, came to the United States when she was about 23 years of age. She did not attend school in the United States. Her use of the English language was limited to usual matters experienced by persons of like situation. She did not understand uncommon, difficult, or unusual words expressed in English. She read and understood the county paper and a daily paper published in English. She generally had read the paper before Chris came home from his work and she would tell him when he arrived home of things she had read. She often discussed news items and events which she had read in the papers. She did this until near the end of her life. The deceased was not as robust physically commencing about 1938 as she had been previously. Her hearing and eyesight were impaired to some extent. She required glasses for reading purposes and she had a hearing aid. In order for her to hear during a conversation it was necessary that the speaker talk somewhat louder than was required in earlier times. It was thought that probably her eyes were affected by cataracts.

In July 1949 she had a heart attack. Chris came home at noon from his farm work and found her ill, lying on the davenport in the home. He summoned a doctor. The doctor attended her for a considerable time thereafter. The sisters and sisters-in-law of Chris came to the home and different ones of them stayed at different times with and assisted the deceased during the day while Chris was away at his work. They did this during work days and Chris took care of his mother and the home at night and on Sunday. The deceased spent

more than half of the time in bed for a considerable time after the heart attack. She was up and down at irregular intervals. She gave evidence after the heart attack of being more easily disturbed and she cried at times when the cause of it was not easily discernible. She did not recover her previous normal physical health but it was not much different than it had been for a year or so previous to her illness. There is testimony that she would be in bed one day and up the next and out in the garden with her flowers. She did things about the house. There were times when she was left alone in the home entirely unattended. She went downtown and to the bank a few times by herself after her illness in 1949. Generally she was accompanied by someone and usually Chris took her.

The husband of the deceased generally attended to business matters until his death and thereafter she usually transacted the business matters in which she was interested until the time of her death. The proof is that until her last illness she recognized persons she had known when she came in contact with them, including members of her family; that she was aware of what property she had; that she knew the facts of her bank account; that she realized what she wanted to do or have done with her property; and that she knew the meaning and effect of what she did, with the possible exception that in 1949 during her illness when she thought her dissolution might be near she exhibited unnecessary and unwarranted anxiety concerning the existence of sufficient funds to pay expenses that would accrue incident to her transition from life to death. There is no evidence that she had any mental deficiency. In this respect she was as mentally sound, alert, and keen of comprehension as would be expected of a normal person her age. She had passed her 83rd year of life at the time of her death.

The deceased was a patron of the Nebraska State Bank of South Sioux City commencing with April 4,

1944, and continuously until the time of her death. The signature card originally furnished by her to the bank incident to her account, identifying the persons authorized to sign checks on it, was signed on the face or front side of the card by Martha Rassmussen and Chris M. Rasmussen. It was shown that the name Chris Rasmussen and Chris M. Rasmussen in this respect related to and identified the same person. At a later date, not established by the record of the bank or known to its officer who testified but probably after September 1946, the joint account agreement printed on the back of the signature card was signed by Martha Rasmussen and Chris Rasmussen using the name of Chris M. Rasmussen.

A daughter of the deceased, one of the appellees, testified that in July 1949, after the deceased had difficulty with her heart, when she was very sick and thought she was going to die, she asked appellant to go to the bank and draw all her money out of it so that there would be money to bury her. He told his mother that he did not want her money but about 11 a. m. of that day he left the house and later returned to the home with two signature cards. He had one "making himself a survivor on her account." He had another and he told his mother "if she would sign them then she could get his money if he died first." She signed the card with respect to her account and the other card he had brought with him when he returned. Appellant returned the card concerning her account to the bank. The witness said the doctor called on her mother that morning and he administered medication to her by hypo before the conversation about the bank account. She said such treatment caused her mother to lose awareness of her environment and usually she went to sleep after she submitted to a hypo. How long it was before the conversation that the hypo was administered or what was administered to the patient does not appear. The deceased said nothing to her daughter then or

later about her bank account. Likewise the daughter had no part in the conversation and made no protest or objection to what was done. She did not say that her mother did not appear and act rational or that she did not act with full knowledge and understanding of what she did. The witness does not claim that she made any effort to find out from her mother then or later if she was aware of what she had done and if her act in that regard and the effect of it was what she desired, notwithstanding the fact that the witness said she spent about one-third of her time with her mother from then until her death and her mother lived for about 3 years afterward. The witness did testify that she did not mean to be understood that she thought at that time that her brother Chris was trying to take advantage of her mother.

Appellant, when he was asked if he remembered when he took the signature card in reference to the account of his mother from the bank to his home so that she could sign it, answered that he did, vaguely. She was quite sick and she became anxious about the signature card she had given the bank as one of its customers. The bank had changed hands some time before. She worried about whether there would be money available to bury her. She did not ask him to withdraw her money from the bank for this purpose. She asked appellant to go to the bank and get a signature card "or to see if it was still available at the bank that way." He went to the bank and talked to the cashier about the signature card, and the cashier said there was a card there but "to make sure you just sign another one here and take down there and have her sign it." Appellant got the signature card from the bank and took it home. The joint agreement on the card was signed by his mother and by him and he took it back to the bank where it remained, was recognized and acted upon, and was in the bank at the time of the death of deceased. His mother was sick at the time but there was nothing that he heard or saw which indi-

cated she thought she was going to die. She did not say for him to get the money from the bank so there would be money to bury her. He did not testify that it was not said at the time the card was signed in the home that if his mother and appellant signed the joint agreement on the card, the latter could withdraw the money. He testified that he did not suggest that his mother sign the joint agreement; that he did not induce her to do so; and that he never attempted to nor did he ever at any time persuade or influence his mother in any manner or by any means in regard to any business matter or act.

The sister of appellant, who was a witness as above related, testified that when she and appellant were alone in her home on the Gladys George place east of South Sioux City he told her that he had tried to get his mother to make a will but she refused and he said "I can't go any further now." He stated that dad said he could have the house and mother should give it to him. He also said, concerning what he felt he should have from the property of his mother, that one lady gave the house to a son who stayed with her and he thought mother should do the same with him because he had all the work to do. The time of these statements ascribed to appellant is not stated with definiteness but it is indicated that it was probably in June 1950. Appellant denied having made the statements attributed to him by his sister and he said that he never talked with her about his mother making a will. He had no knowledge that she made any attempt to give him the house. She had an interest in the house but she did not own it and any talk about her giving it to him was not only futile but improbable.

The hypothesis of appellees that appellant and his brother, Axel Rasmussen, entered into a conspiracy to induce their mother to consent to and join in a sale of the farm land to get the property in a more accessible form since appellant had been named a joint owner

with his mother of her bank account proceeds from and pursues a false and nonexistent basis. Appellees argue that Chris M. Rasmussen, husband of Martha Rasmussen, made a will devising his wife a life estate in his real estate and devising the remainder to his children equally. They say the evidence of this is uncontradicted. Their petition in this case alleges that none of the appellees ever saw an instrument purporting to be the will of their father. They offered no proof of the contents of such an instrument. A deposition offered to show that the witness and another saw Chris M. Rasmussen sign a paper which he stated was his will and that his signature was attested by the witness and another as subscribing witnesses was excluded upon objection at the trial. There was no offer made that either of the persons knew what the instrument was or what it contained beyond the statement attributed to Chris M. Rasmussen. This was said to have happened about 1937. If there was such an experience, the instrument was shown to be in the possession and control of the alleged testator. It was not found after his death and the presumption is that he destroyed it with the intention of revoking it. Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 110 Am. S. R. 431, 62 L. R. A. 383; In re Estate of Ladman, 128 Neb. 483, 259 N. W. 50; In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

It was adjudicated March 25, 1950, by the county court of Dakota County in a proceeding in which it had jurisdiction that Chris M. Rasmussen died intestate. Appellees were present at that time in the courtroom, except Minnie Nelson and she had personal knowledge of the proceedings and the time and place of the hearing. The adjudication of the county court that he died intestate became final. This case is an attempted collateral attack on that adjudication. The adjudication of that court bars appellees from contending contrary to it. §§ 30-1701 to 30-1704, R. R. S. 1943; In re Heirship of Robinson, 119 Neb. 285, 228 N. W. 852.

It was testified by Minnie Nelson and Sena Jensen, sisters of appellant, that shortly after the death of their father in 1939 appellant told them there was a will but that there was no use of their doing anything because "it was all left to Mother as long as she lived and then it was to be divided among the children." Appellant denied that he knew anything about a will of his father or the contents of any such an instrument or that he made the alleged statements ascribed to him by his sisters. If appellant told them that their father left a will, then they knew as much about it as appellant did and the alleged conversations took place about 11 years before the hearing in the county court in which it was adjudicated that their father died without a will. The sisters each had actual notice of the time and place of the hearing and what it was for. Sena Jensen was present at the hearing. She made no objection nor did she claim her father left a will. The sisters participated in the sale of the land on the basis that there was no will. Minnie Nelson and her husband bought part of the land and both sisters received and have retained part of the proceeds of the sale which was made and concluded on the basis that there was no life estate affecting it; that the fee title was capable of sale and conveyance; and that it was sold and conveyed. Appellees or any of them made no claim of the existence of a will of their father until this cause was commenced about 14 years after his death and more than 3 years after it had been adjudicated that he died intestate. They may not now be heard to contend that their father did not die intestate. The purpose of this effort was to permit appellees to claim that their mother was duped into consenting to sell the farm land against her will by improper influence exerted upon her and by a conspiracy. This is indicated in the testimony of Sena Jensen, gladly given, that her mother said "that Dad fixed things the way they are supposed to be and that is the way they are going to be." The witness was asked if her mother said anything at that

time about "your father's will." Her answer was that her mother made only the one statement quoted above. Chris M. Rasmussen had not provided anything about the disposition of the property he owned at the time of his death. In the light of this the statement attributed to the deceased is neither intelligible nor significant. Notwithstanding the foregoing, appellees offered evidence of a conversation said to have taken place between the deceased in her home and one of the appellees to the effect that the deceased said she wanted to sell the land. Soon after she and the witness discussed the price of one of the farms. The question was the difference between $65 and $75 per acre. A short period thereafter he called his mother by telephone and told her that he would take the place at $65 per acre. At the first conversation of the son and his mother the appellant was present. He suggested a price of $75 per acre. The land was sold to the other son who had discussed the matter with his mother for $65 per acre. Apparently the mother asserted herself, made the decision, and it prevailed, contrary to the suggestion of appellant.

The record contradicts the claim that the deceased did not desire to sell the land. When the interested parties met in the office of the counsel of the deceased he asked if they were ready to sign the deeds. Rasmus Rasmussen said he was not ready to do so. The deceased inquired of him why he would not take the place. He did not answer but left the office. The deceased then declared if Rasmus does not take the place which it had been contemplated he would purchase, "there isn't anyone going to get any of it." Axel Rasmussen, one of the older sons, then remarked that if Rasmus did not take it, "we will have to put it to a partition sale." Two of the sisters left the office and followed their brother Rasmus. They overtook him and induced him to return to the office. The transaction was completed. He bought the farm and the deeds to the other two farms were

executed by him at the importunity of deceased and his two sisters. Sena Jensen, on cross-examination, said that she was urging the sale of the land in 1950 because she was told that mother had no money to live on. The explanation she gave is of doubtful validity and sincerity because of the previous statement of Walter Rasmussen that his mother was not in need of money and that she had 1,200 bushels of corn in the crib, presumably crop rent from Walter because he farmed the home place on the basis of crop rent, and also because of the anxiety and activity exhibited by Sena Jensen when her brother refused to proceed with the sale and left the office to make sure that the sale of the land would be completed. The demonstration that day by the deceased convincingly disputes the contention that the deceased was actuated by and the victim of undue influence and conspiracy. She appeared very clearly as the controlling and directing person who made the decision, stated the condition, and declared the result unless Rasmus met her terms. She had independent, expert, and experienced assistance available to her but she demonstrated that she could competently decide and speak for herself. The description offered by some of the appellees that she was a whimpering, emotional, and helpless old woman was definitely refuted by her conduct on the occasion just reviewed.

Chris M. Rasmussen died intestate and the land owned by him descended, by operation of law, to his widow, Martha Rasmussen, and his nine children. Any one or more of them could have legally compelled a partition of the land, which would have in all probability resulted in a sale of it because of the nature thereof and the fractional shares of the owners. It was not a conspiracy or undue influence for one or more of the owners to negotiate for and obtain an agreement with the other owners to sell the land which was, in effect, a voluntary partition of it. Any owner had a right to accomplish that result without legal proceedings if pos-

sible and if this could not be done then by the procedure provided by law. The contention that it was undue influence or a conspiracy for appellant and Axel Rasmussen to seek and induce a sale of the land is a fantasy unsupported by fact or law.

The deceased and her heirs, except Minnie Nelson and the heirs of Hans Rasmussen, deceased, were in the county court of Dakota County March 25, 1950, attending the hearing on the petition for determination of the heirs of Chris M. Rasmussen, deceased, and the petition for the determination of the heirs of Hans Rasmussen, deceased. Mark J. Ryan was present as counsel for Martha Rasmussen and conducted the hearings. The owners of the land who were present bound themselves that day by contract to sell the three farms owned by Chris M. Rasmussen at the time of his death. Thereafter, before May 20, 1950, they were present in the office of Mark J. Ryan and executed deeds to the purchasers of the land. The deeds were afterwards executed by the remaining owners.

There is no issue that the land or any part of it did not sell for its fair and reasonable value. The land was conveyed to the purchasers. The purchase price of the land was paid to the owners in the proportion that the ownership of each bore to the net total purchase price. The payments were received, accepted, and have since been retained by the respective owners. Martha Rasmussen received and disposed of one-third of the net proceeds of the sale of the land as has been herein detailed. She was acquainted with Mark J. Ryan, a member of the bar of Nebraska and a former judge for many years of the district court for the district of which Dakota County is a part, and she was represented by him as her attorney at all times from at least March 6, 1950, through May 23, 1950, when all matters concerned with the sale of the land were completed; the money received by Martha Rasmussen had been disposed of; and the bonds in question were purchased and delivered

to her and by her deposited in the joint safety deposit box belonging to her and appellant in the Nebraska State Bank of South Sioux City. Martha Rasmussen had the independent advice and services of her counsel in all those matters.

The daughter of Martha Rasmussen referred to above testified that about a month after the deeds were executed appellant, in the presence and hearing of his mother, said that he had mother's money put in $12,000 worth of bonds; that he had himself made co-owner of the bonds so that as soon as mother was gone they could pay out and not have to go through court again; and that the rest of her money was put in her bank account. Appellant denied that he made the statements. He testified that he had nothing to do with and expressed no opinion or desire to his mother or anyone as to how the money received by her should be disposed of or invested and that he did not know that she had purchased bonds until he saw an interest check that came through the mail which was payable to his mother and to him. Mrs. Rasmussen lived about 2 years after the alleged conversation. The witness said she spent about one-third of her time with her mother. There was no claim that the witness made any inquiry, protest, or objection to her mother or otherwise concerning what she claimed appellant said had been done. The first time any question was expressed or raised, so far as the record is concerned, in reference to any of these matters was more than 3 years after the transactions.

The subject matter of this case consists of two separate and distinct transactions. One involved the bank deposit. It happened in the summer of 1949. The other concerned the United States savings bonds. It occurred in the spring of 1950. The deposit account of $4,778.42 in the Nebraska State Bank of South Sioux City was in the names of Martha Rasmussen or Chris Rasmussen at the time of the death of the former. The deposit as between the bank and the surviving co-owner became

the sole and absolute property of the latter. The bank was not only justified but was legally compelled to permit appellant, as it did do, to withdraw the deposit by his check as his funds after the death of the deceased. The relevant part of section 8-167, R. R. S. 1943, is: "When a deposit in any bank * * * is made in the name of two * * * persons, * * * payable to either or to their survivor * * * such deposit * * * may be * * * paid to either of said persons or to the survivor * * *." The statute was intended for the protection of banks but it also establishes the property rights of the persons described therein unless the contrary appears from the terms of the deposit. If a deposit is made in a bank payable to two persons, either expressly as joint tenants with right of survivorship or without such qualifying words, upon the death of one of the co-owners of the deposit it is payable to the surviving co-owner thereof. In re Estate of Johnson, 116 Neb. 686, 218 N. W. 739; McConnell v. McCook Nat. Bank, 142 Neb. 451, 6 N. W. 2d 599; Rose v. Kahler, 151 Neb. 532, 38 N. W. 2d 391; Scriven v. Scriven, 153 Neb. 655, 45 N. W. 2d 760; DeForge v. Patrick, 162 Neb. 568, 76 N. W. 2d 733.

The form and nature of a joint deposit in the name of two persons in a bank is not, upon the death of one of the co-owners, conclusive as to the ownership of the deposit by the surviving co-owner as between him and a third person who claims that the surviving co-owner holds the legal title to the funds in trust for the third party. In re Estate of Johnson, *supra;* Scriven v. Scriven, *supra.*

If a person occupies a relationship of confidence and trust to another and by untrue statement, wrongful conduct, or concealment of the truth induces or causes the other, a person of extreme age and of some degree of debility, to make or to attempt to make a gift of a material part of his estate to the former which he otherwise would not have done, the imposition is in equity a constructive fraud and the beneficiary thereof will

be determined to hold the legal title to the subject of the gift in trust for the benefactor or his successor.

It is said in Box v. Box, 146 Neb. 826, 21 N. W. 2d 868: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title." See, also, Peterson v. Massey, 155 Neb. 829, 53 N. W. 2d 912; Stieber v. Vanderlip, 136 Neb. 862, 287 N. W. 773.

Appellant was requested to consult with the bank and ascertain if the signature card given to it by the deceased at the time she opened her checking account with the bank was in the custody of it and then effective to authorize withdrawal from the deposit account as the signature card evidenced when it was executed and placed in the custody of the bank. The card then authorized funds to be paid from the account on the signature of the deceased or appellant. If that was found to be the status and effect of the signature card when the inquiry was made, she requested appellant to ascertain that information and in that event she expressed no desire or intention to disturb or change it in any respect; but if it was not the situation, then she asked him to get another or new card. He brought her the existing signature card which was then effective as it was originally completed and committed to the custody of the bank. He took it to the deceased and informed her that the official of the bank had said that if she and appellant signed the survivorship agreement exhibited on the back of the card, appellant could withdraw her money from the bank. She had not indicated that she desired to change the deposit to a joint one payable to her and appellant and she was not told that the effect of

her and appellant signing the signature card on the back of it would make it a joint account. The doctrine stated above is, under the circumstances of this case, appropriate, applicable, and controlling as to the proceeds of the bank deposit as it existed at the time of the death of the deceased and was afterwards withdrawn by appellant. It is therefore determined that appellant received and holds the legal title thereto as trustee for the legal representative of the estate of Martha Rasmussen, deceased, and that he should be required forthwith to account therefor and pay to the representative of the estate the amount appellant received from the deposit, the sum of $4,778.42.

Appellant, upon the death of his mother, became the sole owner of the United States savings bonds issued and registered on or about May 23, 1950, in the names of Martha Rasmussen or Chris Rasmussen described in the record of this case as consisting of eight $1,000 bonds and eight $500 bonds. A United States savings bond is a contract between the federal government and the purchaser. Treasury Department regulations governing such bonds are incorporated into such contract by reference and are beyond reach of state law to modify or destroy. If such bonds are issued and registered in the names of two persons as co-owners, the rights of a surviving co-owner arise solely from the contract. The surviving co-owner of the bonds takes title thereto by reason of Treasury Department regulations incorporated in the contract between the government and the purchaser. 31 U. S. C. A., § 757c, p. 622; § 315.45, 31 C. F. R. (1949 Ed.); Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711; United States v. Dauphin Deposit Trust Co., 50 F. Supp. 73; In re Bartlett, 71 F. Supp. 514; Annotations, 168 A. L. R. 245, 173 A. L. R. 550. The record does not impeach the ownership of the bonds by appellant or his right to or enjoyment of the proceeds of them. The proof is insufficient to establish that he had any part in the purchase of the bonds or that he in any way at-

tempted to induce or influence the deceased to purchase them or have them issued and registered in the names of Martha Rasmussen or Chris Rasmussen. Martha Rasmussen had independent advice and assistance of counsel in all matters in which she was interested in the sale of the land, the disposition of the funds she received from the proceeds of the sale, and in the purchase of the bonds. The principle decisive of this case so far as it concerns the bonds is stated in Peterson v. Massey, *supra,* in this manner: "The burden of establishing a constructive trust is always upon the person who bases his rights thereon and he must do so by evidence that is clear, satisfactory, and convincing." Appellees have not satisfied the burden thus imposed. It is determined that appellant is the owner of the bonds and all interest or other accruals to them by absolute title and he is entitled to the unconditional possession of them. The bonds are in the custody of Mark J. Ryan as the representative of the estate of Martha Rasmussen, deceased, awaiting the determination of this cause, and he should be directed and ordered to forthwith surrender and deliver the bonds to appellant without condition.

Appellants contest the compensation made counsel for appellees who were plaintiffs for their services rendered in this case. After the judgment was rendered by the district court, counsel for appellees filed an application for allowance of attorneys' fees which is, in substance, the following: They commenced and prosecuted this case for appellees in which it was adjudged that Chris Rasmussen, one of the appellants, should pay to the representative of the estate of Martha Rasmussen, deceased, $4,778.42 and legal interest from May 2, 1952, and deliver to said representative United States savings bonds of the value of $12,000 and interest accrued thereon from November 1, 1952; and that the judgment was for the benefit of all the heirs of the deceased. There were heirs of the deceased who did not

join appellees in the prosecution of the case. The attorneys contracted with appellees for a contingent fee or compensation of one-third of all amounts recovered by the action, which was a reasonable amount. They asked an order requiring the representative of said estate to pay one-third of the amount of the judgment to the attorneys for appellees on account of their services rendered in the case in protecting and preserving said funds for the benefit of all of the heirs of the deceased.

The application was verified on belief. The record fails to show that any evidence was offered in support of it. It was submitted to the court on the day it was filed. Later the district court entered an order "that the application of plaintiffs' attorneys of the allowance of attorneys' fees should be and it is allowed in the amount of twenty-five percent of the judgment entered on June 4, 1956," which is the judgment above referred to. The motion of appellants for a new trial was denied on the day the order allowing fees was entered.

In Linn v. Linn, 146 Neb. 666, 21 N. W. 2d 283, it is said: "Where the services of a litigant's attorney result in rescuing or preserving property or funds, not only for the benefit of the particular litigant but for the benefit of all others in the same class, the court may in the exercise of a sound legal discretion order a reasonable fee to be paid to such attorney from the common fund or by those benefited by it." The opinion in that case contains the following: "It must appear from the record that all in the class benefited from the action of the one making the claim." See, also, Allen v. City of Omaha, 136 Neb. 620, 286 N. W. 916; State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392.

Obviously the class referred to in the present action was the heirs of Martha Rasmussen, deceased. Chris Rasmussen was one of her heirs and he was not and could not be benefited by this action because the object

and purpose of it was to recover from him, that is, take something from him and not to contribute anything to him.

The judgment of the trial court rendered in the case had not become final and the litigation had not yet terminated at the time of the order allowing attorneys' fees. The order of the district court allowing attorneys' fees is also inappropriate because of the conclusions expressed herein concerning the merits and disposition of the case. The order cannot be sustained. There is neither statutory authority nor uniform course of procedure to justify the allowance of compensation to the attorneys for appellees in the circumstances of this case. State ex rel. Ebke v. Board of Educational Lands & Funds, *supra*.

The judgment and the order allowing attorneys' fees to the counsel for appellees should be and they each are reversed and the cause is remanded to the district court for Dakota County with directions to render and enter in this cause a judgment as follows:

1. Requiring Chris Rasmussen, one of the appellants, to account for and pay forthwith to Mark J. Ryan as administrator of the estate of Martha Rasmussen, deceased, the sum of $4,778.42 with interest thereon at 6 percent per annum from May 2, 1952.

2. Adjudicating that Chris Rasmussen is the owner and entitled to the possession of the United States savings bonds, series G, in the principal sum of $12,000 purchased by Martha Rasmussen in her lifetime and issued and registered in the names of Martha Rasmussen or Chris Rasmussen and fully described in the record of this case, and the interest accruing thereon from May 2, 1952; and that Chris Rasmussen is entitled to collect, receive, retain, and use as his absolute property the proceeds of said bonds.

3. That Mark J. Ryan, one of the appellants, who has the custody of the bonds, is required forthwith to

surrender and deliver the bonds without condition to Chris Rasmussen.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD GRIGGS, APPELLEE, V. MAE OAK ET AL., APPELLANTS.
MAE OAK, APPELLANT, V. HAROLD GRIGGS, APPELLEE.
82 N. W. 2d 410

Filed April 12, 1957. No. 34159.

1. **Frauds, Statute of: Specific Performance.** An oral contract partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity.
2. ———: ———. Under this rule the burden is upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.
3. **Contracts.** To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof.
4. ———. The acceptance of an offer must be an unconditional acceptance of the offer as made, otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition.
5. ———. Where one, to whom an offer is made, makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer.

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

Max Marshall, for appellants.

Kenneth M. Olds, 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 Dixon County. It involves two separate actions filed in that court which were consolidated for the purpose of trial and appeal. The first action, instituted on August 20, 1955, by Harold Griggs against Mae Oak and her husband, Clifford J. Oak, seeks to have specifically performed an alleged oral agreement with Mae Oak to give him a 3-year lease on two certain unimproved lots located in Wakefield, Nebraska, owned by her and described as Lots 6 and 7, Block 2, Anderson's Addition to the Village of Wakefield, Dixon County, Nebraska. The second action, instituted on August 24, 1955, by Mae Oak against Harold E. Griggs, who is the same person who, as Harold Griggs, instituted the first action, seeks to have the defendant therein ejected from these same premises; to recover from him all damages he caused thereto and to a crop of alfalfa hay growing thereon; to recover for the use of the property; and to enjoin him from removing any improvements that he has placed thereon.

Harold Griggs died on March 21, 1956, and thereafter both actions were revived in the name of Geneva Griggs, as administratrix of his estate. For convenience we shall hereinafter refer to decedent as Griggs.

On July 26, 1956, the trial court decreed specific performance of the alleged oral lease for the 3-year period claimed by Griggs in the action he instituted, being from June 4, 1955, to June 4, 1958, and dismissed the action of ejectment instituted by Mae Oak. Mae Oak filed a motion for new trial in both actions and, from the overruling thereof, appeal was taken to this court.

The record shows the parties waived a jury trial and therefore appellee claims the trial court's findings have the same effect as a verdict of a jury. An action for specific performance is one in equity. Mainelli v. Neuhaus, 157 Neb. 392, 59 N. W. 2d 607; Bauer v. Bauer,

136 Neb. 329, 285 N. W. 565. Consequently we will consider the record de novo as it relates thereto. On the other hand an action in ejectment is one in law. Abbas v. Demont, 152 Neb. 77, 40 N. W. 2d 265. Consequently the court's findings as they relate thereto will not be set aside unless clearly wrong. Farmers Union Fidelity Ins. Co. v. Farmers Union Co-Op. Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122.

The first question presented is, was there a contract entered into between the parties for a 3-year lease?

The record shows appellant Mae Oak, whom we shall hereinafter refer to as Mrs. Oak, owned the lots hereinbefore described. She, with her husband, Clifford J., resided in Gardena, California. By letter dated May 19, 1952, Mrs. Oak advised Walter L. Moller, an insurance and real estate agent in Wakefield, Nebraska, that she was very anxious to sell the lots she owned in Wakefield and any arrangements which her father, Wilber Evans, made with him in regard thereto would be satisfactory with her. Her father lived in Wakefield. The evidence shows the father contacted Moller on several occasions for the purpose of getting him to try to find a buyer. Moller endeavered to do so and, in his endeavors, contacted Griggs. Although interested in buying the property Griggs advised Moller he could not finance the purchase thereof but would be interested in leasing it. Griggs suggested to Moller a rental of $75 per year and a lease covering more than 1 year.

On June 3, 1955, Moller called Mrs. Oak on the telephone at her home in Gardena, California, and informed her of his opportunity to lease her lots, asking if she was interested in doing so. Mrs. Oak, in her conversation with Moller, authorized him to lease her lots for a period of 1 year at a rental of $100, payable in equal semiannual installments, that is, he was to write up a lease to that effect and mail it to her. Moller immediately advised Griggs thereof but no lease for 1 year was ever prepared. However, on or before June 4, 1955, Griggs

apparently went into possession of the lots and started to make the necessary improvements thereon for a trailer court. The improvements included piping in water and gas, laying sewer lines, putting in wiring for electricity, and building a utility building. This is evidenced by the statements of Harry H. Cruickshank and Lee Swinney. In fact Swinney states his books show that on June 4, 1955, Griggs gave him a check in the amount of $87.25 for 349 feet of waterline trench he had dug.

On June 7, 1955, Griggs told Moller the improvements he was planning to make on the property would cost more than he had anticipated and, on the basis of a 1-year lease, did not think he could get his money back. In view thereof he asked Moller to call Mrs. Oak and attempt to get a lease for 5 years. That evening Moller called Mrs. Oak on the telephone at her home in California and advised her of the foregoing. On the basis thereof he attempted to negotiate a 5-year lease, but failed. He did, however, get her to give him authority to enter into a 3-year lease on the same annual rental terms, Mrs. Oak telling him to prepare and send out such a lease. Moller prepared such a lease, running from June 4, 1955, to June 4, 1958, at an annual rental of $100 payable semiannually but, at the insistence of Griggs, put the following option therein: "AND IT IS FURTHER AGREED, That the party of the first part grants unto the party of the second part an Option to Purchase the above described property at the expiration of the lease for the price of $1,000.00 plus any paving assessments not yet due on the said property, and that any rents which have been paid by the party of the second part to the party of the first part shall be applied toward the purchase price of the property."

By letter dated June 8, 1955, which Mrs. Oak acknowledged receiving, Moller sent her 2 copies of this lease signed by Griggs together with Griggs' check for $50 covering the first semiannual payment of rent. Mrs. Oak replied to this letter on June 11, 1955, advising

Moller the lease, with the option clause, was unacceptable and returned the lease and check. However, therein she advised Moller that: "* * * if the lease is written for a term of three years at $100.00 per year a clause to this effect must be inserted: that the party of the second part agrees to expend not less than $250.00 in connecting with sewer and erecting a utility building which shall be left on the property at expiration of the lease; with no option whatsoever." Moller acknowledged receiving this letter about June 13, 1955, and advising Griggs thereof. However, no lease was ever prepared containing this provision. Griggs continued to remain in possession of the property and continued with the improvemnts he was making thereon.

Meanwhile Griggs apparently found a way whereby he could finance the purchase of the property for he had Moller try to negotiate a purchase thereof. Moller called Mrs. Oak on the telephone for this purpose on June 15, 1955. She, at that time, informed Moller she was no longer agreeable to either a sale or lease of the premises or to anything else. Moller then advised Mrs. Oak of the improvements Griggs had placed on her property.

A few minutes after this call by Moller on June 15, 1955, Griggs called Mrs. Oak and tried to persuade her to sign a lease, which she refused, saying she was not going to do business with him. He then told her of the improvements he had put on her property. She advised him not to do anything further on the property. Thereafter, on June 17, 1955, Harry N. Larson, a lawyer at Wakefield, wrote Mrs. Oak on behalf of Griggs trying to buy her property, which offer she rejected.

During these negotiations, and for some time thereafter as is evidenced by the bills and statements for material and labor, Griggs continued to improve this property, putting in the improvements already referred to at a total cost of over $1,000.

Section 36-105, R. R. S. 1943, provides: "Every con-

tract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

In respect to this statute, correspondence between parties, if sufficient, can satisfy the requirements thereof providing the contract shall be void "unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." See, also, Heenan & Finlen v. Parmele, on rehearing, 80 Neb. 514, 118 N. W. 324.

Also, as stated in Campbell v. Kewanee Finance Co., 133 Neb. 887, 277 N. W. 593: "An oral contract partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity." See, also, Sage v. Shaul, 159 Neb. 543, 67 N. W. 2d 921.

"The burden in the light of this rule has devolved upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract." Peterson v. Peterson, 158 Neb. 551, 63 N. W. 2d 858. See, also, Crnkovich v. Crnkovich, 144 Neb. 904, 15 N. W. 2d 66; Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513; Lunkwitz v. Guffey, 150 Neb. 247, 34 N. W. 2d 256.

It is well settled by these and other decisions of this court that before there can be specific performance of an oral contract coming under this statute, because of acts constituting performance, the contract itself must be proved.

"To establish an express contract there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof." Melick v. Kelley, 53 Neb. 509, 73 N. W. 945. See, also, Beskas v. Calkins, 135 Neb. 323, 281 N. W. 29; Farmers Union

Fidelity Ins. Co. v. Farmers Union Co-Op. Ins. Co., *supra;* Standard Oil Co. v. O'Hare, 126 Neb. 11, 252 N. W. 398.

"The acceptance of an offer * * * must be an unconditional acceptance of the offer as made; otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but is a counterproposition." Anderson v. Stewart, 149 Neb. 660, 32 N. W. 2d 140, 3 A. L. R. 2d 250.

"Where one, to whom an offer is made, makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer." Farmers Union Fidelity Ins. Co. v. Farmers Union Co-Op. Ins. Co., *supra.*

However, an acceptance can be shown by conduct or by performance communicated to the promisor. Siebring Mfg. Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 70 N. W. 2d 149; Johnson v. M. J. O'Neil, Inc., 182 Minn. 232, 234 N. W. 16. But such would not be effective if the offer sought to be performed was, in fact, rejected.

The record shows the first offer made by Mrs. Oak to Griggs was for a 1-year lease. Although Griggs went into possession and started to make improvements on the property immediately thereafter it is self evident he did not accept this offer for he does not here seek to obtain a lease for 1 year. In fact, when he discovered what the improvements for a trailer court would cost, he asked Moller to negotiate for a longer lease. This Moller did, obtaining from Mrs. Oak an offer of a 3-year lease with the terms of an annual rental of $100 payable in semiannual installments. This is apparently the offer appellee is here seeking to have specifically enforced. However Griggs rejected this offer when he insisted that the lease contain the option herein-

before set forth. Mrs. Oak rejected this counterproposal by Griggs but again offered to lease the property for 3 years but in this offer included the provisions hereinbefore set forth from her letter of June 11, 1955. Griggs never accepted this offer and, in fact, rejected it when, on June 15, 1955, he had Moller attempt to negotiate a purchase of the property. At that time Mrs. Oak withdrew all offers to lease the property, which she had a right to do, as none of them had been unconditionally accepted. We do not think the correspondence is such that it creates a contract between the parties leasing the property to Griggs. Neither do we think Griggs accepted Mrs. Oak's offer for a 3-year lease or any other offer to lease. In fact, we think the record discloses he rejected all offers and he, and his successors, have, at all times, been occupying the property of Mrs. Oak without any right to do so. In view of this finding we think the trial court was clearly wrong in denying to Mrs. Oak, in her action, some of the relief she prayed for therein. We think she is entitled to the immediate possession of her property and to have appellee enjoined from removing any of the improvements that have been placed thereon, including those placed thereon in either April or May 1956. In addition thereto she is entitled to recover for the use of the premises at the rate of $100 per year, which we find is the reasonable value for the use thereof, from June 4, 1955, until she is placed in possession thereof. However, she should be denied any damages for the alleged crop of alfalfa growing thereon in 1955, which she claims was destroyed, or for damages to the lots by reason of a roadway that was placed thereon because the proof adduced in relation thereto was insufficient upon which to base the allowance of any damages for either of these items.

We reverse the judgments of the trial court in both actions and remand the causes with directions to it to enter a proper decree in each in accordance with our

holding and directions herein set forth. All costs are to be taxed to appellee in both cases.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPITAL BRIDGE COMPANY, A CORPORATION, DOING BUSINESS AS CENTURY BRIDGE LUMBER COMPANY, APPELLEE, V. COUNTY OF SAUNDERS, APPELLEE, GLENN MELSON, A TAXPAYER, APPELLANT.
83 N. W. 2d 18

Filed April 19, 1957. No. 34005.

1. **Appeal and Error.** In an action at law where a jury has been waived it is not within the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
2. **Counties: Work and Labor.** Where a statute prohibits a county from making a contract, and avoids the obligation of the contract for so doing, a recovery quantum meruit cannot be had.
3. ———: ———. Where a contract has been entered into in good faith with a county, which contract is within the power of the county to make but is void for the reason that statutory requirements were not complied with, an action in quantum meruit for the service performed or material furnished may be maintained.
4. ———: ———. The right to recover in quantum meruit for service performed or material furnished under a void contract with a county exists up to the limit of, and not beyond, that which would have been recoverable under a valid contract covering the same subject matter.
5. **Counties.** Under the provisions of section 23-336, R. R. S. 1943, the obligation of a contract is void where the contract is contrary to a statutory limitation, or where there are no funds legally available at the time with which to pay the obligation, or in the absence of a statute expressly authorizing such contract. It has no application where the county has general authority to make the contract but the power has been irregularly exercised.

APPEAL from the district court for Saunders County: HARRY D. LANDIS, JUDGE. *Affirmed.*

Myrl D. Edstrom, for appellant.

Howard V. Kanouff, Woods, Aitken & Aitken, and *George W. Haessler,* for appellees.

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

CARTER, J.

This is an appeal from a judgment for the plaintiff against the county of Saunders for $4,832 for bridge lumber sold to the county. The appeal was taken by a taxpayer who alleges that the lumber was delivered as the result of two orders each of which was in excess of $500 and therefore contrary to the provisions of section 39-810, R. R. S. 1943, which requires purchases in excess of $500 to be let to the lowest responsible bidder.

The amended petition of the plaintiff sets forth 11 causes of action, each based on a separate order for bridge lumber. Each cause of action is similar except for the order date and the amount claimed as the fair and reasonable value of the lumber furnished. The dates and amounts set out in the 11 causes of action are as follows: May 27, 1943, $483.60; June 4, 1954, $485.69; June 7, 1954, $496.01; June 11, 1954, $489.60; June 14, 1954, $464.10; June 18, 1954, $497.76; June 21, 1954, $448.80; June 25, 1954, $485.34; June 28, 1954, $328.32; June 30, 1954, $326.39; and July 2, 1954, $326.39. The plaintiff prayed for judgment in the amount of $4,832 with interest and costs.

The answer filed by the taxpayer alleges that the board of supervisors did not enter into a contract to purchase the bridge lumber for the value of which suit was brought. It alleges further that the lumber was purchased by William Stewart, the highway commissioner of Saunders County, without the knowledge, consent, authority, or direction of the board of supervisors. The taxpayer further alleges that if lumber was delivered to the county it was pursuant to two orders made

by Stewart, each of which was in excess of the amount that could be purchased without advertising for the lowest responsible bidder, and that plaintiff and Stewart deliberately and intentionally represented to the defendant that the 2 orders were 11 separate and distinct purchases to show that such purchases were each in a sum less than $500.

The reply of the plaintiff alleges that Stewart was authorized by the county supervisors to purchase lumber when required or needed in amounts less than $500. Plaintiff further alleges that plaintiff's agent and salesman had been present at regular meetings of the board when Stewart was authorized to make purchases of lumber, that the board of supervisors had paid previous claims for lumber ordered by Stewart, and that the county was estopped to deny liability because of a want of authority on the part of Stewart. Plaintiff alleges also that the amount claimed is less than the reasonable value of the lumber delivered.

Upon the issues thus made, the case was tried by the court, a jury trial having been waived by the parties. The trial court found for the plaintiff in the amount of $4,832 with interest at six percent per annum from September 12, 1954, a total sum of $5,141.50 on the day of judgment.

The action is one at law in which a jury was waived and a trial had to the court. Under such circumstances the findings of the trial court are equivalent to the verdict of a jury. The evidence must therefore be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in plaintiff's favor and it should have the benefit of every inference that can reasonably be deduced therefrom. Wallace v. Insurance Co. of North America, 162 Neb. 172, 75 N. W. 2d 549; Barnes v. Davitt, 160 Neb. 595, 71 N. W. 2d 107.

The evidence sustains the following findings of fact: From May 27, 1954, to July 2, 1954, the plaintiff re-

ceived 11 separate orders for bridge lumber on 11 different days as hereinbefore recited. The orders were signed by Stewart, the highway commissioner for Saunders County, who was orally instructed by the board of supervisors to make purchases for bridge lumber required, but not in excess of $500 at any one time. The evidence shows without dispute that the lumber in question was delivered, retained, and used by the county. All budgetary requirements had been complied with by the board of supervisors and the county had adequate funds on hand and available to pay for the lumber for which the suit was brought.

The basis of the contention of the taxpayer that there were but two orders each in excess of $500 is grounded upon the following factual situation: The first eight invoices bear plaintiff's order No. 1244, and the last three invoices bear plaintiff's order No. 1227. The president of the plaintiff company testifies that it is the bookkeeping practice of the company to give all the orders received from a customer the same order number until all ordered materials have been delivered. After the delivery of all materials on all past orders has been made, the next order received is given a new order number. The method of bookkeeping was fully explained and is shown to be a bookkeeping practice having no relation to the question as to whether or not the customer's orders were in fact one or more separate transactions. The trial court found in effect that there were 11 orders and not 2 under the evidence. Since we are required to give the evidence its most favorable import, the finding of the trial court on this question is conclusive upon this court on appeal.

It is contended that the circumstances surrounding the transactions support a conclusive finding that the orders were made in amounts less than $500 for the fraudulent purpose of circumventing the statute. The evidence does show notations made on orders previously received by the plaintiff from which it might be in-

ferred that some connivance may have existed between the plaintiff and Stewart, the highway commissioner, to avoid the requirements of the statute. These notations, however, were explained in detail by the president of the plaintiff company as informational data for the benefit of plaintiff's clerical employees. The highway commissioner testifies that the county had a continuing need for bridge lumber, that it was hard to get in large quantities because of a threatened strike in the lumber-producing industry, that the price was exceedingly high because of this fact, that the board of supervisors thought it an inopportune time to purchase any considerable quantity of lumber, and that he was directed to buy the lumber as needed in small lots of less than $500 until the market became stabilized and conditions became more normal. He testifies further that he never ordered more than $500 worth of lumber at any one time and that the orders given to plaintiff were for lumber presently needed. He states further that at no time did he ever advise the plaintiff to split orders to keep them under $500 because he never placed an order in excess of that amount. The president of the plaintiff company positively denies that any orders received were in excess of $500 or that any orders were split to make them less than $500. Upon this evidence the trial court found for the plaintiff. We are concluded by the finding of the trial court in favor of the plaintiff on the conflicting evidence as to plaintiff's intent to fraudulently circumvent the statute.

We conclude that the findings of fact made by the trial court which were necessary to sustain a judgment for the plaintiff are sustained by evidence and conclusive upon this court on appeal. It is contended, however, that the evidence is sufficient as a matter of law to show a violation of section 39-810, R. R. S. 1943, and that a recovery of a judgment by the plaintiff is barred for that reason.

The applicable statute states: "The county board

of each county has the power to erect and repair all bridges and approaches thereto and build all culverts and make improvements on roads, the cost and expense of which shall in no instance exceed five hundred dollars. All contracts for the erection or repair of bridges and approaches thereto, for the building of culverts and improvements on roads, the cost and expense of which shall exceed five hundred dollars, shall be let by the county board to the lowest and best bidder. All contracts for materials for repairing, erecting, and constructing bridges and approaches thereto, the cost and expenses of which exceed five hundred dollars, shall be let to the lowest responsible bidder, but the board may reject any and all bids submitted for such materials. Upon rejection of any bid or bids by the board, such board shall have power and authority to purchase materials to repair, erect or construct the bridges of the county, and approaches thereto. * * *." § 39-810, R. R. S. 1943. It is the contention of the appellant that the giving of 11 orders amounting to $4,832 from May 27 through July 2, 1954, by the highway commissioner and their acceptance by the plaintiff is in itself evidence that the county needed lumber in excess of the value of $500 and that, under such circumstances, the statute requires that its purchase should be let to the lowest responsible bidder.

We point out that this statute gives the county board the general power to erect and repair bridges and approaches thereto, build culverts, and make improvements on roads. It is clear therefore that the county board had general authority to purchase bridge lumber for the erection and repair of bridges.

This court has denied recovery in cases where the applicable statute prohibits the making of a contract and avoids the obligation thereof. Village of Bellevue v. Sterba, 140 Neb. 744, 1 N. W. 2d 820; Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291; City of Lincoln v. First Nat. Bank, 146 Neb. 221, 19 N. W. 2d 156; Warren v.

County of Stanton, 147 Neb. 32, 22 N. W. 2d 287; Heese v. Wenke, 161 Neb. 311, 73 N. W. 2d 223. In Neisius v. Henry, *supra,* we said: "There is much distinction between a contract with a city which is the result of an illegal exercise of an authorized power and one which is illegal because of a statutory disqualification to make a contract, or to create liability. The former may be ratified or a suit quantum meruit maintained. But where one is prohibited by statute from entering into a contract, and the obligation of the contract avoided for so doing, an action quantum meruit cannot be maintained." This is a correct statement of the law to which we adhere.

But in the present case the statute does not avoid the obligation of a contract made in a manner contrary to the provisions of the statute. In such a situation the rule in this state is: Where a contract has been entered into in good faith by a county, which contract was within the power of the county to make but was void for failure to comply with statutory requirements, an action in quantum meruit for the service performed or the material furnished may be maintained.

In such case the party loses the benefit of his contract and his recovery is limited to the reasonable value of the services performed or the material furnished. O'Neill v. City of South Omaha, 102 Neb. 836, 170 N. W. 174; Stickel Lumber Co. v. City of Kearney, 103 Neb. 636, 173 N. W. 595; Omaha Road Equipment Co. v. Thurston County, 122 Neb. 35, 238 N. W. 919; Western Chemical Co. v. Board of County Commissioners, 130 Neb. 550, 264 N. W. 699; Warren v. County of Stanton, *supra.* We conclude therefore, assuming the correctness of the taxpayer's theory that the statute was not complied with, that the trial court having found that the orders were made in good faith, the failure to advertise for bids renders the contracts void. It is not, however, a bar to an action quantum meruit since the county board has the general power to purchase lumber for the erection and

repair of its bridges. It is not questioned that the county accepted, retained, and used the lumber for the benefit of the county.

The evidence is not disputed that the fair market value of the lumber purchased by the county of Saunders was in excess of the amount claimed by the plaintiff. The plaintiff may not, however, recover in quantum meruit an amount in excess of the contract price even though the contract is void. Warren v. County of Stanton, *supra.* The judgment of the trial court is in accord with this rule.

It is contended that the contracts in the present case were not only void but that the obligation thereof is voided by virtue of sections 23-336, 23-337, and 23-338, R. R. S. 1943. We point out that these sections of the statute relate to contracts which contravene statutory limitations and are outside the scope of the powers delegated to a county. They do not relate to the illegal use of a granted power. In the present case the money to pay for the lumber purchased was on hand, having been properly assessed, levied, and collected. The general power to purchase lumber for the erection and repair of bridges is delegated to the county board, consequently the irregular exercise of the power does not defeat the right to recover quantum meruit for services and material furnished where the transaction was made in good faith. This court has so construed these statutes in Bartlett v. Dahlsten, 104 Neb. 738, 178 N. W. 636. With reference to section 1104, Rev. St. 1913, now section 23-336, R. R. S. 1943, the court in that case said: "It was not the intention of this statute that counties should be denied the exercise of those powers which are found to be necessary to carry into effect a power specially granted. If that were the intention it would in many instances effect a repeal of those very provisions of the statute expressly granting the power, for to take away the means of performance is to destroy the power itself. Such would be the result in this case. The pro-

vision of the statute referred to, we take it, was intended to prevent counties from entering into those contracts, express or implied, and was intended to declare such contracts unlawful, where no statutory authority is to be found justifying the making of such a contract." We concur in the view that sections 23-336, 23-337, and 23-338, R. R. S. 1943, void the obligation of the illegal contract only where the contract is contrary to a statutory limitation, or where there are no funds legally available at the time with which to pay the obligation, or in the absence of a statute expressly authorizing such contract. It has no application where the county has general authority to make the contract but the power has been irregularly exercised.

The findings of fact, which have the effect of a jury verdict, are supported by the evidence. Under the law of this state, as herein stated, plaintiff is entitled to recover quantum meruit, not in excess of the contract price. The judgment of the district court, being in conformity with the foregoing pronouncements, must be affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

I dissent.

Because the trial court in its findings of fact and judgment used the one word "plaintiff" instead of "defendant" the court holds that it is powerless to determine the facts, presented by this record, contrary to the determination of the trial court.

By a general finding for the plaintiff the trial court precluded this court from reviewing the facts, save to determine if evidence is sufficient to sustain the finding. Had the trial court found for the defendant, then the plaintiff would have been denied a review of the facts here, save to determine if the evidence is sufficient to sustain the finding.

I submit that the issue of "good faith" upon which this court rests its decision was not an issue before the

trial court and hence was not decided by it. As a corollary to that I submit that the rule stated by the court in its syllabus point No. 1 is the remnant of a series of rules designed to limit the review of appellate courts, substantially all of which have been set aside either by constitutional amendment, statutory enactments, or judicial decisions. The rule now followed has no substantial merit and should be discarded in the light of the demand for full review of causes in this court.

I recognize that when the opinion of this court is filed and becomes final in this case it will be determinative of the cause here presented. It will also state the law generally and the construction of the statutes here involved.

However, the construction put upon the statutes here involved has not been the construction heretofore placed thereon and is contrary thereto.

The Legislature is now left helpless to protect counties or other subdivisions of government from the expenditure of funds under the facts that are shown to have existed here. I shall develop these and related matters in the course of this dissent.

What were the issues? The plaintiff sought recovery on 11 causes of action based on contract, each for amounts less than $500. It sought recovery on the same causes in quantum meruit. We are agreed on that.

The county did not defend this action. It defaulted. Its board of supervisors was directly involved in the fact situation presented. It neither undertook to affirm or deny the liability of the county. Individual members testified as witnesses for the plaintiff. Reference will be made later herein to their testimony. A taxpayer defended the action. He denied generally and as to the issue here pleaded specifically:

"4. That the defendant is not indebted to the plaintiff in the sum of $4832.00, nor in any other amount, for bridge lumber or other materials alleged by plaintiff to have been delivered to defendant pursuant to 'purchases'

made by William Stewart, the Highway Commissioner of Saunders County, between the dates of May 27, 1954, to July 2, 1954, both inclusive; that the Board of Supervisors has never entered into any contract or agreement with plaintiff for the purchase of the bridge lumber alleged by plaintiff to have been delivered to defendant; that any bridge lumber purchased by William Stewart from plaintiff was purchased without the knowledge, consent, authority or direction of the Board of Supervisors; that plaintiff knew, or in the exercise of reasonable prudence should have known, that William Stewart had not been authorized or directed to purchase lumber by the Board of Supervisors.

"5. That if any bridge lumber was delivered by plaintiff to defendant as the result of 'purchases' made by William Stewart between May 27, 1954, and September 2, 1954, it was in fact delivered pursuant to two orders made by William Stewart; that for the purpose of attempting to defeat the provisions of law requiring the Board of Supervisors to let contracts for bridge lumber to the lowest bidder and to enable the plaintiff, with the knowledge and approval of William Stewart, to make claim against the defendant for sums greatly in excess of the market value and in excess of the reasonable value of any bridge lumber delivered and greatly in excess of the sum for which such lumber could have been purchased by bid, the plaintiff and William Stewart have deliberately and intentionally represented to the defendant that the two orders were eleven separate and distinct purchases, that each purchase was for a particular and different job or bridge, and that each of such purchases was for a sum less than $500.00."

Here it should be specifically noted that in its summary of the answer the court does not even mention the allegation "that for the purpose of attempting to defeat the provisions of the law requiring the Board of Supervisors to let contracts for bridge lumber to the lowest bidder," etc.

In reply plaintiff alleged, and I quote the complete reply:

"Plaintiff alleges in reply to paragraph four of said answer that prior to acceptance of the orders for lumber involved herein, the County Board of Supervisors of Saunders County, in regular session, had authorized and directed the purchase of lumber by William Stewart, Highway Commissioner, when required or needed in amounts less than $500.00. *That plaintiff's agent and salesman had* been present at regular meetings of said board, *both before and during* the purchases in issue, when purchases of lumber by said Highway Commissioner, *including purchases herein involved, were reported, discussed and approved* by said Board and the members thereof. That the *members of said Board had knowledge* of the purchase, delivery and use of the lumber involved in plaintiff's claims and prior to the purchase of such lumber had approved and paid claims for other purchases of lumber *similarly made* by said Highway Commissioner. That said County had adequate funds available, according to law, for the purchase of such lumber. That by reason of the facts aforesaid, *if any irregularity exists* relative to the contract for purchase of said lumber, the County of Saunders is *estopped* to deny liability in respect of the purchase of said lumber.

"Plaintiff further alleges that, by reason of the facts aforesaid and the allowance of plaintiff's claims, said County of Saunders fully approved and *ratified* the purchase of said lumber from plaintiff.

"For further reply plaintiff denies all of the allegations of paragraph 5 of said answer and alleges that the amount claimed for the lumber involved in plaintiff's claim is actually below the reasonable value of the lumber so sold and delivered." (Emphasis supplied.)

In summary plaintiff in reply pleaded that it had knowledge of the facts of these purchases, for its "agent and salesman" was present when these and prior purchases were "reported, discussed and approved"; and that

the members of the board had a similar knowledge of the facts of these purchases and had paid prior claims. Here the court ignores plaintiff's judicial admission that it was present when purchases of lumber "including purchases herein involved, were reported, discussed and approved." That admission relates not only to the ones here involved but also to other purchases "similarly made" that form the basis of the plea of estoppel and ratification.

What was the defense tendered on that pleading? It was that "by reason of the facts aforesaid" the county was "estopped" to deny liability. The defense of plaintiff was then "estoppel" and ratification. The court, in its opinion, mentions the plea of estoppel—and then pays no further attention to it.

In Anderson v. Anderson, 155 Neb. 1, 50 N. W. 2d 224, we held: "A litigant may not present an issue for determination and avoid the effect of an adjudication or estoppel by withholding proof thereof. * * * Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or a matter to avoid, will be treated *as admitted,* though the answer also contains his general denial." (Emphasis supplied.)

In Giacomini v. Giacomini, 163 Neb. 798, 81 N. W. 2d 194, we held: "A plea of estoppel in pais may be joined with a general denial when the averments *by way of estoppel are not inconsistent* with such denial." (Emphasis supplied.)

I submit that the defense and only defense of the plaintiff to the charge of illegality of these contracts was that of estoppel based on the knowledge of the plaintiff *and* the knowledge of the county board. I submit that such a defense is inconsistent with the general denial.

The court in its decision ignores the basic plea of estoppel which the plaintiff asserted as a defense and decides the cause on an issue of good faith. It joined issue generally. However, by pleading the estoppel to avoid the facts which the plea of estoppel presents, the

facts denied generally are to be "treated as admitted" and as "inconsistent with such denial."

Plaintiff in its brief here summarizes the issues presented by the taxpayer in his answer as follows:

"2. Claimant and William Stewart, county highway commissioner, falsely represented there to be eleven orders, where actually all of the lumber was ordered in two orders.

"3. The purchases were separated into eleven orders to defeat the provisions of law requiring the board of supervisors to let contracts for lumber to the lowest bidder."

Plaintiff summarizes its reply as follows:

"1. Prior to acceptance of the lumber orders involved, the board of supervisors, in regular session, had authorized and directed William Stewart, highway commissioner, to purchase lumber when required or needed in amounts less than $500.00.

"2. That plaintiff's agents and salesman had been present at regular meetings of the board of supervisors, when purchases of lumber by the highway commissioner, including purchases herein involved, were reported, discussed and approved by the board of supervisors and the members thereof.

"3. That the board of supervisors had knowledge of the purchases, delivery and use of the lumber involved in plaintiff's claims and prior to the purchase of said lumber had approved and paid claims for purchases of lumber similarly made by the highway commissioner.

"4. That said county hal (sic) adequate funds available, according to law, for purchase of said lumber.

"5. That if *irregularity exists* relative to purchase of said lumber, the County of Saunders is *estopped* to deny liability.

"6. That by reason of the above facts and allowance of plaintiff's claims, the County of Saunders approved and ratified the purchase of lumber involved from the plaintiff."

It will be noted that plaintiff here makes no contention of the issue of good faith upon which the court rests its decision. Its entire summary of the pleadings (except for the general denial) leads to the ultimate defense of estoppel and ratification.

Plaintiff summarized the issues here as follows:

"The real questions in this case are:

"1. Did the lumber orders given by Stewart, under direction of the county board, amount to valid contracts between appellee and Saunders County, either in the first instance or by ratification?

"2. If the power and authority of the county to purchase lumber was irregularly exercised, to the extent that appellee can not recover on contract, is the county liable for the reasonable value of the lumber, in quantum meruit?"

We have held: "Where the record on appeal to this court clearly shows that the case was tried and determined in the court below upon a certain theory, it will ordinarily be considered and decided in this court upon the same theory, even though such theory may be somewhat at variance with the pleadings." Hunt v. Chicago, B. & Q. R. R. Co., 95 Neb. 746, 146 N. W. 986.

We have also held: "An issue not presented in the trial court may not be raised for the first time in the Supreme Court." Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67.

Here the issue upon which the court decides the case was not pleaded nor was the cause tried upon that theory.

Able counsel for the plaintiff do not even mention here the rule of law relied on by the court and stated in syllabus No. 1.

Now what about the rule that this being a law action the findings of fact based on conflicting evidence must be accepted here because it is "equivalent to the verdict of a jury."

It is a rule of long standing and repeatedly followed.

We stated it as late as Powell v. Farmers State Bank, *ante* p. 180, 82 N. W. 2d 260.

There are fundamental differences between our consideration of a jury verdict and the consideration of the findings of fact made in a law action by the court without a jury.

One is that if evidence is improperly admitted in a trial to a jury that is prejudicial to the losing party we have the power and duty to reverse.

In a situation where a jury is waived on appeal we review the facts only to find if there was proper evidence to sustain the findings of the trial court, without any way of knowing what evidence the court weighed in coming to its decision.

In a trial to a jury, the court by its instructions puts in writing its theory of the applicable law. On appeal we can reverse if the court's theory of the controlling law is erroneous. We know what it was. Under the rule which we have followed, and which the court now follows here, we have no way of knowing what the trial court's conception of the applicable law may have been. It may have been entirely erroneous. Had the trial court had a correct legal theory in mind, the conclusion of fact might well be different. However, if it led to a conclusion of fact which we can sustain under a correct legal principle then an affirmance is required without regard to what rule the court followed in determining the facts.

The trial court goes from a finding of fact to a conclusion under rules of law. We have no way of knowing, under a general finding, what facts or law the trial court acted upon. We are completely in the dark as to the facts or law that were deemed controlling by the trial court. So we reverse the process and take a proper rule of law and hunt for facts that will sustain the finding.

I have repeatedly voted for opinions based on that rule and no doubt have used it as a ready answer to

problems presented. In my judgment it is fundamentally unsound and should be discarded. This case is a good one to illustrate its fallacies, for a reading of the court's opinion shows that the whole conclusion of the court rests upon the application of the rule of law stated in syllabus No. 1. This presents a good case upon which to investigate the basis of the rule.

The rule, as I understand it, rests in the ancient distinction between the function of trial and appellate courts in that the trial court was a trier of facts and appellate courts dealt with questions of law only and would reverse a fact judgment only for legal errors. But who knows what legal errors were in the mind of a trial court when a general finding of fact only is made without even a finding of a rule of law as a guide to the operation of the trial court's mind?

The rule which the court follows here is a remnant of the old writ of error procedure which presented to an appellate court only questions of law. But the writ of error in civil cases has long since been abolished in this state. § 25-1930, R. R. S. 1943. This provision was first enacted by the Territorial Legislature in 1858. See Code of Civil Procedure, Territorial Laws 1858, section 539. It was reenacted by the Territorial Legislature in 1866. See Code of Civil Procedure, Territorial Laws 1866, section 599.

After statehood, it became section 599 of the Code of Civil Procedure and is found at page 632, G. S. 1873.

Although the writ of error in civil cases has been abolished in this state since 1858, the remnant rule that rests upon that writ remains.

Irwin v. Calhoun & Croxton, 3 Neb. 453, was decided in February 1872. In that decision this court held that there was no appeal in equity cases to this court and that the only method for a review of either legal or equitable actions was by petition in error.

By act effective March 3, 1873, the Legislature provided for appeals in equity. G. S. 1873, p. 716. See

Nebraska Loan & Trust Co. v. Lincoln & B. H. R. R. Co., 53 Neb. 246, 73 N. W. 546.

In Wilcox v. Saunders, 4 Neb. 569, followed in Troup v. Horbach, 62 Neb. 564, 87 N. W. 316, this court held that an appeal brings the whole case to this court for trial de novo. Nevertheless the court continued to apply the remnant writ of error rule even in equity cases. See Gibson v. Hammang, 63 Neb. 349, 88 N. W. 500, where we stated the rule that: "* * * if the evidence is conflicting, or if there is evidence sufficient to sustain the findings of the district court, its determination of questions of fact will not be disturbed, even though we might have reached a different conclusion if called upon to decide such questions in the first instance."

Also see Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005, wherein we held: "In reviewing a cause on appeal, where the findings and decree of the trial court can not be reconciled with any reasonable construction of the testimony, the same will be set aside as unsupported by sufficient evidence."

I have cited these cases from many that could be cited because they were decided in 1901 and 1902.

In 1903 the Legislature enacted what is now section 25-1925, R. R. S. 1943, Laws of Nebraska 1903, chapter 125, page 631. That act required this court in an equity action to "reach an independent conclusion" as to what findings are required, without reference to the conclusion reached by the trial court even though there be evidence in support thereof.

Nevertheless this court continued to follow the remnant writ of error rule where there was conflicting evidence. However, in these later years we have followed it only in cases of irreconcilable conflict. We have recognized the essential unsoundness of the remnant rule in equity cases and have properly moved to relax its rigors. But it is not so in law actions tried to the court without a jury.

It was provided in the 1875 Constitution that: "The

right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Art. I, § 24.

The amendment was prompted by the fact that the right of appeal by appeal, error or otherwise had been a statutory right—and had been denied where no statutory authority existed.

Section 583 of the Code of Civil Procedure (G. S. 1873, page 628), provided: "A judgment rendered or final order made by any court, board, or tribunal, mentioned in the preceding sections, may be reversed, vacated, or modified by the supreme court, for errors appearing on the record; but the petition in error, in such case, can be filed only by leave of the supreme court, or a judge thereof."

In State ex rel. City of Lincoln v. Babcock, 19 Neb. 230, 27 N. W. 98, it was held that the effect of the constitutional provision was to repeal so much of section 583 of the then code "as relates to the allowance of a petition in error."

But the remnant rule remained and has been applied without relaxation although it effectively denies a party the right to have a review of findings of fact in a law action tried to the court without a jury except in those cases where he can show that there is no evidence at all to sustain the trial court. In most cases that is no review of fact at all.

Section 584 of the Code of Civil Procedure provided for proceedings in this court by petition in error to reverse, vacate, or modify a judgment of the district court. G. S. 1873, p. 628. This and other provisions were repealed in 1907. Laws 1907, c. 162, p. 495. This section provided for appeals to the Supreme Court in all civil cases. It is now with amendments, section 25-1912, R. R. S. 1943. The "appeal" in civil cases was recognized as a right in Gentle v. Pantel Realty Co., 120 Neb. 630, 234 N. W. 574.

In Hoover v. State, 126 Neb. 277, 253 N. W. 359, we

held that all judgments other than those made felonies or misdemeanors by the criminal statutes "are reviewable by appeal."

Although writs of error in civil cases and petitions in error in civil cases to this court have long since been abolished, nevertheless the remnant rule remains.

By legislative act, often at the suggestion of this court, and by judicial decision, many of the old rules of procedure have been put aside in the interest of removing barriers that prevent a full consideration of a cause here on appeal.

There is no reason, save adherence to an ancient rule, that prevents this court from giving the same full consideration to facts and law in a law action tried to the court without a jury that is presently accorded a litigant in an equity action. It would be an advance in the science of jurisprudence to recognize that fact and have the rule now applicable to appeals in equity actions applicable to law actions tried to the court without a jury.

And now I go to the facts of this case.

The court summarizes the evidence into two pages. I prefer to make a more detailed statement of the evidence which I find in this record coming almost entirely from plaintiff's witnesses and plaintiff's records. Later in discussing the court's conclusions I will restate parts of it.

Prior to the purchases here involved, the county made its last purchase of lumber in carload lots in August of 1953. Thereafter in the fall and winter of 1953-1954 the highway commissioner purchased lumber of plaintiff at different times. These purchases were all invoiced in amounts less than $500 and the claims were allowed by the county. These invoices total several thousand dollars.

The first of this series of invoices is dated November 18, 1953, and the last four are dated February 24, 1954. Unless otherwise stated, all dates hereinafter used are for the year 1954.

It appears that on February 25 the county had a substantial stockpile of lumber on hand. At that time the highway commissioner had calculated the anticipated needs for lumber. At its February 1954 meeting the highway commissioner appeared before the board and asked what they were going to do about obtaining lumber and asked, "Do you want me to work up an invitation to bidders?" He was told to consult with the bridge committee, to buy the lumber as needed, and to stay under $500 in cost amount. Further details as to these instructions will be set out later in this opinion.

Thereafter two invoices dated May 28 were presented to support a claim for $908.29. One invoice refers to 40 pieces, the other to 41 pieces. The invoices describe identical lumber except as to number of pieces. These invoices were paid.

Previous to and thereafter, and dated May 27, June 4, June 7, June 11, June 14, June 18, June 21, June 25, June 28, June 30, and July 2, 11 separate orders were executed by the highway commissioner and delivered to the plaintiff. They are the basis of the claim involved in this litigation.

On June 10 delivery was made to the county at plaintiff's yards of the lumber involved in the first three of these orders.

The orders of May 27 and June 4 contained lumber of identical description, the first order being for 28 pieces and the second for 11 pieces. The orders of June 11, 14, and 18 included a total of 320 pieces of one description of lumber. These 320 pieces were delivered to the county at plaintiff's yards on July 2. There was also delivered at that time 50 pieces of a total of 80 pieces of another description which had been included in the orders of June 14, 18, 21, and 25. Thereafter on July 9 there were delivered to the county 30 additional pieces of the same description of lumber that was delivered in part on July 2, There were also delivered 14 pieces of another description, 5 of which had been ordered on

June 25 and 9 on June 28. There were also delivered 14 pieces of another description, 7 of which had been ordered on June 30, and 7 on July 2.

The lumber so delivered to the county was taken to its yard and placed with other lumber in the stockpile there, from which it was later removed and used as the county's needs required.

There was no record made of the board's decision of February 1954 directing the highway commissioner to purchase bridge lumber as needed and in amounts of less than $500 in value. It is patent from the record here that the chairman of the board gave the instructions and that it was concurred in by other members of the board. The highway commissioner testified that the board assented. It is also patent that the instructions were repeated from time to time.

The chairman of the board fixes the time of the instructions to the highway commissioner as in February or March 1954. The chairman on direct examination testified that he told the highway commissioner "he better keep them in less than $500 lots to comply with the law." The chairman testified:

"Q In other words, if he needed $900 worth of lumber he was to order it in two orders so that neither order would be over $500, is that correct?

"A Well, I suppose. I instructed him to keep it under $500.

"Q And the reason for doing that, Mr. Hanson, was to avoid the provision of the statute which says that when it runs over $500 you are supposed to call for bids, isn't that true?

"A No, we didn't do it to avoid; we did that to comply with the law was my idea, trying to comply with it.

"Q In other words, you figured that *if you broke the need for $900 into two orders you were complying with the law?*

"A *That's what we thought, yes.*" (Emphasis supplied.)

The highway commissioner testified: "And they told me to buy lumber as we needed it as it come up in amounts of less than $500, and to contact the bridge crew and get their authority as to when to buy it—or the bridge committee."

The highway commissioner further testified that *one* of the reasons why he ordered as he did was to comply with his instructions to keep the orders under $500. It is patent that he complied with his instructions.

The plaintiff's president testified that he often attended the board meetings and knew the highway commissioner had been ordered to purchase lumber as needed. He personally handled some of the orders involved in this claim. He testified that he did not know that he heard "any such conversation" about keeping the orders under $500.

Part of the records of the handling of these purchases prior to those involved in this claim are in evidence.

The method of handling these orders intraoffice as testified to by plaintiff was in general as follows: When an individual order was received, it was given an order number. It was then held and, as additional orders were received, it was given the same order number as the first. That same order number was used until the material ordered was delivered. So at least, for bookkeeping purposes, the accumulated orders were treated as one entire order for the material delivered. Then a new order number was given to a succeeding order and the same procedure followed. Individual invoices were then made based on the material in each individual order and as such submitted to the county to support a claim for the entire amount. That procedure was not followed in these claims and invoices.

The invoices dated July 2, 6, 9, 10, 13, 14, 16, and 18, 1954, bear "Our Order No. 1244." The last three dated July 19, 22, and 23, 1954, bear "Our Order No. 1227."

These invoice dates are not related either to the date on the order or the date of deliveries. As above pointed

out, this lumber was delivered on June 10, July 2, and July 9, 1954. The material involved in the order of May 27 was invoiced, dated July 19. The order of June 4 was invoiced, dated July 22. The order of June 7 was invoiced, dated July 23. The order of June 11 was invoiced, dated July 2. The order of June 14 was invoiced, dated July 6. The order of June 18 was invoiced, dated July 9. The order of June 21 was invoiced, dated July 10. The order of June 25 was invoiced, dated July 13. The order of June 28 was invoiced, dated July 14. The order of June 30 was invoiced, dated July 16. The order of July 2 was invoiced, dated July 18. The invoice dated July 18, 1954, is shown as verified before a notary public on that date. July 18, 1954, was a Sunday. The evidence does not show that plaintiff was transacting business on that date.

I go now to some of the earlier orders and their handling as taken from plaintiff's records. On October 6, 1953, is shown an order for 85 pieces 3″ x 12″ x 16′ material. This bears a notation, "Okayed by Stewart phone," (Stewart being the highway commissioner). On October 9, 1953, "Phone by Stewart" is shown on order for 65 pieces 3″ x 12″ x 16′ of the same material. On October 14 an order is shown for 150 pieces 3″ x 12″ x 15′ of the same material. It bears the writing, "Invoice in amounts of less than 500.00 per order," and below that, *"Separate Invoices,"* and two orders shown for 85 and 65 pieces, respectively. This has the endorsement, "Okayed by phone Stewart." The writing quoted above as to invoicing less than $500 per order was placed there by a *salesman of plaintiff* who explained by saying that the board chairman "would say not to go over five hundred dollars for any material * * *." Dated January 27, 1954, is shown an order for 80 pieces 3″ x 12″ x 16′ fir plank. A like order the following day calls for 70 pieces of the same material. On January 29, 1954, 150 pieces were delivered to the county at one time. The same day an office order was prepared by one of plain-

tiff's employees calling for 150 pieces. Below that is written, "Invoice in amounts of less than 500.00 as below" and "*Make Separate Invoices.*" Below that are entries of two separate orders, one for 80 and one for 70 pieces. It is noted that the instructions were not to invoice as per each order but to invoice for less than $500.

The record shows that on January 29, 1954, the county made a separate order for 30 pieces of 3″ x 12″ x 18′ lumber. On January 30, 1954, 12 pieces of 6″ x 16″ x 24′ were ordered. January 31 was a Sunday. February 1, 1954, 75 pieces of 2″ x 12″ x 16′ were ordered. On February 1, 1954, that lumber (plus 32 pieces of 3″ x 12″ x 18′) was delivered to the county. On the same day an office order was prepared for the total of this delivery with the notation, "* * * Make Separate invoice for each item."

On April 21, 1954, there was a consolidated order made out by a salesman for 120 pieces of 3″ x 12″ x 22′ material. It bore the notation, "Bill under $500.00 See attached," written by the salesman. Attached were separate orders signed by the highway commissioner dated April 16, 19, and 21, 1954.

Plaintiff's president testified as to an intimate knowledge of the transactions of this business and that he quite often went over the invoices before they went out. He testified that the plaintiff had a very good reason for making these notations on the office-prepared orders, saying, "we had been warned several times that a competitor of ours was going to tie up our funds in Saunders County, and I wanted to be very sure that I could give him no reason to tie up our funds in Saunders County."

That is the story of the system of handling purchases and sales initiated in 1953 by the highway commissioner and the plaintiff. It shows that when the board, in February 1954, informally instructed the highway commissioner to make purchases in amounts of less than $500 in value, that that action was only directing him to con-

tinue to purchase as had been theretofore done. It shows also that plaintiff's officers, employees, and salesmen knew what was being done, why it was being done, and cooperated fully in the execution of the plan.

Two other matters should be mentioned. There is no claim here that any of the orders involved were in the nature of emergency orders. Rather the orders were made to keep the county stockpile of lumber reasonably adequate for needs that might arise.

There is considerable evidence in the record that in the late spring of 1954 there were stories of an expected strike of labor in the lumber-producing regions of the Pacific Northwest. That strike became effective in the summer of 1954. However, there was no strike or threat of a strike when this plan of making purchases and sales was devised in 1953. The chairman of the board testified that he had no knowledge of a pending strike when he first gave the highway commissioner the order to buy under $500 in cost in 1954. This situation is advanced as a reason for buying in small quantities. There is evidence that lumber of the kind here involved could not be purchased in carload lots during this period of 1954. We find no evidence of an attempt to buy lumber in quantity at any time after 1953 in compliance with the statute.

The court states that the evidence shows facts as to orders previously received "from which it might be inferred that *some connivance* may have existed between the *plaintiff* and Stewart, the highway commissioner, to avoid the requirements of the statute." (Emphasis supplied.) Webster defines connivance as "passive cooperation, as by consent or pretended ignorance, especially in wrongdoing." I accept the definition. I point out, however, that the connivance, the cooperation in wrongdoing by the plaintiff that was involved in the "orders previously received," was by judicial admission in the plaintiff's reply carried forward into the 11 orders here involved. That was a necessary admission as a

foundation for the plea of estoppel and ratification.

But it need not rest on a judicial admission alone. Plaintiff's evidence and records establish the fact that the conniving was a continuing process reaching into the orders here involved.

Why were the pleadings so drafted? It appears without dispute from plaintiff's records that beginning in the fall of 1953 these orders were being split, consolidated in the plaintiff's office at times and at times by the salesmen, and after delivery of the lumber, invoices in less than $500 based on the split orders were filed and claims paid. These facts were not of record in the county offices. The claims were filed so as to conceal those facts. In February of 1954 the highway commissioner at a regular meeting of the board asked for instructions as to whether he was to "work up an invitation to bidders." He was told to buy in small lots as lumber was needed "in amounts of less than $500." It was at that meeting that the board, as a board, had knowledge of what was being done and approved its continuance. Hence the plea of plaintiff's knowledge "both before and during the purchases" which were "reported, discussed and approved" by the board. To give any validity to the plea of estoppel it was necessary to bring that knowledge home to the board. Hence the plaintiff pleaded its own knowledge, the knowledge of the board, and the payment of claims with that knowledge.

What is the evidence that relates this conniving to the orders here involved? The court says that Mr. Stewart, the highway commissioner, was directed to buy "in small lots of less than $500 *until* the market became stabilized and conditions became more normal."

I quote the exact testimony of plaintiff's witnesses both as to the directions and the reasons given:

Mr. Hanson, plaintiff's witness, and chairman of the board, testified:

"Q Now, you testified on direct examination that you

instructed Mr. Stewart to keep the orders below $500, didn't you?

A I did.

Q In other words, if he needed $900 worth of lumber he was to order it in two orders so that neither order would be over $500, is that correct?

A Well, I suppose. I instructed him to keep it under $500.

Q And the reason for doing that, Mr. Hanson, was to avoid the provision of the statute which says that when it runs over $500 you are supposed to call for bids, isn't that true?

A No, we didn't do it to avoid; we did that to comply with the law was my idea, trying to comply with it.

Q In other words, you figured that if you *broke the need* for $900 into two orders you were complying with the law?

A That's what we thought, yes." (Emphasis supplied.)

Mr. Stewart, the highway commissioner, testified as to the making of these orders. He was asked and answered as follows:

"Q Isn't it true, Mr. Stewart, that on May 27th, 1954, you could just as well have ordered all of the lumber that you ordered June 4, 1954?

A I could have. It might not have been available at the time.

Q And that the *only* reason you didn't order it was to comply with Mr. Hanson's instructions to keep the orders under $500, isn't that true?

A I wouldn't say that was the *only* reason. There may have been other reasons why it wasn't ordered." (Emphasis supplied.)

The court states: "The president of the plaintiff company *positively* denies that any orders received were in excess of $500 or that any orders were split to make them less than $500" and that the trial court was justi-

fied in holding that plaintiff had no "intent to fraudulently circumvent the statute."

The court finds evidence of conniving as to the earlier transactions, but finds none as to those here involved. The only difference between the two in this regard is that the earlier claims were paid, while those here involved were not.

Now what is the evidence as to the knowledge of the plaintiff's president and as to participation in the conniving as to these orders here involved? The plaintiff's president, Mr. Ward, testified as to full knowledge of all these transactions. The plaintiff's pleadings admit it.

Four of the orders involved in this litigation were taken by Mr. Ward, plaintiff's president. The remaining seven orders were taken by Mr. Morrissey, a salesman for plaintiff.

The conclusion to buy in amounts less than $500 was openly arrived at, so far as the witnesses reveal, at a regular board meeting in February 1954.

Mr. Ward testified that he made regular visits to Wahoo as a salesman; that he was present at board meetings four or five times during the time this lumber was being purchased when lumber needs were discussed and when Mr. Stewart was instructed to purchase lumber; that all orders taken by him were obtained in the courthouse; and that he overheard the conversations about the purchase of lumber and the directions to buy. He sustained the allegations of plaintiff's reply.

He was then asked and answered:

"Q Now, did you hear any talk about keeping the orders below $500?

A *I don't know that I heard any such conversation. I simply heard a direction to buy lumber.*" (Emphasis supplied.)

That is the extent of his positive (?) denial. He does not deny knowledge of what was being done.

I find no direct evidence that Mr. Ward was present at the February 1954 meeting when this plan of pur-

chase was openly stated. He puts himself at several of the meetings. Mr. Stewart testified that he might have been there and that he or some other salesman might have been there. Mr. Stewart three times avoided answering whether or not he had told Mr. Ward or any representative of the plaintiff about his instructions to buy in amounts of less than $500. *Mr. Ward denied only to the extent that he did not remember any conversation with them about splitting orders.*

We now go to the testimony of Mr. Morrissey, the salesman who obtained the balance of the orders involved in this litigation. He was present in the courthouse and heard conversations between Hanson and Stewart regarding the purchase of lumber.

Under date of April 16, 1954, Mr. Stewart signed an order for 39 pieces of lumber, under date of April 19, 1954, there was an order for 40 pieces, and under date of April 21, 1954, there was an order for 41 pieces, or a total of 120 pieces of exactly the same description of lumber at a price of $1,345.61.

These appear on a consolidated order form for 120 pieces below which is written by Morrissey: "Bill under $500.00. See attached." Attached are the delivery sheets showing delivery at *one time* and Mr. Stewart's separate orders. The consolidated order is signed by Mr. Morrissey, the salesman, and bears the annotation that it was "okayed" by the board of supervisors, which was written by Mr. Morrissey.

An order taken by Morrissey on October 14, 1953, shows a total of 150 pieces ordered—stricken out— and "Separate Invoices" written in, making it into two orders. This shows "Okayed by phone Stewart." Mr. Morrissey testified it was a phone call. Yet attached to it are two separate orders "Okayed" by Stewart "by phone."

Other orders were similarly handled. They show inescapably that Mr. Morrissey was taking the split orders, consolidating them to submit to the plaintiff, getting their approval in consolidated form by the board, and

that he was doing it so as to keep all orders under $500 and obviously doing it with knowledge of the plan that was being followed.

It is in evidence that the invoices involved in these claims were "proofread" by Mr. Ward. He knew what was going on. If this record does not establish knowledge on the part of the plaintiff, then it is futile for anyone ever to attempt to show knowledge. In fact it goes further and shows a full cooperation in the procedure by which evasion of the law was carried out.

I readily concede that most of the direct evidence of the conniving relates to previous transactions that had been paid. But it was all one plan, all carried out in the same way by the same officers and the same salesmen. The fact that the earlier claims had been paid does not wash out all of the correlated executed plan to "avoid the requirements of the statute."

The court states that the taxpayer's contention that there were but 2 orders in excess of $500 (and not 11 orders under $500) is based on the fact that the first 8 invoices bear No. 1244 and the last 3 invoices bear No. 1227. That is an understatement "more than slight," to use a comparative negligence expression.

The above is but one single fact among the many that is the basis of the taxpayer's contention.

The explanation given by plaintiff's president and accepted by the court is that orders are held and given a consolidated number when deliveries are made and then subsequent orders receive a new number. What is the evidence?

The invoices that bear order No. 1244 are dated July 2, July 6, July 9, July 10, July 13, July 14, July 16, and July 18, 1954. The invoices that bear order No. 1227 are dated July 19, July 22, and July 23, 1954. The earlier No. 1227 is on the latter invoices and the later No. 1244 is on the earlier invoices so far as dates of invoices are concerned.

The lumber involved in the invoice dated July 2, 1954,

bearing order No. 1244 was delivered July 2. The lumber involved in the invoice dated July 6 bearing order No. 1244 was delivered July 2. The lumber involved in the invoice dated July 9 and bearing order No. 1244 was delivered July 2. The lumber involved in invoice dated July 10 and bearing order No. 1244 was delivered July 2. The lumber involved in invoice dated July 13 and bearing order No. 1244 was delivered July 9. The lumber involved in an undated invoice but "date shipped" July 14, bearing order No. 1244, was delivered July 9. The lumber involved in invoice dated July 16 and bearing order No. 1244 was delivered July 9. The invoice dated July 18, bearing order No. 1244 (for an *identical* amount of lumber as that invoiced on July 16), was delivered on July 9, 1954. The lumber involved in invoice dated July 22, 1954, bearing order No. 1227, was delivered June 10. The lumber involved in invoice dated July 23, bearing order No. 1227, was delivered June 10.

The above analysis of the invoices shows that the orders bearing No. 1227 were delivered June 10. That fits plaintiff's explanation of its bookkeeping practices. The first four invoices bearing order No. 1244 were delivered July 2. That fits plaintiff's explanation of its bookkeeping practices.

The next four invoices bearing order No. 1244 were delivered July 9. *That does not fit into plaintiff's explanation of its bookkeeping practices.* Yet the court does not mention it and holds that the trial court could properly accept plaintiff's statement although it was directly contrary to the undisputed records made by the plaintiff at the time. The court finds no inference of conniving from the above facts from plaintiff's records as to the transactions here involved. But let's go further.

In the above I have been talking about invoice dates and order numbers. I now repeat a paragraph from my statement of the facts which shows the *dates* of the *orders* and the dates of delivery and their lack of any

relationship to the *dates* of the *invoices*. The court does not mention this evidence.

As above pointed out, this lumber was delivered on June 10, July 2, and July 9, 1954. The material involved in the order of May 27 was invoiced, dated July 19. The order of June 4 was invoiced, dated July 22. The order of June 7 was invoiced, dated July 23. The order of June 11 was invoiced, dated July 2. The order of June 14 was invoiced, dated July 6. The order of June 18 was invoiced, dated July 9. The order of June 21 was invoiced, dated July 10. The order of June 25 was invoiced, dated July 13. The order of June 28 was invoiced, dated July 14. The order of June 30 was invoiced, dated July 16. The order of July 2 was invoiced, dated July 18. The invoice dated July 18, 1954, is shown as verified before a notary public on that date. July 18, 1954, was a Sunday. The evidence does not show that plaintiff was transacting business on that date.

The evidence of the notary, an employee of the plaintiff, is undisputed that the affidavit as to date of that invoice is false.

These invoices are the only records that appear in the county's records. The evidence of their falsity is in the plaintiff's records and was dug out and produced by the taxpayer. Why were these false dates made on the invoices? Was it a good faith act or a conniving act?

Mr. Ward, president of the plaintiff company, testified that it was his practice to examine and approve these invoices. The record was in his office in connection with these invoices that showed on their face what was being done. Mr. Ward in explaining some of these matters said that they had very good reason for doing what was done because they had been warned that a competitor was going to tie up their funds and wanted to give him no good reason for doing so. What did he have to fear except the knowledge of the way these orders had been split in their inception with the "intent to fraudulently circumvent the statute"?

Plaintiff in its brief here says that the "dates of invoices are not evidence of bad faith," and that the fact that one invoice was dated on Sunday was an immaterial "office error." Are they evidences of good faith? Neither the plaintiff nor the court seems to think so. Possibly one "office error" of a date would not be material but these 11 falsely dated invoices go beyond that to a designed plan to conceal and to connive. The court neither explains, justifies, or excuses these matters. It ignores them. However, they are a part of the undisputed story of the conniving.

On the evidence set out by the court it finds that there is evidence to sustain a finding that there were 11 orders and not 2 orders involved and that there was evidence to sustain a finding that there was no intent to fraudulently circumvent the statute. The court holds that the "findings of fact made by the trial court" are "conclusive upon this court on appeal."

The trial court made no such findings. This court makes the findings fitting them into the trial court finding for "the plaintiff and against the defendant." The trial court did not even find whether recovery was to be had on contract or on quantum meruit. The findings made here are those which this court conceives the trial court might have found.

On this record to me the conclusion is inescapable that orders for lumber were split into small orders for the purpose of bringing the cost of each order within the statutory limit of $500. The parties say so. Plaintiff's records prove it. The invoices filed with the county do not reveal that fact. It is patent that the concealment was intentional. In view thereof I would find the judgment of the trial court is clearly wrong even under the court's rule of law as stated in syllabus No. 1.

It occurs to me that if the facts are that there were 11 contracts all for less than $500 and were good faith contracts, that that would end the matter and that plaintiff would be entitled to recover on contract under sec-

tion 39-810, R. R. S. 1943. But the court does not rest the decision on that ground.

It goes to a determination of whether the evidence is sufficient as a matter of law to bar recovery under the statute.

The evidence which the court states in this connection is evidence which the court has just put aside as beyond the reach of its consideration under the jury rule.

The court then quotes all but the concluding sentence of section 39-810, R. R. S. 1943. I shall refer to that sentence later herein.

The court then holds that the "statute gives the county board *general power* to erect and repair bridges" etc., and that the county board has "*general authority* to purchase bridge lumber for the erection and repair of bridges." (Emphasis supplied.) Up until this opinion was filed that has not been the law. The court states the rule that recovery is denied where the applicable statute prohibits the making of a contract and avoids the obligation thereof.

The court does not analyze the statute nor refer to our decisions. I suggest that if the court is right that the statute can stand the test of analysis.

The first sentence of section 39-810, R. R. S. 1943, is: "The county board of each county has the power to erect and repair all bridges and approaches thereto and build all culverts and make improvements on roads, *the cost and expense of which shall in no instance exceed five hundred dollars.*" (Emphasis supplied.) That sentence is a grant of power limited to a cost of not to exceed $500. It is not a general power as the next provision indicates. The third sentence is: "All contracts for materials for repairing, erecting, and constructing bridges and approaches thereto, the cost and expenses of which exceed five hundred dollars *shall* be let to the lowest responsible bidder, * * *." (Emphasis supplied.) That is a mandatory provision. It is a grant of power on condition, not a general power. It attaches to and is a

part of the power itself. In Cheney v. County Board of Supervisors, 123 Neb. 624, 243 N. W. 881, with reference to this statute we held: "The statutory language is clear that, where the cost and expense involved 'exceed five hundred dollars,' contracts relating to the following subjects *must* be entered into by county boards in compliance with its terms, viz., contracts for (1) erection and reparation of bridges and approaches thereto; (2) for building of culverts; (3) making improvements on public roads; (4) for furnishing materials in connection with the same." The mandatory "shall" is used in the statute. We construed it using the mandatory "must."

In People ex rel. Putnam and George v. Commissioners of Buffalo County, 4 Neb. 150, we stated this rule: "Whenever a statute requires the performance of an act for the sake of justice or the public good, the word 'may' is the same as 'shall' and imposes a positive and absolute duty." We have consistently adhered thereto down to and including State ex rel. Cashman v. Carmean, 138 Neb. 819, 295 N. W. 801. The statute, then, so far as above quoted, imposes an absolute duty on the county to contract in that manner and that manner only. To imply a power to contract otherwise would be to make compliance with the statute an optional act.

Any question as to that conclusion is removed by the remainder of the sentence just quoted from the statute and the succeeding sentence. It is: "* * * but the board may reject any and all bids submitted for such materials. *Upon rejection* of any bid or bids by the board, such board *shall* have power and authority to purchase materials to repair, erect or construct the bridges of the county, and approaches thereto." Obviously the only time that the board has the general power to let contracts without competitive bidding for materials in excess of a $500 cost is after a bid or bids have been received and rejected. The concluding sentence is, "*All* bids for the letting of contracts *must* be deposited with

the county clerk and opened by him in the presence of the county board, and filed in the clerk's office." (Emphasis supplied.) This is the sentence which the court does not quote. That provision requires the bids to be a matter of public record. Obviously no compliance with that provision has been made as to the contracts here involved.

The court ignores and reads out of the statute everything following "The county board of each county has the power to erect and repair all bridges and approaches thereto and build all culverts and make improvements * * *."

In Neumann v. Knox, 115 Neb. 679, 214 N. W. 290, we had before us a comparable statute applicable to cities and villages. The statute there involved was section 4180, Comp. St. 1922, as amended by Laws 1925, c. 51, § 1, p. 202, which provided that contracts for works to cost more than $500 should not be entered into "without advertising for bids." We enjoined a contract not so let. We also held: "It is evident that the legislature was intending to protect the citizens of cities and villages in the expenditure of their moneys by their officials, and also to protect the taxpayer from possible venality of the officials and prevent them from entering into improvident contracts for work or improvements, of the cost of which they might not be well advised."

Other courts have considered cases based on similar statutory provisions and under contentions such as the plaintiff makes here. Those courts have denied the existence of a general power and denied recovery.

In 10 McQuillin, Municipal Corporations (3d ed.), § 29.33, p. 279, there is this statement: "In some jurisdictions, the necessity of competitive bidding depends on the amount involved in the contract to be let. If applicable, such a requirement must be observed in good faith by the acting municipal authorities. And where a municipality is prohibited from letting contracts involving an expenditure of more than a specified sum

without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding." Ellis v. City of New York, 1 Daly (N. Y.) 102, is cited to sustain the text. In that case Keyes had a contract for certain curb and gutter work. He made claim for additional work not covered in the contract which he performed at the direction of the street commissioner. The work involved several parcels of work which was ordered done at one time and as continuous work. The commissioner had no authority to contract work costing more than $250 without authority of the council and then only to the lowest bidder. Plaintiff claimed less than $250 for each parcel of work. The court denied recovery and held: "To hold, as the plaintiff's counsel contended on the argument, that the wall thus built being in four detached pieces, should be considered as four separate and distinct employments, each under $250, would be to declare in effect, that a positive prohibition in the charter might be *evaded and nullified by a plan so simple that it could scarcely be considered as rising to the dignity of a trick;* as I can hardly imagine any work required by the corporation to be done, that could not thus be divided into parts sufficiently small as to make the expense of doing each part come within the prohibition. The plaintiff's contract, even, would have been unnecessary, and indeed the entire streets of the city might be paved by the Street Commissioner without contract and without subjecting the work to public competition, if such a palpable violation of the law as is shown in the present case should be allowed to prevail." (Emphasis supplied.)

The plain meaning and intent of the holding is quite applicable in the instant case.

In 63 C. J. S., Municipal Corporations, § 996, p. 567, the rule is stated as follows: "Where a statute, charter, or ordinance requires advertising and public bidding, a municipal contract made in violation or evasion of these re-

quirements, and not within the terms of a special exception, is generally invalid and imposes no obligation or liability on the corporation * * *."

A case cited there is that of Wing v. City of Cleveland, 9 Ohio Dec. (Reprint) 551. In that case city officials were proposing to purchase material in violation of a statute which, among other things, required that all contracts exceeding $500 be awarded to the lowest and best bidder and have the approval of the council. An injunction was issued restraining the execution of the contract. The amount involved was $3,800. The officials then divided the purchase and made contracts so that no purchase exceeded $500. This was done by four resolutions passed at three different times. They were cited for contempt for violation of the injunction. It was contended that, having divided the purchase into quantities of less than $500, there was no violation of the injunction or statute. The court held: "It is very difficult for me to understand how anybody could have supposed that was a fair compliance with the provisions of this statute. It would be a very brief way of repealing this statute and setting it entirely at defiance. * * * it is impossible to reach any other conclusion in this case, than that these acts are wholly unlawful * * *." The court held that a "parceling" of the purchase was "a direct violation" of the statute.

State ex rel. Butler v. Dugger, 172 Tenn. 281, 111 S. W. 2d 1032, is quite comparable to the instant case. There a contract had been entered into with a bus operator to transport school pupils for $100 per month. The relator performed service under that contract for some time. It appears to have been determined, without litigation, that the contract was illegal because of a statutory requirement that such a contract, where the cost exceeded $100, should not be entered into until there had been advertisement and bids and then to the lowest bidder. In the course of the opinion the court held that the $100-a-month contract was illegal as a preliminary

finding to a decision of the case. Relator discontinued performance. The board then, pursuant to a resolution, entered into a contract with relator to operate the bus for $5 a day, payable weekly. Relator performed service for 9 days. The action involved an attempt to recover $45. The court held that the $5-a-day contract was a "patent effort" and an obvious attempt to evade the requirements of the statute. In the course of the opinion the court referred to Savage v. Macadam Co., 5 Tenn. App. 377. There macadam had been purchased at different times for the repair of streets, the aggregate purchases exceeding $500. Contracts involving more than $500 were to be let by public bidding. The court said: "It did not appear in that case that an undertaking which would necessarily involve the expenditure of more than $500 was purposely split up in order to avoid the charter limitations." Recovery was denied.

People ex rel. Whitlock v. Lamon, 232 Ill. 587, 83 N. E. 1070, is a comparable case. There the statute required all contracts for the construction of sidewalks where the expense exceeded $500 to be let to the lowest responsible bidder. The city desired to construct a sidewalk in front of contiguous lots in a block. The cost of the sidewalk in front of all the lots exceeded $500. The cost of the sidewalk in front of each lot was less than $500. The city entered into separate contracts with the same contractor for the sidewalk in front of each lot without any attempt to comply with the statutory requirement. The court denied recovery, holding: "No reason is suggested and no explanation is attempted by appellee for splitting up this improvement into four separate contracts. The reason for the course pursued is apparent. It is manifestly a mere shift for the purpose of evading section 7 of the sidewalk statute. If the method pursued by the city is sustained, section 7 of this statute will be rendered nugatory. If the sidewalk in front of each lot is to be regarded as a separate and distinct improvement it

would probably never happen that the cost of constructing a sidewalk in front of a single lot would exceed $500. Under appellee's contention a sidewalk extending the entire length of a street may be constructed at a cost of many thousand dollars and a private contract entered into for the entire work. The only thing necessary to evade the statute is to execute a duplicate contract for that portion of the walk in front of each lot."

Bigham v. Lee County, 184 Miss. 138, 185 So. 818, involved a statute that required competitive bidding for the purchase of supplies except that in cases of emergency, purchases could be made for sums less than $100 under certain circumstances. Without competitive bidding a supervisor purchased lumber totaling $613.62. No emergency existed. The purchases were for the repair of bridges. Bills for the lumber were submitted so that none of the itemized accounts would exceed $100. In denying recovery the court held that the manner of making the contracts "was a plain evasion of" the statutory requirements, and "The manifest purpose of the statutes is to safeguard public contracts, and to secure competitive bids from parties interested, to secure to the public fair contracts, and the advantages of competition."

But the court concludes that regardless of the "general power" the plaintiff cannot recover on contract for it concludes that "plaintiff is entitled to recover quantum meruit, not in excess of the contract price." This is based on the theory that "the county has general authority to make the contract but the power has been irregularly exercised." Here the court shifts from its conclusion that the evidence sustains a recovery on the basis of valid contracts and hence is an action in contract and proceeds to its ultimate conclusion that the contracts are void, but that recovery can be had quantum meruit.

This conclusion proceeds on two conclusions. The violations were irregularities and the statute does not avoid

the obligations of the contract. I shall discuss these contentions separately.

What is the "irregularity"? The obvious answer is the failure to comply with the terms of the statute. But the evidence as to the failure to comply has all been put aside by the court.

I again point out that in Cheney v. County Board of Supervisors, *supra*, we construed the statute here involved, using the mandatory "must be" complied with. We denied an injunction there, not because of an irregular exercise of the power, but because under the *facts* of that case the statutory restrictions in section 39-810, R. R. S. 1943, were not applicable to the work involved. Clearly under that opinion had the litigation involved "bridges and approaches" the injunction would have been granted. The court makes no reference to this opinion.

In Hunt v. Fenlon, 313 Mich. 644, 21 N. W. 2d 906, the court had litigation which involved the construction of a statute which required competitive bidding on all contracts involving an expenditure of $500 or more. The court followed its earlier decision in City of Saginaw v. Consumers Power Co., 213 Mich. 460, 182 N. W. 146, and held: " 'That a provision requiring competitive bidding is mandatory, that the municipality is not bound by contracts made in defiance of it, finds support in the great weight of authority and is in accordance with the holdings of this court.' " It cited with approval the text from 44 C. J., Municipal Corporations, § 2490, p. 324 (now 63 C. J. S., Municipal Corporations, § 1148, p. 811).

In State ex rel. Whedon v. York County, 13 Neb. 57, 12 N. W. 816, the statute required bids to be let on or before January 1 of each year and the letting of bids to the lowest competent bidder. A contract was let to one not complying with the terms of the statute. An unsuccessful bidder brought an original action in this court to compel the awarding of the contract to him on

the ground that he was the lowest bidder. We issued the writ, holding: "While the presumption is that the defendants acted in good faith in letting the contract in the manner they did, the statute points out their duties and the manner of performing the same, and this mode is exclusive."

The rule is stated as follows: "The purpose of a statute requiring the letting of bids to the lowest bidder is to invite competition, and to that end publicity of the intention to let the contract is of the essence of the proceeding. Hence, any statutory provisions requiring advertisement, or specifying its nature, are usually to be regarded as mandatory, and a failure substantially to comply with their requirements is sufficient to avoid the contract." 2 Dillon, Municipal Corporations (5th ed.), § 809, p. 1219.

I would hold that the statutory provisions of section 39-810, R. R. S. 1943, are mandatory and exclusive.

My objection to the quantum meruit rule as stated goes to its application here where it is resolved into a "heads I win, tails you lose" rule.

The court holds the county liable for the reasonable value of the material delivered under a procedure that in nowise complies with the mandatory statutory power of the board to purchase materials.

It does not appear that this fact and law situation has ever been decided by us. Other courts have considered and determined a contention of the right to recover reasonable value. We go now to those decisions, pointing out that they sustain a denial of recovery either on contract or quantum meruit.

The taxpayer cites Johnson County Savings Bank v. City of Creston, 212 Iowa 929, 231 N. W. 705, 84 A. L. R. 926. The facts are in part found in Jackson v. City of Creston, 206 Iowa 244, 220 N. W. 92. There the city council entered into four contracts for street improvements with one contractor. They were identical contracts except that each referred to a different street

to be improved. The contracts were let without competitive bidding. In the first case the court enjoined the levying of assessments and the issuance of bonds. In the second case the attempt was to establish the liability of the city upon the contracts and alternately for the value of the work done.

The defense was that there was in fact but one contract, divided into four contracts for the purpose of avoiding a budget law requirement that contracts to cost $5,000 or more required the adoption of plans and specifications, proposals for contract notice, and hearing. The contracts were entered into without submission to competitive bidding. The statute requiring competitive bidding was held to be "preemptory." The court held: "The statute is a prohibition upon letting such contracts in any other mode. * * * It is a general principle that a municipal contract entered into in violation of a mandatory statute, or a contract in opposition to public policy is not merely voidable but void * * * and that no contract for services rendered or goods furnished pursuant thereto can be implied, nor may the acceptance of benefits thereunder be made the basis of a liability by estoppel. * * * Municipal corporations are the creatures of the legislature. They have such powers to contract, and only such powers, as the legislature grants to them. When the legislature withholds power to contract, or permits the exercise of the power in a given case only in accordance with imposed restrictions, the corporation may no more bind itself by implied contract than by the forbidden express contract. All persons dealing with a municipal corporation are charged with notice of the limitations upon its power. Those limitations may not be exceeded, defeated, evaded or nullified under guise of implying a contract. A municipal contract let without competitive bidding when the statute requires competitive bidding, is void, *and no recovery may be had either upon the purported express contract or upon an implied contract to pay the*

reasonable value of the services or material furnished thereunder. * * * A meeting of the minds is as essential to the existence of a contract implied in fact as it is to an express contract. * * * Manifestly the making of a contract may not be implied in a case in which an express contract is forbidden. * * * 'it is fundamental doctrine that a contract which is violative of public policy is void and will not be enforced.' * * * To sustain the plaintiff's contention would be to permit one to obtain from a municipality an illegal contract for doing work impossible of return and by performing it enable him to recover the reasonable value of the services and materials furnished—to nullify the law by evasion and indirection and to recover the value of work done under a contract which the law prohibits." (Emphasis supplied.)

I have omitted the citations of authorities found in the opinion. The court distinguished cases which involved the "irregular exercise of conferred power" which did not involve the "total absence of power, or the exercise of assumed power in defiance of the express command of the legislature."

In Tobin v. Town Council of Town of City of Sundance, 45 Wyo. 219, 17 P. 2d 666, 84 A. L. R. 902, recovery was sought for the balance due for street improvements performed under a written contract. The defense was that the contract was void because of the amount involved and the failure to comply with a requirement to let the contract to the lowest bidder. The court held the contract to be void, relying on 2 Dillon, Municipal Corporations (5th ed.), § 801, p. 1197; 44 C. J., § 2185, p. 100; 3 McQuillin, Municipal Corporations (2d ed.), § 1283, p. 849; and 19 R. C. L., § 356, p. 1068. It then held that provisions such as were contained in its statutes "from the standpoint of both reason and authority alike, may not be regarded lightly and as merely formal and unimportant matters. They appear in those statutes generally, throughout the several states of the Union, which control the action of state and municipal officers who are

charged with the duty of expending public funds for necessary improvements, material, services, and the like. Unquestionably, they were devised and are so inserted to prevent favoritism, corruption, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions. Provisions of this kind must be so administered and construed as fairly and reasonably to accomplish their vitally important purpose. *Only by sternly insisting upon positive obedience thereto as mandatory provisions of law* have the courts found that the policy they uphold may be maintained. We deem it unwise to relax this policy, concededly an extremely valuable safeguard to the taxpayers of the municipalities of this state." (Emphasis supplied.)

The court then went to the contention of ratification, estoppel, and implied contract for the work and materials furnished. The court held: "Contentions of this character have been urged upon the courts of this country in a vast number of cases and, while in some jurisdictions there may be found decisions which support them, our search and study of the matter has led us to the conclusion that the weight of authority and reason alike is with that line of cases which decline to allow contentions of this character to succeed.

"Mr. McQuillin, in his work on the law of municipal corporations, has very well summarized his survey of the legal principles bearing on these points as follows:

" 'The doctrine which seems to harmonize with our governmental and legal system, which appears to be supported by reason, and which, therefore, should prevail may be thus stated briefly: If the charter or the statute applicable requires certain steps to be taken before making a contract, and it is mandatory in terms, a contract not made in conformity therewith is invalid, and ordinarily cannot be ratified, and usually there is no implied liability for the reasonable value of the property or services of which the municipality has had

the benefit. These provisions exist to protect the citizens and taxpayers of the municipality from unjust, ill considered, or extortionate contracts, or those showing favoritism, and if the municipality is suffered to disregard them and the other contracting party is, nevertheless, permitted to recover for the property delivered or the services rendered, either on the ground of ratification, estoppel or implied contract, then it follows as the night the day that the statute or charter provision can always be evaded and set at naught. Cases holding the contrary are usually based on the idea that it is unjust for a municipality to receive and accept the benefits of a contract and then turn around and defend an action to recover the contract price or the reasonable value, on the ground that the contract was not entered into as provided by statute or the charter, but it should be remembered that the other contracting party is charged with notice of the provisions of the statutes or charter in regard to contracting, and that the welfare and protection of the taxpayers and residents of the municipality is of more importance than the dispensation of justice to a private party in a particular case.' 3 McQuillin, Municipal Corporations (2nd Ed.), § 1266, p. 798-9.

"The same author further says, in Sec. 1283 of the volume last cited:

" 'The prevailing rule undoubtedly is that if the powers of a municipality or its agents are subjected by statute or charter "to restrictions as to the form and method of contracting that are limitations upon the power itself, the corporation cannot be held liable by either an express or an implied contract in defiance of such restrictions." '

"And in Sec. 1358 following appears this language:

" 'A municipality cannot be estopped to aver its incapacity to make a contract by receiving benefits thereunder. That is, it cannot be made liable either on the theory of estoppel or implied contract, where it had no

capacity to make the contract or where it was made in express violation of law. * * *

"'A contract which violates an express provision of the law cannot be ratified, e.g., one not awarded by competitive bidding, as required, or one that must be upon a consideration wholly to be performed after the making of the contract, and to be in writing. Such invalid contracts cannot be ratified after performance.'"

The court then cited with approval and quoted from Johnson County Savings Bank v. City of Creston, *supra;* Frisbie Co. v. City of East Cleveland, 98 Ohio St. 266, 120 N. E. 309; and Bartlett v. City of Lowell, 201 Mass. 151, 87 N. E. 195. It denied relief to the plaintiff.

In Bechtold v. City of Wauwatosa, on rehearing, 228 Wis. 559, 280 N. W. 320, a contract for paving was held void because of failure to comply with a statute with reference to bids and the letting to the lowest responsible bidder where the estimated cost exceeded $500. The court held: "* * * a municipality has no power to make contracts for public improvements unless it proceeds in the manner prescribed by law, and that a contract entered into without complying with the charter provisions is void. * * * a contract void in its inception is not validated by performance and remains a void contract." The court further said that a failure to comply with every incidental provision of a statute might not necessarily invalidate a contract but "a failure to comply with those provisions which are essential to the accomplishment of the legislative purpose are in a different category."

The above decision was followed by Federal Paving Corp. v. City of Wauwatosa, 231 Wis. 655, 286 N. W. 546, where an attempt was made to recover the reasonable value of the paving. The court held: "(2) A municipality does not become liable for money, goods, or services upon principles of unjust enrichment where it is prohibited from contracting in any other than a specified way, as for instance, with the lowest bidder.

* * * (4) Where the municipality has power to do an act or enter into an obligation and is not prohibited from creating a liability in any but a specified way, it may become liable upon principles of unjust enrichment for moneys had and received, for services rendered, or for goods furnished. This is the converse of the situation set forth in (2), and relates to a situation where there is no prohibition against the creation of a contract in the way that it was sought to be created. * * * (8) Where the statute forbids the making of the contract by a municipality and the other party, the contract is illegal and there shall be no recovery upon principles of unjust enrichment."

The court then discussed certain authorities and continued: "Summarizing very briefly, it is evident that in many fact situations there is no good reason why a municipal corporation should avoid the duty of paying for benefits conferred in good faith under merely void or irregular contracts, and the courts have tended to impose this duty where the case involved nothing more than this. Where, however, the situation is that outlined in the following quotation from Woodward, Quasi-Contracts, p. 261, § 161, the great weight of authority denies a recovery in restitution:

" 'If the irregularity is such as to deprive the municipality of the protection of a safeguard against the extravagance or corruption of its officers—as a substantial failure to comply with a requirement that contracts shall be let to the lowest bidder after due publication of notice—recovery should be denied.'

"The matter is thus put in Restatement, Restitution, p. 241, § 62: 'A person otherwise entitled to restitution of a benefit conferred by mistake is disentitled thereto if restitution would seriously impair the protection intended to be afforded by common law or by statute to persons in the position of the transferee or of the beneficiary, or to other persons.'

"One of the illustrations to this section is as follows,

p. 243: 'In state X a statute provides that no contract for work to be done for a municipality where the contract price exceeds $10,000 shall be made unless it has been passed upon at regular session of the municipal council duly called. A contracts with the city of Y for dredging for the price of $50,000, the contract being approved only by the municipal officers. Upon completion of the work, A is not entitled to reasonable compensation from Y although he believed that the council had approved the contract or although he did not know of the statute.'

"* * * however harsh the result may appear to be, the decisions are sound in principle if there is to be effective enforcement of mandatory statutes and avoidance of the circumvention of statutory prohibitions. This principle also makes impossible application of the doctrine of estoppel as a means of binding a municipality. Where creation of a contract in any but a specified way is prohibited, the city may not by waiver, ratification, or acts ordinarily amounting to an estoppel give vitality to the prohibited contract or become bound upon the principles of restitution." Recovery was denied.

In conclusion on this feature of the case I refer to our decision in Fairbanks, Morse & Co. v. City of North Bend, 68 Neb. 560, 94 N. W. 537. There the plaintiff had made a bid for public improvements accompanied by a deposit of $200 to be forfeited if plaintiff failed to enter into the contract. As the situation developed we held that the bid was made on a proposal that was without compliance with the statute requiring advertising for bids. The plaintiff, refusing to enter into the contract, sued to recover the amount of the deposit. We held that the statute was mandatory, and that neither party was estopped to deny the legality of the proceedings. We permitted a recovery of the deposit on the theory that the parties had stopped short of the consummation of an illegal contract. We stated the rule that "* * * where one of the parties to an

illegal contract pays money thereon to the other, he may recover it back before the contract is executed, but not afterwards."

The reasoning threaded through all of these decisions is that if recovery is allowed on implied contracts that the salutary purposes of the statutes requiring competition and bidding on contracts of this character would be defeated and a mandatory statute, in effect, nullified.

And yet the court allows recovery "quantum meruit not exceeding the contract price."

That is done on the theory that the statute does not avoid the obligation of a contract made in a manner contrary to the provisions of the statute.

I have cited the mandatory provisions of the statute and the repeated decisions holding that such a statute makes the contract void and denying recovery either on quantum meruit or on contract.

But there is such a statute. It is sections 23-336, 23-337, and 23-338, R. R. S. 1943. The court cites it but does not quote it nor analyze it. It provides: *"All contracts, either express or implied,* entered into with any county board, for or on behalf of any county, and all orders given by any such board or any of the members thereof, for any article, service, public improvement, material or labor *in contravention of any statutory limitation,* or when there are, or were no funds, legally available therefor, or in the absence of a statute expressly authorizing such contract to be entered into, or such order to be given, are hereby declared unlawful and shall be wholly void as an obligation against any such county." § 23-336, R. R. S. 1943. (Emphasis supplied.)

"Any public official or officials who shall audit, allow or pay out, or cause to be paid out, any funds of any county for any article, public improvement, material, service or labor, contrary to the provisions of section 23-336, shall be liable for the full amount so expended, and the same may be recovered from any such official

or the surety upon his official bond by any such county, or any taxpayer thereof." § 23-337, R. R. S. 1943.

"*No judgment shall hereafter be rendered by any court against any such county* in any action brought to recover for any article, public improvement, material, service or labor contracted for or ordered in contravention of any statutory limitation, or when there are or were no funds legally available at the time, with which to pay for the same, or in the absence of a statute expressly authorizing such contract; Provided, that this section and sections 23-336 and 23-337 may not prevent the repairing of any bridge damaged by sudden casualty, when the county board shall first declare that an emergency exists, and give notice of its intention to repair such damage by at least one publication in some newspaper of general circulation in the county." § 23-338, R. R. S. 1943. (Emphasis supplied.)

The court says that statute relates to contracts "outside the scope" of delegated powers; it does "not relate to the illegal use of a granted power"; and "has no application where the county has general authority to make the contract but the power has been irregularly exercised."

The court here relies for its sole authority upon Bartlett v. Dahlsten, 104 Neb. 738, 178 N. W. 636. That was a claim by a physician based on contract to recover for services rendered in an emergency. Recovery was permitted *in part*. The authority for the decision rested upon the powers granted to county boards and state boards of health in the prevention of contagious diseases. The statute was then sections 2737 and 2738, Rev. St. 1913 (now as amended sections 71-501 and 71-502, R. R. S. 1943).

An examination of the statute reveals that as to the county it is one of general authority to counties to prevent contagious diseases. There is one exception to which I shall refer presently. There were no limitations, conditions, or provisos attached to the power.

The provisions as to the state Board of Health are of like general import. We held in the Bartlett case that while there was no provision in the act providing for the charging of expenses, "that liability must necessarily be inferred." The court then referred to section 1104, Rev. St. 1913 (now section 23-336, R. R. S. 1943), and questioned whether it "has any bearing on this case." It then used the language quoted herein by the court.

What application does it have here? The court there said that where there was a general power to do certain acts, liability to pay the expenses of exercising the power would be inferred. It is only by resorting to the general power construction of section 39-810, R. R. S. 1943, that this case can have any application at all. I have explored, and I think exploded, the general power construction of section 39-810, R. R. S. 1943. None of the provisos, conditions, or limitations, or "musts" found in section 39-810, R. R. S. 1943, exist in sections 2737 and 2738, Rev. St. 1913. The court ignores the distinction in the two acts.

There is one exception in section 2737, Rev. St. 1913, that requires notice—although the court ignores it. It is that the general powers of the county shall not extend to cities and villages having the power to establish boards of health and quarantine regulations. The court in the Bartlett case *denied recovery* for services to individuals resident in incorporated towns. Why? Because of the absence of the grant of power—and not because there was no provision of the statute that avoided the obligation. That denial rested on a lack of power in the county to incur the obligation.

Recovery in the Bartlett case was allowed as it was in Cheney v. County Board of Supervisors, *supra*, because there was a general power *with no statutory restriction on the exercise of the power*. In the instant case there are those mandatory restrictions on the exercise of the power. The court by its decision now holds them for naught except possibly to prevent the recov-

ery of the contract profits above resasonable value.

Do sections 23-336, 23-337, and 23-338, R. R. S. 1943, apply here?

The court says that the statute has no application where "the county has general authority to make the contract but the power has been irregularly exercised."

That is the ipse dixit of the court.

I examine first the history of the act and then our decisions construing and applying it.

The statute when passed was a new and not an amendatory act. Laws 1905, c. 55, p. 301. It is entitled "FOR AN ACT to prevent the illegal expenditure of public funds."

It was introduced in the Legislature by Senator Laverty who represented Saunders and *Sarpy* Counties.

Section 23-338, R. R. S. 1943, has a particular provision in a general act which excepts repairs to a bridge damaged by sudden casualty where there is a finding that an emergency exists and a notice of intention to repair is published. So somebody was thinking about bridges when this general act was passed.

It appears from the journal and the files in the Secretary of State's office that the bill as originally introduced applied to counties, cities, villages, and school districts and that the proviso above referred to was not a part of the bill as introduced.

The standing committee struck out everything after the enacting clause and reported the bill, limiting its operation to counties and putting in the proviso above referred to.

I have undertaken to find the background of the legislation. It appears from the briefs in the cases subsequently cited that a bridge was built across the river at Louisville by Cass County and one of its precincts. It got into disrepair.

In Dutton v. State ex rel. Pankonin, 42 Neb. 804, 60 N. W. 1042, Cass County by mandamus was required to repair the south half of the bridge.

State ex rel. Pankonin v. County Commissioners of Cass County, 58 Neb. 244, 78 N. W. 494, was a mandamus action to compel Cass County to repair the north half of the bridge. This was denied on the holding that the north half of the bridge was not in Cass but was in Sarpy County. That decision was filed on March 8, 1899.

In 63 Neb. 813, 89 N. W. 291, is the first of a series of opinions in County of Cass v. County of Sarpy.

That case was determined by the trial court on a demurrer. Cass County requested Sarpy County to enter into a joint contract for the repair of the bridge. Sarpy County refused. Cass County then had the bridge repaired and filed a claim with Sarpy County for one-half the cost. Sarpy County refused payment. An appeal was taken to the district court where a general demurrer was filed and sustained. On appeal on recommendation of the Commission (Department 3) the cause was reversed and remanded.

The statute involved is now as amended sections 39-827, 39-828, and 39-829, R. R. S. 1943. Sarpy County claimed that there had to be a contract under the statute before liability attached. The court held: "When a public bridge has been constructed across a stream dividing two counties, each county may be compelled, at the suit of the other, to contribute toward the expense of necessary repairs upon the same, although there may be no contract between the counties for the building or repair of the structure."

Cass County won the first round.

Sarpy County filed a motion for a rehearing.

A rehearing opinion is reported in 66 Neb. 473, 92 N. W. 635. Commissioner Ames wrote the majority opinion and in it expressed his dissenting views. The opinion recites that it had been urged that a consideration of other provisions of the statute "would be productive of a different result,"—and it was—temporarily!

The other provisions were sections 83, 84, and 85 of the code. Sections 4585, 4586, and 4587, Comp. St. 1901. They

became sections 5335, 5336, and 5337, Comp. St. 1903. As such they were repealed by an act in 1905. Laws 1905, c. 126, p. 539. The new act became sections 39-810 to 39-826, R. R. S. 1943,—the statute involved in this action. See history under section 39-810, R. R. S. 1943. So there became involved in this litigation the lineal ancestor of the present statute, section 39-810, R. R. S. 1943.

The opinion recites: "Sections 83, 84, 85 of the statute, *as construed by this court,* limit the power of counties to erect or repair bridges or approaches thereto, in instances in which the cost thereof shall exceed $100, by requiring contracts therefor to be let to competitive bidders after the adoption of the plans and specifications of the proposed works, and after notice of such letting by newspaper advertisement in a specified manner." Cass County v. Sarpy County, *supra.* (Emphasis supplied.) That is the construction for which I contend here.

Commissioner Ames stated the majority views with which he apparently disagreed. The opinion recites that "it was conceded that * * * a specific contract for the repairs in controversy had not been made" but were made pursuant to yearly contract for repairs. A majority of the commission, affirmed by the court, held that in order for plaintiff to recover, it was necessary to prove that the work was done pursuant to a specific contract, although Commissioner Ames held that it was "lawful work done in an irregular and unlawful manner." That is comparable to the view which the court now adopts.

As a result of that opinion the court receded from its earlier opinion and entered a judgment affirming the judgment of the trial court. The different result followed the consideration of what is now section 39-810, R. R. S. 1943.

Sarpy County won the second round.

Another motion for rehearing was filed—this time by Cass County.

A year later another opinion was filed, with Commissioner Ames again writing the opinion. 66 Neb. 476, 97 N. W. 352. The opinion recites that there was a diversity of opinion regarding the construction of sections 83 to 85, now section 39-810, R. R. S. 1943.

In between these two opinions Clark v. County of Lancaster, 69 Neb. 717, 96 N. W. 593, was decided. In the opinion in 66 Neb. 476, 97 N. W. 352, reference is made to Clark v. County of Lancaster and construed as holding that in the absence of a statute expressly or by necessary implication denying such right, one who furnishes labor and materials for the creation of a public work, in good faith, but in the absence of a contract such as is required by statute is entitled to recover their reasonable value.

The syllabus in the opinion in 66 Neb. 476, 97 N. W. 352, is: "One who furnishes labor and materials for the creation of a public work, in good faith, but in the absence of a contract such as is required by the statute, is entitled to recover their reasonable value, *in the absence of a statute expressly or by necessary implication denying such right.*" (Emphasis supplied.)

The judgment of November 19, 1902, was set aside and the judgment of the district court was reversed.

Cass County won that round.

Here I point out that the decision in the last opinion adopted the view now taken by the court "*in the absence of a statute expressly or by necessary implication denying such right.*"

A motion for rehearing was filed by Sarpy County and denied in an opinion reported in 72 Neb. 93, 100 N. W. 197, and filed June 9, 1904.

Then what happened?

At the opening of the next session of the Legislature, Sarpy County's representative introduced the bill that resulted in the enactment of what are now sections 23-

336, 23-337, and 23-338, R. R. S. 1943. The statute declared that "all contracts either express or implied" and "all orders" etc. were "unlawful" and "wholly void as an obligation against any such county."

This is a statute meeting the requirements of the opinion in 66 Neb. 476, 97 N. W. 352, "of a statute expressly or by necessary implication denying such right" of recovery. The statute went further and provided that recovery could be had against county officials for funds paid out contrary to section 23-336, and further that "No judgment shall * * * be rendered by any court against any such county" in the absence of a statute expressly authorizing such a contract. Obviously sections 23-336, 23-337, and 23-338 were enacted directly to overcome the result of the final opinions in Cass County v. Sarpy County.

What more could the Legislature do to provide a statute expressly or by implication denying a right of recovery on such contracts or claims as are here involved?

The court says here: "But where one is prohibited by statute from entering into a contract, and the *obligation of the contract avoided* for so doing, an action quantum meruit *cannot be maintained.*" (Emphasis supplied.)

I have here cited a statute, and its history, which the Legislature enacted specifically to overcome the court's construction of section 39-810, R. R. S. 1943, in the last of the Cass County v. Sarpy County cases.

Here I point out that in the recent case of Heese v. Wenke, 161 Neb. 311, 73 N. W. 2d 223, we held that: "* * * where there is a prohibition of power to contract coupled with a declaration of avoidance of obligation in the case of attempted exercise of power * * * there may be no recovery * * *." Here the only difference is that the statute of "avoidance of obligation" is an independent subsequent act, enacted for the specific purpose of meeting a situation such as we have here.

In the Wenke case the defendant was required to pay back because the statute avoided the obligation. Here

the statute says the obligation is wholly void—yet recovery by plaintiff is allowed.

It is to be remembered that the basis of liability against Sarpy County was what are now sections 39-827 to 39-830, R. R. S. 1943. The statute under which the liability was finally determined was what is now section 39-810, R. R. S. 1943. The Legislature sought, as it expressed it, to reach "all contracts, either express or implied," etc., hence used an independent bill and not one amendatory of either sections 39-827 to 39-830, R. R. S. 1943, or section 39-810, R. R. S. 1943.

Cass County v. Sarpy County, 90 Neb. 709, 134 N. W. 270, was an appeal involving this same matter. The cause was tried to a jury and judgment was for the defendant. We reversed and remanded.

Why?

Two contentions as to the sufficiency of the evidence were raised as to two separate issues. One was as to whether or not the bridge was a part of a public highway. The other was whether the bridge was repaired or a new one built. We held that if the verdict turned on the second fact question that it was not sustained by the evidence.

But the court held because "no special findings were submitted to and returned by the jury, it is impossible to say upon which of these two points the verdict of the jury was based. * * * Being unable, as above indicated, to determine upon what theory the jury returned their verdict, it should not, *in the face of the apparent merit of the plaintiff's claim,* be permitted to stand."

I quote this case here at the end of the Cass County series because it illustrates one of my objections to the "equivalent to the verdict of a jury" rule upon which the court relies. In this last Cass County case there were no special findings and there was no evidence to sustain one theory upon which the verdict might have rested. Because we were unable to determine upon what fact basis the jury's verdict rested, we reversed.

In the instant case there were "no special findings" by the court; it is "impossible" to determine upon what fact "theory" the trial court found for the plaintiff; nevertheless because the court finds some evidence that would sustain *a* theory upon which the trial court's finding possibly could rest, we affirm.

Under the rule stated in syllabus No. 1 here, had Cass County v. Sarpy County, 90 Neb. 709, 134 N. W. 270, been tried to the court without a jury resulting in a judgment for the defendant, it would have been affirmed "in the face of the apparent merit" of the claim. Consideration of evidence rules in this court that produce such diametrically opposite final results cannot be justified.

I now go to some of our decisions where sections 23-336, 23-337, and 23-338, R. R. S. 1943, have been involved and construed so far as important here.

It seems that Buffalo County and Kearney County have also had bridge troubles on a boundary river. See Buffalo County v. Kearney County, 95 Neb. 439, 145 N. W. 985. One was involved in Standard Bridge Co. v. Kearney County, 95 Neb. 744, 146 N. W. 943. It was claimed that the contract was void because it was let without advertising for bidders. It was stipulated that an emergency existed. It was held that whether or not an emergency existed was a serious question under the evidence but "in this court on appeal * * * the stipulation of facts is the only evidence that we can consider." There was a beautiful opportunity to have applied the "equivalent to a jury verdict" rule. But it was not applied. The court examined the controlling fact situation and held that advertisements for bids were not required because of the emergency. That rested on the proviso of section 23-338, R. R. S. 1943. It was further contended that there had to be at least one publication of notice of intent to repair. That question had not been raised in the trial court. We held: "A case on appeal rests upon the issues tendered and finally determined in the district court." I cite the case here

principally because of its bearing on the matters earlier discussed herein.

Gibson v. Sherman County, 97 Neb. 79, 149 N. W. 107, involved a claim for two items of bridge material totaling $512.24. No "bookkeeping practice" was involved. The claim was denied under section 23-336, R. R. S. 1943, in that there "were no funds legally available therefor." The Legislature then enacted Laws 1909, chapter 178, page 598, authorizing payment. The trial court denied the payment of the claim. On appeal here we held that the special act authorizing payment was constitutional, and reversed and remanded. The decision rests on the validity of the special act as removing "the bar to the remedy." The application of section 23-336, R. R. S. 1943, to this situation (comparable to the one here) was conceded—otherwise it would not have been necessary to get or for this court to rely on the special act.

Judge Letton, dissenting, went to the validity and purpose of sections 23-336, 23-337, and 23-338, R. R. S. 1943. He held: "The act of 1905 was evidently designed to put upon inquiry every person who thereafter dealt with a county board or board of supervisors as to the legality of the proposed contract. It was a direct notification that, unless the contract was authorized, was not in contravention of any statutory limitations, and there were funds legally available at the time, it should be 'wholly void as an obligation against said county.' The purpose of the statute is beneficial. In my opinion it should be obeyed by this court, as well as by all other courts in the state." Gibson v. Sherman County, *supra*.

Judge Letton in the conclusion obviously was referring to section 23-338, R. R. S. 1943, which bars a judgment "by any court" where material is contracted for in "contravention of any statutory limitations" as it was in the Gibson case and as it is here. The majority did not join issue with Judge Letton.

So far as matters such as are involved here are concerned, when the court's opinion here becomes final, the legal situation will be just where it was when Cass County v. Sarpy County was finally decided. The Legislature moved to correct the effect of that opinion. The act of 1905 is now put aside and is a nullity so far as matters of this kind are concerned. The situation is now as though that act had not been passed. The Legislature declared transactions such as this to be "void as an obligation" against a county; it declared that funds paid out could be recovered from the officers making the payments; and it provided that no court should render judgments against a county. These provisions were directed at "all contracts either express or implied, * * * in contravention of any statutory limitation, * * *." The Legislature did not say, "provided this act shall not be effective where granted powers have been 'irregularly exercised.'"

This court said that in the Cass County v. Sarpy County decisions. The Legislature in 1905 undertook to avoid such an avenue of escape from the effect of an "illegal or irregular" act. The court now again opens the avenue to liability.

The Legislature may once again enact a law "to prevent the illegal expenditure of public funds." I think doing so once should be sufficient, but evidently it is not so.

IN RE ESTATE OF MARY E. KNOTT, DECEASED.
MARGIE I. REYNOLDS, APPELLANT, V. RALPH KNOTT ET AL., APPELLEES.

82 N. W. 2d 568

Filed April 19, 1957. No. 34085.

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 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.

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. ———. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence.
5. ———. There may be influences directing the will-maker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but so long as not coercive, they are not undue influence. Circumstances often arise where such conduct is proper and wholly justifiable.
6. ———. 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.
7. **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.
8. **Wills: Trial.** It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict for proponent.
9. **Trial.** To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to

satisfy the jury that the fact sought to be proved is established.

10. **Parent and Child: Gifts.** It is well established in this jurisdiction that in the case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud or undue influence arises as between the parties thereto by the mere fact of the relation.

11. ———: ———. The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful influence, and will not render it voidable unless this influence has been so used as to confuse the judgment and control the will of the donor.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Munro & Parker, for appellant.

Cunningham & Cunningham and *Hamer, Tye & Worlock,* for appellees.

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

CHAPPELL, J.

On November 12, 1954, Margie I. Reynolds filed a petition in the county court of Buffalo County, seeking probate of the last will and testament of Mary E. Knott, deceased. The will, executed July 7, 1950, first revoked all former wills, codicils, or testamentary documents made by testatrix, and directed payment of debts and funeral expenses. It then bequeathed in substance as follows: (1) $50 to her granddaughter, Marie Viola Knott, the daughter of a deceased son, Clyde E. Knott (such beneficiary was not directly a party in this case, and her married name and address were unknown); (2) $50 to each of her granddaughters, Betty Jean Brownell and Fern Lorraine Brasel, also known as Lorraine Brasel, daughter of a deceased son, Joseph Ray Knott; (3) $100 to her son, Louis Ralph Knott, also known as Ralph Knott; and (4) $100 to her grandson, Archie B. Keup, son of a deceased daughter, Lillian Viola Keup. There-

after the will of testatrix gave, devised, and bequeathed all the rest and residue of her estate, including all real and personal property of whatsoever kind and nature, to her only living daughter, Margie Irene Reynolds, and nominated and appointed George A. Munro, her lawyer, as executor.

Thereafter, Ralph Knott, Archie B. Keup, Betty Jean Brownell, and Lorraine Brasel filed objections to probate of the will, alleging that it was not executed as provided by law; that testatrix lacked testamentary capacity to execute it; and that its execution was procured by the undue influence of testatrix's daughter, Margie I. Reynolds, and others. Proponent's reply thereto admitted relationship of the parties to testatrix, and denied generally.

After hearing upon the merits the county court rendered judgment in favor of proponent and against contestants, admitted the will to probate, and appointed George A. Monro executor. Therefrom, contestants appealed to the district court, where, upon comparable new pleadings duly filed, like issues were tried to a jury. At conclusion of contestants' evidence, proponent moved for directed verdict substantially upon the grounds that there was no evidence: (1) That the will was not duly executed as provided by law; (2) that testatrix lacked testamentary capacity; and (3) that there was not sufficient competent evidence that the will was procured by the exercise of undue influence as alleged. Thereafter the trial court sustained such motion in part, concluding as a matter of law that the will was duly executed as required by law, and that testatrix had testamentary capacity. In such respect, concededly the record conclusively supports that finding and direction. However, that part of proponent's motion with regard to undue influence was overruled, and such issue was submitted to the jury for its determination, after the court had overruled proponent's motion again made at conclusion of all the evidence to

direct a verdict for proponent upon the ground that there was not sufficient competent evidence that the will was procured by the exercise of undue influence.

The jury thereafter returned a verdict in favor of contestants and against proponent, finding that the will was not the valid last will and testament of Mary E. Knott, deceased. Judgment was rendered accordingly, with costs taxed to proponent, whose motion for judgment notwithstanding the verdict, or in the alternative for new trial, was overruled. Therefrom proponent appealed to this court, assigning, insofar as important here, that the trial court erred in failing to sustain her motions for directed verdict upon the issue of undue influence made at conclusion of contestants' evidence and again at conclusion of all the evidence, and erred in overruling proponent's motion for judgment notwithstanding the verdict. We sustain the assignment. As we view it, the sole primary issue is whether or not there was sufficient competent evidence adduced by contestants to support a verdict of undue influence. We conclude that there was not. Hereinafter, we will designate Mary E. Knott as testatrix and all other parties generally by their first names except when necessary to designate them otherwise as proponent or contestants.

In In re Estate of Scoville, 149 Neb. 415, 31 N. W. 2d 284, we held: "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." In other words, whether or not a testator was justified in making the provisions of a duly executed will is of no concern to the court, provided testator has testamentary capacity and the will was not procured by undue influence.

We have long established that in a will contest upon

the ground of undue influence the burden is upon contestants to prove by a preponderance of evidence 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. Contrary to contestants' contention, we no longer recognize any exceptions to that rule. In re Estate of Hagan, 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573; In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80; Parkening v. Haffke, 153 Neb. 678, 46 N. W. 2d 117.

We have established as well that 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. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence. There may be influences directing the willmaker's attention to proper obligations which it might be thought ought to be satisfied by testamentary provisions. Such influences may be persuasive and effective, but so long as not coercive, they are not undue influence. Circumstances often arise where such conduct is proper and wholly justifiable. Also, in order to invalidate a will duly executed as provided by law 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 evaluating the testimony and proper inferences to be drawn therefrom, it is not always possible to apply the evidence tending to establish improper influence which is referable to the will solely to one of the essential elements. It is therefore permissible to rest the decision

upon whether or not the evidence as a whole is of such a substantial nature as to contain some competent and relevant proof of each of the essential elements, and require the issue of undue influence to be submitted to and determined by a jury. It is also the rule that 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. See, Horton v. Maruska, 158 Neb. 723, 64 N. W. 2d 734; In re Estate of Fehrenkamp, 154 Neb. 488, 48 N. W. 2d 421; In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625; Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127; In re Estate of Scoville, *supra.*

In the last-cited case, quoting with approval from In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37, and In re Estate of Frazier, 131 Neb. 61, 267 N. W. 181, we said: " 'It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. In a will contest on the ground of mental incompetency and undue influence, if the evidence is insufficient to sustain a verdict upon either of such issues in favor of the contestants, then the trial court should withdraw both issues from the jury and direct a verdict.' * * *

" 'To justify the direction of a verdict, it is not necessary that there should be literally no evidence to go to the jury; it being sufficient that there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.' " See, also, In re Estate of Benson, 153 Neb. 824, 46 N. W. 2d 176.

In Parkening v. Haffke, *supra,* cited with approval in Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266, we held: "The rule is well established in this jurisdiction, in a case of a gift and voluntary conveyance from a parent to his child or children, no presumption of fraud

or undue influence arises as between the parties thereto by the mere fact of the relation.

"The affection, confidence, and gratitude of a parent to a child which inspires the gift is a natural and lawful inference, and will not render it voidable, unless this influence has been so used as to confuse the judgment and control the will of the donor."

Also, in In re Estate of Bose, 136 Neb. 156, 285 N. W. 319, quoting with approval from Isaac v. Halderman, 76 Neb. 823, 107 N. W. 1016, we said: " 'Courts and juries are not warranted in setting aside last wills and testaments, and substituting in lieu thereof their own notions as to what a testator should do with his property, except upon satisfactory evidence. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. In this country a man's prejudices form a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality.' " That statement has particular application in the case at bar.

In the light of the foregoing rules, we have examined the voluminous record to determine whether or not the

evidence of contestants was sufficient to support a verdict in their favor upon the issue of undue influence. In doing so, we conclude that it was not.

In that connection, the record as summarized substantially discloses the following: Testatrix was 82 years old when she died in a hospital in Omaha on November 7, 1954, some 4 years and 4 months after execution of her last will and testament on July 7, 1950. She was a large woman, of sound mind and excellent mental capacity at all times until her death. However, she was badly crippled with arthritis which progressively grew worse, making it difficult for her to get around, particularly up and down stairs. From about 1940 until 1952 she lived alone most of the time in a little home in the north part of Gibbon. She had purchased same after her husband's death with funds received from the sale of personal property on an 80-acre farm here involved which she then owned and had rented to a satisfactory tenant. The title to her home in Gibbon was taken in the name of testatrix and her only living daughter, Margie I. Reynolds, as joint tenants with right of survivorship so that Margie would have a home if she did not make a go of it with her husband, Ray Reynolds, with whom testatrix was not even on speaking terms until several years after their marriage in 1933. However, often during the ensuing years testatrix visited with Margie, who lived in Fairbury for a time, then moved to Omaha. Testatrix spent a part of some summers and usually spent all of her winters with Margie, but returned in the spring to make out her income tax and prepare her home at Gibbon for summer occupancy. Also, Margie often came out to Gibbon to visit and care for testatrix, because other relatives failed and neglected to do so.

Naturally and by reason of necessity because there was no one else with whom she could counsel or advise, she discussed some of her problems with and sought advice about them from Margie and a real estate man

in Gibbon who was her neighbor and a close personal and business friend for many years. He testified as a witness for contestants that he thought testatrix was prone to and would sometimes because of such necessity listen to Margie's advice or his own if she were at a loss to know what to do, and asked for it, provided it was not anything wrong or evil, but she had a rather strong mind and followed her own wishes if she disagreed.

In that connection, from 1949 to 1952, testatrix gradually became so crippled with arthritis and disabled from dropsy that she could no longer live alone and take care of herself. She then of necessity turned to Margie who was the only member of her family who would take care of her, and she wanted Margie to look after her business affairs. In that situation, in 1952 testatrix reluctantly sold her furniture, broke up housekeeping, closed and rented her home in Gibbon, and went to live with Margie in Omaha. In or just before 1954 her old farm tenant had bought a farm of his own, so at request of testatrix she was brought back to Gibbon by Margie to meet and visit with a new tenant on her farm in order to determine whether or not he would be a satisfactory tenant.

In the meantime, during 1943 Ralph Knott, the only living son of testatrix, who was a contestant here, bought and moved into a home at Gibbon. It was located a block west of the home of testatrix, with only one house separating them. Ralph and his wife, Marie, had cared for testatrix once when she was ill for a period of time in 1942, and testatrix made the down-payment on that home for them where they lived in Gibbon until 1948 when they moved out on a farm north of Gibbon. From 1943 until about 1946 or 1947 they and their family were generally friendly with testatrix. However, at about that time, Ralph evidently wanted to replace the satisfactory farm tenant of testatrix and move out on her farm. She did not consent to that, and hard feelings

resulted for which, as a conclusion without any factual foundation, he blamed Margie.

In 1947 testatrix fell while crossing an alley near her home and was severely injured, as a result of which she was confined to her bed 3 or 4 days and then could sit up in a rocking chair part time but needed nursing care and attention for about 3 weeks or more. Although Ralph and his wife were notified at once of her accident and injuries neither of them ever came to see testatrix, which caused her great grief and anxiety. During such period and for sometime thereafter near neighbors and friends nursed, cared for, and fed testatrix until she recovered. As a matter of fact, concededly Ralph never went to see, talked with, or wrote to his mother, the testatrix, during 1947, 1948, 1949, and 1950, which was a constant source of grief and anxiety to testatrix. He claims that he saw her once in 1951 when he invited her to dinner, but she did not come. Concededly, he went once to her home in 1952 when she was selling her furniture and breaking up her housekeeping in order to go and live with Margie in Omaha. However, concededly while there, with loud and profane language addressed to Margie and Ray, he questioned the right to sell her furniture without his permission or a court order, and tried to stop the sale. From that moment until her death neither he nor his wife ever wrote to testatrix or saw her again even during her last illness and death in 1954, although they were informed of it. Ralph claimed that once in 1952 or 1953 he went to Omaha to see her but she had then gone back to Gibbon and neither he nor his wife ever thereafter wrote to her or made any further effort to see her again during her lifetime. Further, on September 25, 1947, and again on September 16, 1950, Ralph's wife Marie wrote testatrix insulting letters framed with hatred, seeking to shame testatrix and prejudice her against Margie, against the farm tenant of testatrix, and against the family of Archie B. Keup, grandson of testatrix, who is a contestant here.

Marie testified that in 1946 or 1947 testatrix had told her that she wanted to divide her property equally but she didn't want certain granddaughters to have anything.

Ralph, his wife, and Archie all testified that about 1946, 1947, or 1948, testatrix told them that Margie and Ray had wanted her to will the farm to them, then come to live with them, and they would take care of her for the rest of her life, but she wanted to divide her property equally except as aforesaid, and not live with any of her children. They testified also that about that time testatrix wanted to trade her home for another more modern, fairly new one in Gibbon, but Margie advised against it because it involved too much money. In that connection, they knew nothing about the terms of the transaction or whether it was a good or bad deal, and it will be remembered that Margie was a joint owner of the home in which testatrix lived, and had a perfect right to counsel and advise her with regard to the transaction. She also advised against it because the other house involved was a two-story, or one and one-half story, house with two rooms upstairs, and a basement with cellar steps which testatrix could not climb because of her physical condition. On the other hand, the home in which she lived was comfortable with only a couple of steps to enter it. It also had a basement where she kept vegetables and fruits, but generally when necessary either the neighbors or children of Ralph or Archie traversed cellar steps for her.

Ralph and his wife testified that about the time testatrix wanted to procure the new home she also wanted to purchase a new bedroom suite and a decorative bronze horse which she admired, but Margie advised otherwise, saying that testatrix did not need them. However, she bought them anyway.

Archie, a grandson, lived with testatrix and her husband out on the farm from the time he was 4 years old until he was out of high school in 1929, when he left and,

after working around a couple of years, moved to Peru, Nebraska. He saw testatrix only 3 times from 1931 to 1942 when he finally moved back to Gibbon, and lived in a home about 2 blocks from testatrix, who made the down-payment on that home for him. From that time he saw testatrix quite often except while he was away for several months at different times. After 1952 he saw her but once in May 1954 while she was seriously ill at Margie's home in Omaha. Before 1952 some of his 10 children, 8 of whom lived at home, saw testatrix often and helped her when necessary. Also, he sometimes took testatrix about in a car when she wanted to go.

Archie testified that in the summer of 1949 he saw a typewritten copy of a will allegedly made by testatrix which, if he remembered correctly, gave him one-third, Margie one-third, and Ralph one-third of her property, with a bequest of money to some other grandchildren. Ralph's share as he remembered it was put in trust so that he would receive $100 a month as long as his share lasted, but if Ralph or Margie died before testatrix, their share went to Archie's children who were the great grandchildren of testatrix. No such will appears in the record, although it was conceded that on February 22, 1949, testatrix had made a prior will.

Archie also testified that in 1950 he talked to Margie who said that testatrix was failing in health, and they were going to have to move someone in with her in order to take care of her, but he objected to that because she always was a very independent person who transacted her own business and wanted to take care of herself. He also testified that on July 8, 9, or 10, 1950, testatrix, Margie, and Ray came in a car over where he was working, at which time testatrix was crying and said that since she could not take care of herself any more, she guessed she would have to live with Margie, and he replied that it was all right to do that.

Archie testified further that sometime about 1947 or 1948 testatrix told him that her farm tenant wanted her

to put in a hot water system, then leave it as part of the farm. The tenant also wanted her to put in some posts for a corral, and shingle the barn and corn crib. However, Margie advised her that it would be a waste to spend her money for such improvements out of her income from the land without getting any greater return from it. Nevertheless, testatrix made some of such improvements. In that connection, it would seem logical that if Margie was using undue influence to get the farm, as claimed, it would have been good judgment for her to have advised testatrix to make such improvements out of her income therefrom so that Margie could eventually have a better and more valuable farm at her mother's expense.

There is evidence that Archie drank excessively and spent his money for intoxicating liquor instead of for the care and support of his family and children, who were in a deplorable condition without proper food and clothing, which disturbed and worried testatrix, so she sewed for them, gave them food, and paid them small sums of money for services rendered for her. Archie testified that after the death of testatrix, and the will had been read to the family, Margie, using his nickname, said: " 'Ikey, I suppose there'll be a big stink raised over this. * * * if you'll just stick with me and meet me half way I'll see that you're taken care of.' " In that connection, we cannot see how, under the provocative circumstances presented in this case, such a statement tended in any manner to prove that the will of testatrix was procured by undue influence.

Another witness for contestants testified by deposition. She was formerly the wife of Joseph Ray Knott, a deceased son of testatrix, who was the father of contestants, Betty Jean Brownell and Lorraine Brasel. She was a school teacher who left Nebraska and went to California in 1945 or 1946, but generally returned for short visits with testatrix and others in Gibbon during summer vacations. She testified that she was not in-

terested in getting any money from the estate for her daughters but she felt sorry for Ralph and Archie, had contributed $100 which they needed, and was doing her best in order to help them carry on and win this litigation. She was not sure when it occurred, but testified that on several occasions testatrix had told her Margie and Ray wanted testatrix to will her farm to them, then come to live with them, and they would take care of her for the rest of her life, but she wanted to leave her property equally and not live with any of her children. In that connection, she also testified that testatrix was a rather strong-willed person and did not once part with any of her property while living, except when she had helped different ones at times.

Contrary to contestants' contention, we find no competent evidence adduced by them from which it could be reasonably concluded that from 1946 until the death of testatrix, Margie ever neglected, failed, or refused to give her necessary loving care and attention when contestants refused or failed and neglected to do so.

We come then to the manner of execution of the will. In that connection, due execution thereof was properly disposed of as a matter of law, but we summarize the undisputed evidence with regard thereto for whatever bearing it may have if any upon the issue of undue influence. A short time before July 7, 1950, testatrix wrote Margie telling her that she had some legal business to transact with her lawyer, George A. Munro at Kearney, and asking if Margie and Ray would come to Gibbon and take her there. In response, they came on July 6, 1950, and took testatrix to her lawyer's office on July 7, 1950. His office was located on the second floor up a long stairway. They arrived about midmorning, without prior appointment, and assisted testatrix up the stairs to her lawyer's office. There, and before that, she said that she had to have somebody appointed to look after her affairs because she was no longer able physically to get around and do so, and she

requested Margie to act in that capacity. Thus in her lawyer's office, as advised by her lawyer and at request of testatrix, conservatorship papers were first drawn, then executed by testatrix, and Margie was duly appointed by the county court. Contrary to contestants' contention, such proceedings, as shown by contestants' evidence, appear to have been regular in every material respect. Thereafter, Margie acted as conservator from July 7, 1950, until June 14, 1955, when, over objections of contestants here to her final account and report, which were overruled, she was discharged by the county court in an order which became final, reciting in substance that she had in all things faithfully and fully performed and discharged all and singular her duties and obligations imposed upon her by law and orders of the court, and had duly and fully acted for and administered all of the estate coming into her possession as conservator.

After conservatorship papers were drawn and executed, testatrix told her lawyer, " 'I want to change my will.' " Her lawyer then told Margie and Ray to leave and let him talk to testatrix alone in his private office. They then did leave, and while alone in her lawyer's office her will here involved was prepared as directed by testatrix. It was then read to her, and after approval of its provisions, her will was duly executed in every respect as provided by law. Margie and Ray knew of its execution but did not know its contents. They came back to the lawyer's office about 3:30 p. m., helped testatrix down the stairs, and later drove back to Gibbon with her.

Contestants lay particular stress upon the fact that testatrix stayed in her lawyer's office alone for lunch which Margie had brought up to her, but we see nothing unusual or wrong with that fact since it is clear that she stayed there simply because her business transactions had not yet been completed and she was physically unable to get up and down the long stairway again.

As we view it, there was opportunity for Margie and Ray to exercise undue influence. On the other hand, there was no sufficient competent evidence adduced by contestants that testatrix was a susceptible person who would be subject to undue influence or that there was a disposition by Margie and Ray to exercise undue influence for any improper purpose, and under the unusual circumstances presented in this case, the result was a natural one which did not clearly show the effect of undue influence. No presumption of fraud or undue influence arose simply because Margie was the daughter of testatrix, since the affection, confidence, and gratitude of testatrix to her was, under the circumstances heretofore recited, a natural and lawful influence, unless it had been used to confuse the judgment and control the will of testatrix, which contestants failed to establish by sufficient competent evidence. Further, as conservator from July 7, 1950, until the death of testatrix, Margie had a right and duty to counsel and advise with her as she did, and in such respect Margie was subject to the orders of the county court at all times.

For reasons heretofore stated, we conclude that the trial court should have sustained proponent's motion to direct a verdict for proponent upon the issue of undue influence made at conclusion of contestants' evidence. Therefore, the verdict and judgment of the trial court were clearly wrong and the judgment should be and hereby is reversed and the cause is remanded with directions to sustain proponent's motion for judgment notwithstanding the verdict, and render judgment accordingly for proponent and against contestants. All costs are taxed to contestants.

REVERSED AND REMANDED WITH DIRECTIONS.

HULDA BURHOOP, APPELLEE, V. WAYNE BRACKHAN, APPELLANT.

82 N. W. 2d 557

Filed April 19, 1957. No. 34094.

1. **Automobiles.** Ordinarily a guest passenger in an automobile has the right to assume the driver thereof is a reasonably safe and careful driver and a duty to warn the driver does not arise until some fact or situation out of the usual and ordinary is presented.
2. **Torts.** Where independent tortious acts of two persons combine to produce an injury indivisible in its nature either tortfeasor may be held for the entire damage, not because he is responsible for the act of the other but because his own act is regarded in law as a cause of the injury.
3. **Automobiles: Negligence.** Where the negligence of the driver of an automobile, in which a person is riding as a guest, is the sole proximate cause of a collision in which the guest is injured the guest cannot recover from a third person for such injury.
4. **Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury.
5. ———. If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him.
6. **Automobiles.** A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident.
7. ———. The duty of the driver of an automobile about to enter a street intersection to look for automobiles approaching the same intersection implies the duty to see that which was in plain sight, unless some reasonable excuse for not seeing is shown.
8. **Trial.** In stating the issues of fact in its charge to the jury the court should submit to the jury only such issues as are in controversy under the pleadings and which find support in the evidence.
9. ———. It is for the triers of fact to decide any issue upon all of the evidence adduced, and this is true even when the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is found in his own testimony.
10. **Case Overruled.** Insofar as McCleneghan v. Powell, 105 Neb.

306, 180 N. W. 576, is in conflict with syllabus 9 hereof the same is overruled.

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

Wallace W. Angle, for appellant.

Kirkpatrick & Dougherty, 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 York County. It involves an action wherein Hulda Burhoop sued Wayne Brackhan to recover damages resulting from injuries which she allegedly suffered in a car accident which, she claims, resulted from negligent conduct on the part of Brackhan. A jury returned a verdict in favor of Brackhan. Plaintiff thereupon filed a motion to set aside this verdict and for a new trial. The trial court sustained this motion, set aside the verdict, and granted plaintiff a new trial but gave no reason for doing so. It is from this order that this appeal was taken.

For convenience we shall herein refer to the parties as they appeared in the district court, that is, to appellant as defendant and to appellee as plaintiff.

The rule applicable here is stated in Gain v. Drennen, 160 Neb 263, 69 N. W. 2d 916, as follows: "In an action where the trial court has sustained a motion for a new trial without assigning reasons therefor, appropriate procedure on appeal is for the appellant to bring the record here with an assignment that the court erred in granting a new trial and submit it for critical examination. The duty then devolves upon the appellee to point out the prejudicial error which he contends justifies the granting of a new trial."

In this respect we said in Anderson v. Nielsen, 162

Neb. 110, 75 N. W. 2d 372, that: "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."

Plaintiff primarily contends the trial court erred in failing to take all questions of negligence away from the jury and submitting only the issue as to the amount of damages on the basis that defendant was, as a matter of law, guilty of negligence which was a proximate cause of the accident and resulting injuries to her.

It is true, as plaintiff contends, that she was, at the time of the accident, riding as a guest in a car being driven by her daughter, Gladys Naber, and consequently any negligence of her daughter could not be imputed to her. See Remmenga v. Selk, 150 Neb. 401, 34 N. W. 2d 757. Nor, under the factual situation as developed by the evidence adduced, can it be said she could be found guilty of any conduct constituting negligence which contributed to the accident and resulting injuries. See Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466. As stated in Bartek v. Glasers Provisions Co., Inc., *supra:* "Ordinarily, the guest passenger in an automobile has a right to assume that the driver is a reasonably safe and careful driver; and the duty to warn him does not arise until some fact or situation out of the usual and ordinary is presented."

If, as plaintiff contends, defendant was guilty of any negligence that was a proximate cause of the accident then he could be liable for, as stated in Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569: "Where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tortfeasor may be held for the entire damage—not because he is responsible for the act of the other, but because his own act is regarded in law as a cause of the injury." See, also, O'Neill v. Rovatsos, 114 Neb. 142, 206 N. W. 752; Daniel-

sen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913; Fick v. Herman, 161 Neb. 110, 72 N. W. 2d 598.

"Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." Shupe v. County of Antelope, *supra.*

The trial court submitted the issue, pleaded by the defendant, that any injuries or damages sustained by plaintiff were solely and proximately caused by negligent acts of Gladys Naber, the driver of the automobile in which plaintiff was riding as a guest. If there is evidence to support this issue then, of course, it was proper for the court to submit it and, based thereon, it would be proper for a jury to find for defendant. See, Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673; Shiers v. Cowgill, 157 Neb. 265, 59 N. W. 2d 407; Ricker v. Danner, 159 Neb. 675, 68 N. W. 2d 338. As stated in Bergendahl v. Rabeler, *supra:* "Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury."

"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." Remmenga v. Selk, *supra.* The same would be true with reference to a motion for a directed verdict or for judgment notwithstanding the verdict. See Stark v. Turner, *supra.*

"Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury." Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

"If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and direct a verdict against him." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

"The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong." Griess v. Borchers, *supra.*

It is only "Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, (that) it will be set aside and a new trial granted." Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465. See, also, Stewart v. City of Lincoln, 114 Neb. 362, 207 N. W. 511.

The accident wherein plaintiff was injured happened sometime between 4:45 and 5:30 p.m. on Monday, August 24, 1953, in the intersection of two country roads at a point 1 mile west and 2 miles south of Waco, in York County. It occurred when the front of a 1950 Tudor Ford, being driven by defendant, ran into the left side of a 1949 Buick sedan, being driven by Gladys Naber and in which plaintiff was riding as a guest. As a result of the impact the Ford came to an immediate stop, although the front end thereof was shoved toward the east. It remained upright and came to a stop, facing southeast, at a point in about the center of the intersection. The defendant was not hurt. The Buick, after the impact, continued on in a southeasterly direction some 54 feet and finally stopped in the ditch at the southeast corner of the intersection. It came to rest on its top with the front end facing to the north-northeast. It was in the ditch located along the south side of the east-west road. Plaintiff was thrown out of the car and apparently severely injured.

The roads creating the intersection were of equal dignity, the intersection being unprotected by signs of any kind. Just south of the intersection, on the east side of the traveled portion of the north-south road, was a sign advising the traveling public that the road to the south of the intersection was closed. However, the road to the south was not completely unusable and that fact was known to the defendant. The roads were dry, the sun was shining, and visibility was good.

Defendant, at the time, was driving south on the north-south road. This road is graveled north of the intersection. It had a 17-foot surface for travel on which the public had been driving down the center. Gladys Naber, at the time, was driving east on the east-west road. This road is graveled west of the intersection. It had a 16-foot surface for travel on which the public had been driving down the center. To the northwest of the intersection was a cornfield some 5 to 6 feet in height and at the corner were weeds some 4 to 5 feet in height. This created a blind northwest corner of which fact both drivers were fully aware, both being familiar with the road. However, back some 200 feet north of the intersection on the north-south road was a knoll from which cars could be observed traveling on the east-west road west of the intersection. From this knoll the north-south road slopes down slightly to the intersection. Likewise there is a knoll west of the intersection on the east-west road from which cars could be observed traveling on the north-south road north of the intersection. It is back about 500 feet. From this knoll the east-west road slopes down toward the intersection at about 20 degrees.

Gladys Naber, driver of the Buick, testified that as she approached the intersection from the west she was traveling between 35 and 40 miles an hour at the knoll some 500 feet to the west of the intersection; that she was familiar with the road and knew the intersection was dangerous so slowed her speed as she approached it

but did not apply her brakes; that she did not think anybody would be coming very fast from the north because of the fact that the road to the south was closed; that as she approached and entered the intersection at 30 miles an hour she first looked to the east and saw nothing, then looked to the south and saw the "road closed" sign of which she had previous knowledge, and then looked to the north when she saw the defendant's car just as it was about to hit her car; and that the car she was driving was hit on the left side when she was over half way across the intersection. She also testified she looked to her left, or north, when she first approached and entered the intersection but saw nothing coming from that direction.

Defendant testified that as he approached the intersection from the north he was traveling about 40 miles an hour as he came over the knoll; that he was intending to cross the intersection and go on south; that when he was about 140 to 150 feet from the intersection he was looking to the west and thought he saw a car or something on the west road; that he was then going about 35 miles an hour; that he immediately applied his brakes; that his car, including the brakes, was in good mechanical condition; that the application of his brakes caused the tires of his car to skid on the gravel; that he kept his brakes on and kept looking for the car on the west road; that he continued to look to the west and when he reached a point some 30 to 40 feet north of the intersection he thought he saw a car some 50 feet or so west of the intersection; that as he reached a point where he could see past the weeds located in the northwest corner he saw the Buick; that he continued to apply his brakes; that his car entered the intersection at a very reduced speed but he could not get it completely stopped before it hit the left side of the Buick at about the center thereof, although he had skidded his tires up to the point of impact, a distance of some 92 feet; that his car had very little forward movement

at the time the impact occurred; that the front of his car was shoved to the left as a result of the impact, but remained upright; and that it came to a stop a little past (south) the center of the intersection, facing southeast.

It is the plaintiff's thought that since the Buick approached the intersection from the right, and since the defendant admits it approached and entered the intersection first, that therefore the driver of the Buick had the right-of-way and defendant was guilty of negligence as a matter of law which was a proximate cause of the accident when he entered the intersection and ran into the side of the Buick car. It is true that defendant admitted the Buick was first in the intersection, although he also testified that the car he was driving was first to enter the intersection. There were facts and circumstances testified to that would justify a jury in finding that defendant's car entered the intersection first. However, for the purpose of the following discussion, we shall assume that the driver of the Buick had the right-of-way.

"In an action for damages for negligence the burden is on the plaintiff to show 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." Hansen v. Henshaw, 163 Neb. 191, 79 N. W. 2d 15.

Even though the driver of a car has the right-of-way at an intersection he still has duties in regard to other cars which are approaching and entering it at about the same time.

"A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident." Wendel v. Carlson, 162 Neb. 742, 77 N. W. 2d 212.

"The driver of an automobile, upon reaching an in-

tersection, has the right of way over a vehicle approaching on his left, and may ordinarily proceed to cross; but if the situation is such as to indicate to the mind of an ordinarily prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent accident, even to the extent of waiving his right." Thrapp v. Meyers, 114 Neb. 689, 209 N. W. 238, 47 A. L. R. 585.

When a driver of an automobile approaches or enters an intersection of two roads he is obliged to timely look for approaching vehicles and to see those within that radius which denotes the limit of danger. Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405; Elliott v. Swift & Co., 151 Neb. 787, 39 N. W. 2d 617.

"The duty of the driver of a vehicle about to enter a street intersection to look for vehicles approaching the same intersection implies the duty to see that which was in plain sight, unless some reasonable excuse for not seeing is shown." Bergendahl v. Rabeler, *supra*. See, also, Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491.

"One is required only to have his car under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required." Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669.

"Users of the highway are required to exercise reasonable care. What is reasonable care must in each case be determined by its own peculiar facts and circumstances." Lammers v. Carstensen, 109 Neb. 475, 191 N. W. 670.

We find the evidence adduced does not, as a matter of law, establish that defendant was negligent in the operation of his car. Under the facts disclosed by the record we think that reasonable minds could differ as to whether or not he was negligent and, if so, whether or

not such negligence was a proximate cause of the accident. In view thereof both are issues for the jury and the trial court was correct in submitting them.

The defendant pleaded that plaintiff's injuries were caused by negligent acts of Gladys Naber which were the sole and proximate cause thereof, setting out six specific items of negligence of which he claims she was guilty and which he claims were the proximate cause of the accident. The trial court submitted this issue, and we think properly in view of the evidence adduced, although we do not approve the instruction by which it was done.

Instruction No. 2 presented the issue of sole proximate cause, as pleaded, to the jury. It is as follows: "Defendant filed an answer in which he denied every material allegation in said petition and in which he alleged that any injuries or damages sustained by plaintiff were solely and proximately caused by the negligent acts of Gladys Naber, the driver of the automobile in which plaintiff was riding in that: 1. She failed to keep and maintain a proper lookout as she approached said intersection. 2. That she failed to keep her automobile under control. 3. That she was familiar with the road upon which she was traveling as well as the said intersection and knew or should have known that the intersection which they were about to enter was obstructed by weeds and growing corn but that despite such knowledge she failed to slacken the speed of her automobile as she approached said intersection or to make any observation of defendant's automobile until it was in the intersection itself. 4. That she operated her automobile at such a high, careless and negligent rate of speed that she could not control it nor stop nor turn aside in an attempt to avoid an accident with the automobile driven by defendant. 5. That she failed to grant defendant the right-of-way across the intersection, the defendant being in the intersection first. 6. That said accident was due entirely to the negligent conduct of the driver of

the car in which plaintiff was riding and was unavoidable insofar as the defendant is concerned. The defendant therefore asks that the petition of plaintiff be dismissed and her claims be denied."

By instruction No. 5 the trial court advised the jury that the issue of sole proximate cause of the accident, as it relates to Gladys Naber, was an affirmative defense and in order for the defendant to relieve himself of liability by reason thereof the burden of proof was upon him to prove that fact by the greater weight of the evidence. It is not an affirmative defense. See, Umberger v. Sankey, 151 Neb. 488, 38 N. W. 2d 21; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854; Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333. As stated in Styskal v. Brickey, *supra:* "Such defense is not an affirmative plea in avoidance of appellee's cause of action and imposes no burden of proof upon appellant with relation thereto but is one entirely consistent with and provable under the general issue. However, some place in the instructions the jury should be advised that if it should find the sole proximate cause of the accident in which appellee was injured was the negligence of the driver of the car in which she was riding then its verdict should be for the appellant."

Although the court was in error in placing this burden on defendant it could work no prejudice to the plaintiff and consequently she is not in a position to complain thereof.

In relation to the six specifications of negligence which defendant alleged Gladys Naber was guilty of they must each find support in the evidence or otherwise it was prejudicial error for the court to have submitted them for, as stated in Koehn v. City of Hastings, 114 Neb. 106, 206 N. W. 19: "In stating the issues of fact in its charge to the jury, the court should submit to the jury only such issues as are presented by the pleadings and are in controversy, and which find some support in the evidence." We shall therefore examine the record with

reference to each of the specifications of negligence set out in instruction No. 2 to see if there was any evidence adduced to justify their submission.

Specification No. 1 relates to a failure on the part of Gladys Naber to maintain and keep a proper lookout as she approached the intersection. The evidence justifies the submission of this contention for a jury would be justified in finding that she did not.

Specification No. 2 relates to her failure to keep her automobile under control. Considering the circumstances of where and how the accident happened, the speed of her car, and the question of her maintaining a proper lookout, we think a jury would be justified in finding that she did not keep her automobile under control as she approached and entered the intersection.

Specification No. 3 relates partly to specification No. 1 and partly to the speed of her car as it approached and entered the intersection, describing it. We think a jury would be justified, in view of the evidence adduced, in finding she was negligent in entering this intersection at the speed she did and in failing to slacken her speed below 30 miles an hour as she did so.

Specification No. 4 relates to the rate of speed at which she approached and entered the intersection and her inability, because thereof, to control, stop, or turn aside her car in time to avoid the accident. We think the record justifies the submission of this specification. As stated in Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499: "What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances."

And in Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, we said: "The lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined

by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing."

Plaintiff complains primarily of the giving of specification No. 5 because, as she contends, defendant admitted on cross-examination that the Buick entered the intersection first. It is true that defendant so testified but he also testified otherwise and the physical facts, as well as the circumstances disclosed by other evidence adduced, support the latter. We think, in view of this situation, it was a question for the jury to determine as to which car actually entered the intersection first and had the right-of-way and that defendant was not conclusively bound as to that issue by the one statement he made. Nama v. Shada, 150 Neb. 362, 34 N. W. 2d 650; Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518; Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236. We think the correct rule is stated in 169 A. L. R. under the annotation of "Binding effect of party's own unfavorable testimony" under IV b, at page 805, as follows: "* * * where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is in his own testimony, no distinction is drawn as compared with the situation where the curative evidence is from other witnesses. It is still for the trier of fact to decide the issue upon all the evidence." Insofar as our holding in McCleneghan v. Powell, 105 Neb. 306, 180 N. W. 576, is in conflict therewith the same is overruled.

Specification No. 6 is merely a conclusion and, in fact, states the issue of sole proximate cause as pleaded, that is, it states the accident was due entirely to negligent conduct on the part of Gladys Naber and unavoidable insofar as the defendant was concerned. We do not think it should have been given in this form as it really relates itself to no specific conduct on the part of Gladys Naber to which the jury could direct its attention insofar as her conduct being negligent is concerned. As stated in

Parker v. Womack, 37 Cal. 2d 116, 230 P. 2d 823: "'* * * if the accident was inevitable or unavoidable that is the same thing as to say that the defendant was not negligent, or that his negligence, if any, did not cause the accident. In other words, it is to say that the plaintiff has failed in his proof.' (Jolley v. Clemens, 28 Cal. App. 2d 55, 72, 73 (82 P. 2d 51) * * *.)" However, we do not think it was prejudicial in view of our holding as to specifications Nos. 1 and 5, both inclusive.

Plaintiff complains of instruction No. 17 given by the trial court. This instruction relates to the duty of one reaching an intersection and having the right-of-way. It properly states the rule in regard thereto as we have hereinbefore set out the duties under such circumstance. Under the factual situation disclosed by the evidence adduced the jury could find it had relation to either Gladys Naber or defendant and it is so worded. We do not think the fact that the masculine pronoun was used in any way limits the application thereof since the language used is general in its nature.

Plaintiff complains of the court's instruction No. 11 which relates to speed. The complaint is that the instruction does not include all of the elements of statutory provisions with reference thereto and all limitations thereon. We think the instruction covers the situation here presented for the question primarily involved is whether or not driving into the blind intersection at 30 miles an hour was negligence under all the circumstances relating thereto. We have held that: "Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter." Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701. This rule relates specifically as to what facts may be shown as they can be said to bear on the question of speed, that is, what is reasonable

and prudent under the conditions existing at the time. See §§ 39-723 and 39-7,108, R. R. S. 1943. However, the various factors need not be set out in an instruction relating to speed but are sufficiently covered by that part of the instruction referring to "all the circumstances" relating thereto. An instruction on speed should always contain all material applicable limitations and qualifications thereon as contained in statutes or ordinances as they relate to the factual situation with which a jury is confronted. However, those limitations and qualifications contained therein which have no relation to the situation at hand need not be included. See Harding v. Hoffman, *supra*. We think this instruction, under the situation disclosed by the record, adequately covered the limitations and qualifications of the statutory provisions here applicable.

Plaintiff complains of the two provisions of instruction No. 12 which deal with statutory duties of drivers at intersections. In view of our holding that the jury, under the evidence adduced, could have found that the car being driven by either defendant or Gladys Naber was the first to enter the intersection, we think there was nothing wrong with either paragraph of this instruction of which plaintiff is critical. They correctly set forth the statutes that have application here. See §§ 39-728 and 39-751, R. R. S. 1943. It is true that one paragraph of the instruction uses the pronoun "he" whereas here one of the drivers was a woman. However, they are quotes from the statutes and general in their character, and we do not believe the jury could possibly have been mislead thereby. We think, under the evidence adduced, that Gladys Naber, because of the manner in which she was driving, could have been found by the jury to have forfeited her right-of-way if the jury came to the conclusion that she was driving at an unlawful rate of speed. See § 39-7,108, R. R. S. 1943.

Plaintiff complains that on cross-examination of de-

fendant her counsel was improperly limited. This relates specially to objections sustained by the trial court when defendant was asked how far it would take him, while going 40 miles an hour on a gravel road, to bring his car to a stop. While defendant testified he had driven a car for some years, and was entirely familiar therewith, he stated he had never made such a test about which he was here asked to testify. Under this situation any answer he could have given must necessarily have been a guess. We do not think the trial court erred in its discretion by sustaining the objection in view thereof. It is true that in Blado v. Draper, 89 Neb. 787, 132 N. W. 410, we held: "It is not reversible error to permit a witness, who is well skilled in the use of automobiles and is accustomed to handling and driving them, to testify as to the distance in which such a machine may be stopped when going at different rates of speed, where on the trial of a cause that question is or may become material." But that does not necessarily mean that any witness familiar with automobiles can be forced to make a guess in regard thereto when he has not only not testified in regard thereto but has, in fact, testified he has had no experience on which to base his answer. Although a wide latitude should ordinarily be given counsel on cross-examination to bring out any facts bearing upon the cause of the accident, however, such rule must necessarily have some limitation. See, Zimmerman v. Lindblad, 154 Neb. 453, 48 N. W. 2d 415; Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381.

In view of what we have said and held herein we think the trial court erred in setting aside the jury's verdict and granting the plaintiff a new trial. We therefore set aside the judgment of the trial court doing so and remand the cause to it with directions to reinstate the verdict and enter a judgment thereon for defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

BARBARA BEZDEK, APPELLEE, V. KENNETH PATRICK, APPELLANT.

82 N. W. 2d 583

Filed April 19, 1957. No. 34113.

1. **Trial.** If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the 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. The same rule applies to a motion for judgment notwithstanding the verdict.
2. **Automobiles: Highways.** A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection.
3. ———: ———. The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence.
4. ———: ———. Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury.
5. ———: ———. A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored motor vehicle to exercise ordinary care to avoid an accident.
6. ———: ———. A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it.
7. ———: ———. A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge,

he is entitled to govern his actions in accordance with such assumption.

8. ———: ———. A motorist should have his motor vehicle under such control that upon entering an intersection he can avoid a collision with another vehicle which is operated with due care.
9. ———: ———. The right of a motorist on an arterial highway to assume that a motor vehicle on a nonfavored intersecting street will be brought to a stop before entering the intersection does not permit him to claim the right-of-way when too far from the intersection to be entitled thereto.
10. **Trial.** Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside.
11. **Appeal and Error.** If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon.
12. **Damages: Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.
13. **Damages: Appeal and Error.** The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.
14. **Appeal and Error.** The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.

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

Crawford, Garvey, Comstock & Nye, for appellant.

Matthews, Kelley & Delehant and *Martin A. Cannon, Jr.*, for appellee.

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

MESSMORE, J.

This is an action at law brought by Barbara Bezdek as plaintiff in the district court for Douglas County to

recover damages for personal injuries sustained by her by virtue of a collision between an automobile driven by her husband, Joe Bezdek, in which she was riding as a passenger, and a truck being driven by Kenneth Patrick, defendant. The case was tried to a jury resulting in a verdict in favor of the plaintiff in the amount of $10,000. The defendant filed a motion for new trial and a motion for judgment notwithstanding the verdict. These motions were overruled by the trial court. From the overruling of the same, the defendant appeals.

The plaintiff, in her petition, charged the defendant with negligence which she claims directly and proximately caused the accident resulting in the injuries she sustained. The negligence charged is as follows: In failing and neglecting to keep a proper lookout for other vehicular traffic and in particular for the vehicle in which the plaintiff was riding; in failing to keep his truck under proper control; in failing and neglecting to grant the right-of-way to plaintiff's driver; in driving his truck at a high, dangerous, negligent, and unlawful rate of speed under the circumstances, to wit 60 miles an hour; and in failing to apply the brakes on his truck in time to avoid a collision when he had ample opportunity to do so.

The defendant's answer alleged that the sole and proximate cause of the collision and the injuries resulting therefrom to the plaintiff, if any, was the negligence of the driver of the car in which the plaintiff was riding immediately before and at the time of the collison.

For convenience we will refer to the parties as designated in the district court, to the car the plaintiff was riding in as the Bezdek car, and on occasion to the parties by their given names.

The record discloses that L Street is a through street and State Highway No. 275 at the place where the collision occurred. As L Street extends west from the boundary of Sixtieth Street at the intersection it is a two-lane highway 20 feet wide, and proceeding east

from the west boundary of Sixtieth Street it is a four-lane highway 42 feet wide. As L Street extends east from the intersection it has a grade of approximately 6.6 percent. West of the intersection it has a gradual decline ranging from a grade of 5.6 to 4.7 percent, and then flattens out as it proceeds west. In approaching this intersection from the west there is a sign stating: "Reduced Speed Zone Congested Area," up to which point the usual speed rates prevail, that is, 60 miles an hour in daylight, which would be in effect at the time this accident happened. Continuing east toward the intersection there is a sign indicating the speed limit to be 45 miles an hour.

Sixtieth Street is a two-lane street north and south of the intersection 18 feet wide, with a slight slope in both directions. There is a stop sign facing southbound traffic on the west side of Sixtieth Street 44 feet north of the edge of the paving on L Street. On the northwest corner of the intersection is a filling station referred to in the evidence as Tex's Service Station, which is of concrete block construction.

Joe Bezdek testified that he owned a two-door Studebaker automobile. On Sunday, August 1, 1954, which was a nice day, he and his wife Barbara drove to the Bohemian National Cemetery. Barbara was sitting to his right in the front seat of the automobile being driven by this witness. After leaving the cemetery they arrived at Sixtieth Street and proceeded south. He stopped the car about 2 feet to the north of the stop sign. The service station to his right obstructed his view to the west. He put his car in low gear and proceeded about 10 feet to the south of the stop sign. Looking to the west, he saw a truck about 300 feet away proceeding east on L Street. He started to step on the gas and thought he had plenty of time to cross the intersection as he was going to proceed straight south on Sixtieth Street. His car did not pick up speed. He continued to watch the truck and it continued on east without slowing

down or stopping but maintaining a rate of speed which he estimated to be 60 miles an hour. His car was in the intersection when the truck struck it on the right side with its left bumper, behind the right front wheel. The collision occurred in the intersection. He testified that he did not know what happened after the impact. He fell out of the car, slid on the cement on his hands and face, and became unconscious. He was lying in the street on his face, he thought, about 20 feet from where the accident occurred. He regained consciousness in a short time and saw his wife sitting up on the pavement about 20 feet from him. Later he saw a patrolman and some ladies from the service station who helped him and his wife. They were taken to the County Hospital. He further testified that as the truck came toward him, he stepped on the brake. He kept looking at the truck, and thought the driver of the truck would reduce its speed or stop, but he did not. The witness was proceeding across the intersection at a speed of from 7 to 10 miles an hour. He had been over Sixtieth Street once that day and apparently only once on a prior occasion. He thought there was a stop sign on L Street and that the truck would have to stop. The front of his car was beyond the north curbline of L Street. He at no time saw any car ahead of him. He watched the truck right up to the time of the collision. The accident occurred at approximately 5 p.m.

Joe Bezdek, Jr., testified that a day or so after the accident occurred he went to the scene, and that there was a square white sign 250 feet from the edge of the intersection along L Street stating the speed limit of 60 miles an hour by day and 50 miles an hour by night. A distance of 250 feet from this sign there was a bridge.

Barbara Bezdek testified that at the time of the accident she was 59 years old. As they drove up to the intersection of Sixtieth and L Streets, there was a stop sign, and her husband stopped the car. The service station to her right blocked her view to the west. She

looked both to the east and to the west, then Joe started the car, and when it was a few feet south of the stop sign she looked to the west and saw a big truck. She could not tell how far it was away from them, but it was between the big white sign and the bridge. She did not know what happened when the truck collided with their car.

The defendant, Kenneth Patrick, testified that he owned a 1952 model Ford truck. It was about 8 feet wide and 25 feet in length, equipped with what he called a "grain box." The weight of the truck was about 11,000 pounds. At the time of the collision he had 14 head of cattle in the truck. They weighed approximately 10,000 pounds. The truck was equipped with four speeds forward. He operated his own truck, and had for 15 years, primarily to haul livestock to the market in South Omaha. He lived at Genoa, and averaged about three trips a week to Omaha. On Sunday, August 1, 1954, he was hauling cattle to Omaha. He left Genoa at approximately 1 p.m., and got onto State Highway No. 275 at Fremont, the route he always took to South Omaha. He drove at a speed not in excess of 45 miles an hour. He further testified that Joe Pencak, the owner of the cattle he was transporting to market, was riding with him. He was familiar with the intersection of Sixtieth and L Streets, and there was no stop sign as you approach Sixtieth Street from the west on L Street. When he was proceeding east on L Street and approximately 75 to 100 feet from the intersection, a car came from the north and turned east on L Street. He was driving his truck on the right, or south traffic lane and had entered the intersection with the front wheels of his truck about even with the center line of the intersection when the impact took place. The instant he saw the Bezdek car, he attempted to bring the truck to a stop and endeavored to avoid an accident. He applied the brakes, swerved the truck to the right, or south, and about that time the Bezdek car and his truck collided.

The left front fender of the truck was alongside the right front wheel of the Bezdek car. It appeared to the defendant that Bezdek was attempting to make a turn to the left or east. He applied the brakes about the time the Bezdek car and his truck collided. The impact and the setting of the brakes threw the cattle against the front of the truck box with the result that glass broke and flew into the cab, and about all he could do at that time was straighten the truck up, release the brakes, and let the truck come to a stop. He testified that he went about 200 feet before the truck came to a stop. The Bezdek car glanced off to the north side of the highway. He stayed with the truck, and was able to drive it home. He maintained a rate of speed of 40 miles an hour at the time he entered the intersection, and generally drove at a speed of 45 miles an hour.

On cross-examination he testified that the hill on L Street starts going up before arriving at Sixtieth Street, and is a steep hill; that a driver going south on Sixtieth Street would have his view to the west impaired by the service station; and that he knew that traffic could be coming out from behind the service station. He noticed the sign "Congested Area, Reduce Speed." When he reached the sign, he was proceeding at 40 miles an hour. He did not slow down as he passed the sign, nor until the time of the impact. He was just in the intersection when he saw the Bezdek car, but did not say how far into the intersection. He saw the Bezdek car just an instant before the impact, and at that time the Bezdek car and his truck were practically together. He believed there were no trees or shrubs outside the service station. He did not know exactly where the Bezdek car and his truck came together.

A Nebraska safety patrolman arrived at the scene of the accident just prior to 5:20 p.m. He testified that it was cloudy, the ground was dry, and there was daylight visibility. He observed cars at the scene of the accident, one the Bezdek car and the other the defendant's truck.

The marshal of the village of Ralston and this patrolman took some measurements. The right side of the Bezdek car was 53 feet east and 11 feet 5 inches north of the center of the intersection. The rear end of the Bezdek car pointed west. With reference to the defendant's truck, it was 207 feet east of the center of the intersection, and the right side of the truck was 11 feet 7 inches north of the south edge of L Street. In the intersection he found debris and dirt 7 feet 5 inches south and 3 feet 3 inches west of the center of the intersection. When he arrived at the scene of the accident, Mr. and Mrs. Bezdek were lying on the ground in the vicinity of the intersection.

On cross-examination he testified that west of Sixtieth Street on L Street there was a 45-mile-an-hour speed sign; and that the speed would be 60 miles an hour by day and 50 miles an hour by night west of that area. The stop sign facing L Street north on Sixtieth Street is for southbound traffic and is in front of the Tex's Service Station. As a practical matter, one approaching that stop sign and stopping even with it and looking to the west would be looking into the service station. A person would have to go beyond the service station before he could have a clear view to the west.

The defendant contends that the trial court committed reversible error in the following respects: (1) The trial court erred in including in its instruction No. 10 to the jury the following words: "but, having complied with the rule to stop at a point where he can reasonably see," for the reason that there is no evidence in the record to support such statement; (2) the trial court erred in including in allegation No. 3 of its instruction No. 1 to the jury the following words: "In failing to grant the right-of-way to the plaintiff," for the reason that there is no evidence in the record to support the implication that the plaintiff had the right-of-way; (3) the trial court erred in failing to sustain the defendant's motion for a directed verdict at the end of the plaintiff's

evidence, or at the end of all of the evidence; and (4) the trial court erred in failing to sustain the defendant's motion for new trial or, in the alternative, defendant's motion for judgment notwithstanding the verdict.

Before determining the assignments of error we call attention to the following rule which is applicable: "If a motion for a directed verdict is made at the close of the plaintiff's evidence and again at the close of all the evidence, or in the alternative to dismiss plaintiff's case, to test the sufficiency of the 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." Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. The same rule applies to a motion for judgment notwithstanding the verdict. Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367.

With reference to defendant's assignment of error No. 1, the defendant argues that Joe Bezdek, the driver of the car in which the plaintiff was riding, stopped 2 feet north of the stop sign on Sixtieth Street; that there was a filling station at the northwest corner of the intersection of Sixtieth and L Streets; that this stop sign was 10 feet north of the south line of the filling station and at that point where Joe Bezdek stopped his car he would be unable to see traffic on L Street approaching the intersection from the west; and that in emerging south from the stop sign Joe Bezdek, in driving his car, disregarded the traffic on the highway and under the circumstances the trial court's instruction was too broad and constituted reversible error.

Instruction No. 10 given by the trial court is as follows: "The statute requires one to come to a full stop as near the right-of-way line as possible before driving onto the state highway and to give the right-of-way to vehicles on such highway, regardless of direction, but does not require a driver to remain in that position until

the highway is entirely clear of traffic, but, having complied with the rule to stop at a point where he can reasonably see, if it appears to him in the exercise of ordinary care that any traffic is so far away and proceeding at such as (sic) speed that he could safely cross, he would not be negligent if he so proceeds and exercised ordinary care in doing so."

"A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. See, also, Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701.

"The violation of traffic regulations concerning stop signs, speed, the manner of operating a motor vehicle on the highway, and the like is not negligence as a matter of law of any kind or degree, but it is a fact to be considered with the other evidence in the case in deciding an issue of negligence." Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593.

The record shows that Joe Bezdek, after arriving at the stop sign, put his car into low gear and proceeded at a speed of 7 to 10 miles an hour, and when about 10 or 11 feet south of the stop sign he looked to the west and saw the defendant's truck at a distance of 300 feet proceeding east toward the intersection. At that time the Bezdek car was approximately 34 feet from the north edge of the intersection, the stop sign being approximately 44 feet from the north edge of the intersection. He thought that he had plenty of time to cross the intersection to proceed directly south on Sixtieth Street. He stepped on the accelerator, but the car did not pick up speed. He continued to watch the defendant's truck which did not slow down or stop, but maintained the same speed as at the time he first saw it. The defend-

ant's truck struck the right side of the Bezdek car and the right front wheel. The defendant testified that he did not observe the Bezdek car until just an instant before the collision occurred.

As said in Borcherding v. Eklund, *supra*: "Where the driver of a car approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury." See, also, Paddack v. Patrick, *supra*.

We find no merit to the first assignment of error.

With reference to the defendant's second assignment of error, the defendant states that it was stipulated that the defendant was traveling on State Highway No. 275. Defendant argues that a stop sign faced traffic for a driver proceeding south on Sixtieth Street before entering the intersection; and that negligence of the plaintiff's driver was the direct and proximate cause of the collision and, this being true, no recovery could be had in favor of the plaintiff. In addition, the defendant argues that Joe Bezdek thought, or believed, there was a stop sign on L Street which would require the defendant driver to stop his truck before entering the intersection. Therefore, in connection with the argument as previously set out, there could be no recovery in behalf of the plaintiff.

We believe the following to be applicable: "A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident." Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491.

"A person traveling a favored street protected by a

stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it.

"A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highways will use them in a lawful manner, and until he has such warning, notice, or knowledge, he is entitled to govern his actions in accordance with such assumption." Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507. See, also, Paddack v. Patrick, *supra.*

"An automobile driver should have his car under such control that upon entering an intersection he can avoid a collision with another car which is operated with due care." Woracek v. Schuehart, 130 Neb. 260, 264 N. W. 670.

"The right of a motorist on an arterial highway to assume that a motor-cycle (here, a car) on a non-favored intersecting street will be brought to a stop before entering the intersection does not permit him to * * * claim the right of way when too far from the intersection to be entitled thereto." McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321.

We believe, as shown by the evidence and the foregoing authorities, that the negligence of the driver of the car in which the plaintiff was riding and the negligence of the defendant were questions for the jury to determine.

As to the instructions complained of, the following is applicable.

Instructions should be considered together in order that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. If an examination of all the instructions given by the trial court discloses that they fairly and correctly state the law applicable under the evidence, error cannot be predicated thereon. See, Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217; Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293;

Griess v. Borchers, 161 Neb. 217, 72 N. W. 2d 820.

The defendant's second assignment of error cannot be sustained.

The defendant contends that the verdict is excessive and that the only element of damage was pain and suffering.

The record discloses that after the accident occurred both the plaintiff and her husband were taken to the County Hospital in an ambulance, where they were placed in separate rooms. After a few hours they were removed to their home and the plaintiff went to bed. She testified that she was confined to bed for 12 or 13 weeks; that during that time she suffered great pain and anguish; that her right leg was badly swollen as well as her right ankle; and that she was unable to do any of her housework.

A niece of the plaintiff testified that she and her husband went to the hospital and took the plaintiff home on August 1, 1954; that she stayed with her, alternating with the plaintiff's son and his wife, both day and night for a period of approximately 5 or 6 weeks; and that they applied hot and cold packs to the plaintiff's injuries. During all of that time the plaintiff was confined to her bed. After that time, neighbors took over and cared for the plaintiff. The plaintiff's right leg was swollen, and at times the swelling would increase. During the time this witness was there, the plaintiff was unable to get out of bed for any purpose.

It also appears from the record that Dr. Christlieb attended the plaintiff immediately after the accident for a short period of time, since her regular physician was on vacation. Upon his return, Dr. Srb saw the plaintiff at her home. He testified that he treated the plaintiff for the injuries she received in the accident of August 1, 1954; and that she had a contusion of her whole right leg which was black and blue in places. He found no fracture, nor was there any fracture at any time. She was put to bed and ordered to stay there. She

remained in bed for several weeks. He described her condition as being a serious ecchymosis, with bruises and blood clots up and down her right leg, above her ankle. On August 27, 1954, he opened a hematoma, which is a blood tumor where the blood, having escaped from veins or arteries, coagulates in the tissues causing pain. To relieve the pain, he performed this operation. On September 21, 1954, he incised another hematoma to give her relief from pain. He continued to see her and treat her until the time of trial. She had an edema of her ankle, which is a swelling, disclosing interference with the circulation. He examined her shortly before the trial and testified that if she remained in bed the swelling would lessen or go down. In a normal case of this type, the swelling would go down in a year or less, but in this particular case the swelling was still present and it had been more than a year since the accident. He did not feel that the swelling would leave or that there would be any change in her condition from that time on. On cross-examination he testified to the various times he saw and treated the plaintiff; that she was not carried into his office, but walked; and that at the time of trial she had a swelling of her right ankle.

A doctor who made an examination of the plaintiff just prior to the trial testified that in the plaintiff's right leg there was a disturbance in the return circulation, or in the circulation proper, which enlarged and dilated the veins and created a swelling around her ankle; that the fluid elements of the blood get into the tissues by increased pressure in the smaller blood vessels; that such damage often results from trauma such as a blow; and that the injury the plaintiff had at that time was permanent. In his opinion, considering the time that had elapsed after the accident and the disability still present, the injury would remain as it was, and constitute a permanent injury.

The defendant's doctor, who examined the plaintiff thoroughly, testified that she was normal in all respects

except that her right leg exhibited a grade 2 edema. Grade 1 would be the lowest, and grade 4 the most serious. She walked with a peculiar gait. The doctor concluded that from the history it would be right to presume that the injury to the right lower extremity produced an acute thrombophlebitis. As a result, she had a chronic edema of the right lower extremity resulting from a venous or lymphatic obstruction, or both.

"A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law." Remmenga v. Selk, 152 Neb. 625, 42 N. W. 2d 186.

" 'The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.' " Bresley v. O'Connor Inc., 163 Neb. 565, 80 N. W. 2d 711. See, also, Peacock v. J. L. Brandeis & Sons, 157 Neb. 514, 60 N. W. 2d 643; Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627.

"The verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong." Griess v. Borchers, *supra*. See also, Granger v. Byrne, *supra*.

We find that the verdict and judgment were sustained by competent evidence and that there was no error in the record prejudicial to the rights of the defendant, therefore, the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

ELLA L. ROBINSON, APPELLEE, V. GEORGE L. ROBINSON, APPELLANT.
82 N. W. 2d 550

Filed April 19, 1957. No. 34124.

1. **Divorce.** A decree of separate maintenance may be granted only when the evidence brings the case within the scope of the statute providing for such relief.
2. ———. A decree of separate maintenance may not be granted on the uncorroborated declarations or admissions of the parties to the case.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded with directions.*

George B. Boland and *A. J. Walen,* for appellant.

Burbridge & Burbridge, for appellee.

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

CARTER, J.

The plaintiff, Ella L. Robinson, filed this suit for an absolute divorce against the defendant, George L. Robinson, on the ground of extreme cruelty. The defendant denied plaintiff's charge of misconduct and prayed for a dismissal of her petition. The trial court denied the plaintiff an absolute divorce and granted her a decree of separate maintenance. The defendant has appealed.

The parties were married on October 6, 1932. Plaintiff is 56 years of age and had two sons by a previous marriage. Defendant is 60 years of age and had three children by a previous marriage. No children were born to the parties to this suit. The children of the plaintiff lived in the home most of the time until they became self-supporting. The children of the defendant lived with their mother and were never in the home of these parties. The evidence is clear that the children of the parties were never a cause of dissension and were not a contributing factor to the divorce proceeding. The

record shows that the parents of the plaintiff lived with the parties during the winter for 12 years or more and since 1953 have lived with them permanently. The evidence is undisputed that defendant had a very high regard for plaintiff's parents and approved of their living in the home. The care and support of plaintiff's parents in the home in no manner contributed to the marital difficulties of the parties.

At the time of the marriage defendant had approximately $8,500 and two automobiles. After spending the first years after the marriage as a traveling salesman, defendant embarked in the construction business. In 1941 he went through bankruptcy when he owed about $4,000. Subsequent to receiving his discharge in bankruptcy he paid off this indebtedness. Commencing in 1947 defendant began to accumulate considerable property. He engaged in the manufacture of metal corner bead for dry wall construction and metal trim for doors and windows. The business became very profitable. He had also become engaged in the construction and sale of residence properties. While there is great conflict in the evidence as to his net worth at the time the divorce was commenced, the record indicates that it was at least $200,000. In view of the result at which we arrive, we shall not determine the extent of his holdings with any degree of certainty.

As grounds for a divorce the plaintiff alleges that on August 25, 1955, defendant threatened her life, that he became moody and used vile and profane language toward the plaintiff and guests visiting in the home, and that he would absent himself from the home without explanation. She asserts that this caused her to become nervous and in ill health, and that his acts have completely destroyed the objects of matrimony. The defendant denies any misconduct on his part. The record does show that plaintiff lost weight and became nervous. The evidence fails completely to corroborate her statements as to any misconduct on the part of the defendant

and the trial court was in all respects correct in denying her an absolute divorce.

The defendant asserts that the evidence is insufficient to support a decree for separate maintenance, attorney's fees, and costs. The determination of this issue requires a further consideration of the evidence.

The plaintiff contends that defendant once threatened her life. The defendant denies it. The circumstances were as follows: Plaintiff says that defendant was driving her to a garage to get her automobile which was there for repairs. She says he started to condemn her daughter-in-law and she told him to talk about his daughter-in-law and not hers. She states that he swore and said: "Some of these days I am going to kill you." The defendant says that he complained to the plaintiff about her daughter-in-law turning her three little boys against him and "that is going to kill me." Plaintiff asked why he did not bring up his own daughter-in-law. At that time they arrived at the garage and defendant said: "You had better get out right now." There is no corroboration of this incident in the record.

Plaintiff complains about the defendant going to California in January 1956 and refusing to take her with him. He says he offered to take her if she would get a suitable person to care for her parents. She wanted her brother to come into the home for this purpose. Defendant refused to permit this, but was agreeable to employing a practical nurse. Plaintiff refused to do this, and defendant stated she would have to remain and do it herself. The evidence shows that defendant left more than $1,000 in the bank subject to her check when he left. She drew out this money and used some of it for a plane trip to Arizona to visit her son. Upon her return she filed this suit for a divorce.

The plaintiff complains that defendant took $50,500 with him on his trip to California without informing her. The defendant states that he expected to set up another manufacturing plant or establish two ware-

houses on the west coast to further his business interests. He testifies that although he had an established credit, a substantial bank account permitted him to operate more expeditiously. Upon his return he immediately told the plaintiff where the money was deposited and offered to show her his bank book. It is true that he did not tell her his intentions before he left. Plaintiff appears to have the notion that the removal of this money out of the jurisdiction was a violation of his marital obligations. There is no merit to this contention. She complains also that defendant did not communicate with her during this 5-week trip. The evidence shows the defendant did communicate with his office in Omaha and requested plaintiff's son to advise his mother where he was. The evidence shows that plaintiff made no effort to communicate with defendant, even though she knew where he was. This seems to fit the pattern that they had previously followed over the years. We find nothing in this evidence that sustains plaintiff's allegations of extreme cruelty.

The evidence shows for the first 23 years of their married life these parties got along exceptionally well. Plaintiff worked as a beauty shop operator when times were hard. Defendant praises her as a housekeeper and cook. Plaintiff kept house without help and appears to have been frugal in her handling of money. The defendant built a new home costing in excess of $50,000, which they occupied in 1954. He furnished it with the best of furniture and household equipment. He bought plaintiff a new automobile costing in excess of $3,500 within a year previous to the commencement of their marital troubles. He bought her presents on her birthdays and at Christmas time. He treated her children the same as his own. He helped her children with gifts and loans, the same as his own. He carried most of his real estate in joint tenancy with the plaintiff, at her insistence. She always had an adequate checking account. The defendant contends that plaintiff lost her

affection for him and became cool toward his advances and efforts at a reconciliation of their marital troubles. The plaintiff contends that it was the defendant who brought about their apparent differences. There is no evidence corroborating the statements of either. It is evident, however, that it is the plaintiff and not the defendant who wants a divorce and a division of the property. The most favorable view of the evidence reveals little, if any, corroboration of the misconduct attributed to the defendant. The decree for separate maintenance is not supported by the evidence.

It is clear from the evidence in this record that these parties lived together for 23 years or more as a happy and contented married couple. The most that either testify to is that a coolness developed between them. The evidence of neighbors and friends, considered in its most favorable light, is that they did not appear to talk to each other as much as formerly and that a tension appeared to exist; some of whom testify that they realize it only in retrospect. A dissolution of a marriage by divorce or separate maintenance cannot be sustained on such flimsy grounds. A marriage contract is one having a great public interest and it cannot be dissolved except when all conditions of controlling statutes are met. The parties to a marriage assume duties and obligations of a most solemn character. They may not be put aside at the will of the parties as in an ordinary partnership. A divorce or legal separation must be grounded on a legal fault within the grounds enumerated in the statutes and proved in the manner therein provided. One party may not create the grounds that will sustain him or her in maintaining such a suit. It is not the province of the courts to grant such decrees for sociological reasons. The policy of the state relative to marriage is fixed by the Legislature. It is not for this court to do what it deems best for the parties, The only relief that may be granted is that provided

by statute when the evidence is sufficient to bring the case within its purview.

The evidence in this record does not show a semblance of a cause of action for divorce or separate maintenance. It would be manifestly unjust to require the husband in such a situation to divide his property, jeopardize his business, and destroy his source of income on such trivial grounds. One party to a marriage is not required to suffer detriment because the other, through whimsy, fancied wrongs, or petty grievances, elects to violate the marital obligation. The evidence shows the marriage to have been a happy one during the periods that the parties were suffering economic reverses. When defendant's business became successful and the parties began to accumulate property and money in substantial amounts, the demands of the wife became progressively greater. The defendant appears to have complied with her wishes in taking real estate in joint tenancy and in maintaining joint bank accounts to the extent possible. Now she wants half of the property and a termination of the marriage relation, when legal fault on the part of the husband was not shown. So long as the defendant fulfills his marital obligations, she is not entitled to any such relief. The following cases support this conclusion: Brown v. Brown, 130 Neb. 487, 265 N. W. 556; Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126; Schwarting v. Schwarting, 158 Neb. 99, 62 N. W. 2d 315; Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321.

For the reasons stated, the judgment of the district court awarding separate maintenance, attorney's fees, and costs, is reversed and the cause remanded with directions to dismiss the case and tax the costs to the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

R. B. LEACH, APPELLANT, V. CLARENCE L. TREBER ET AL., APPELLEES.

82 N. W. 2d 544

Filed April 19, 1957. No. 34140.

1. **Trial.** If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts.
2. **Bills and Notes.** Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon, to have become a party thereto for value.
3. **Bills and Notes: Pleading.** In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence.
4. **Bills and Notes.** A promissory note is supported by a valid consideration if the transaction confers a benefit upon the promisor or causes a detriment to the promisee, and either is a valid consideration which will support a contract.
5. **Bills and Notes: Contracts.** In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
6. **Contracts.** Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement.
7. ———. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
8. **Witnesses.** As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded.*

Richards, Yost & Schafersman, for appellant.

Richard A. Dier, for appellees.

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

CHAPPELL, J.

Plaintiff, R. B. Leach, brought this action against defendants, Clarence L. Treber and Donna Treber, seeking recovery upon a certain unpaid promissory note allegedly executed and delivered to him for valuable consideration by defendants as C. L. Treber and Mrs. C. L. Treber. The instrument, dated June 9, 1955, and due 180 days after date, on December 9, 1955, was for the principal sum of $2,500 with interest at six percent until due, and nine percent from maturity until paid. Hereinafter, Clarence L. Treber will be called defendant and Donna Treber will be designated as Mrs. C. L. Treber. When speaking of them both, they will be called defendants.

Defendants' answers admitted execution and delivery of the note on or about the date thereof, but alleged that it was without any legal consideration which could give it validity and make it collectible, therefore nothing was due thereon. Plaintiff's reply was a general denial.

Jury trial was waived, and after trial to the court it rendered judgment which found for defendants and against plaintiff, and dismissed plaintiff's petition at plaintiff's cost. Thereafter, plaintiff's motion for new trial was overruled, and he appealed, assigning, insofar as important here, that the judgment was contrary to the evidence and law. We sustain the assignment. Concededly, the sole question presented is whether or not there was a legal consideration for the note. We conclude that there was.

It is now elementary that findings of a court in a law action in which a jury is waived have the effect of the verdict of a jury and judgment thereon will not be disturbed unless clearly wrong. Also, in testing the sufficiency of the evidence to support a verdict and judgment, 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 be reasonably deduced therefrom. On the other hand, as held in Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396: "As a general rule a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable.

"A party who offers the evidence of a witness cannot subsequently object that it should not have been received or that it is insufficient to sustain a judgment based thereon.

"But where such evidence is contradicted, either expressly or by inference, by evidence which would justify the trier of facts in arriving at a different conclusion, the party offering it is not ordinarily concluded thereby."

Also, as concluded in Farmers & Merchants State Bank v. Kuhn, 125 Neb. 457, 250 N. W. 652, if from the undisputed facts different minds may not honestly reach different conclusions or draw different inferences without reasoning irrationally, the trial court should render judgment consistent with the facts. Further, as stated in that opinion: "* * * to constitute a consideration for the giving of a promissory note it is ordinarily unnecessary that any benefit result to the promisor, it being sufficient if the transaction results in trouble, injury, inconvenience, prejudice or detriment to the promisee; * * *." We also held therein that: "Good consideration for a promissory note may consist of money received by the maker or of money or property lent, advanced or returned by said payee to a third person at the instance of said maker and with her knowledge and consent." See, also, Vybiral v. Maly, 123 Neb. 436, 243 N. W. 268.

In Plaza Hotel Co. v. Hotel Stratton, 132 Neb. 396, 272 N. W. 224, we held: "In an action on a promissory note, the burden is on the defendant to establish the defense of want of consideration.

"It is not essential to a valid consideration that it should move to the promisor. It is sufficient if it causes a loss, disadvantage, or imposes a legal obligation upon the promisee." See, also, Johnson v. Hansen, 139 Neb. 428, 297 N. W. 643.

As stated in Plumbly v. Harvard State Bank, 133 Neb. 630, 276 N. W. 385: "The burden of proving want of consideration was upon plaintiff, the party alleging it. Farmers & Merchants State Bank v. Kuhn, 125 Neb. 457, 250 N. W. 652; Neslund v. Kinnan, 129 Neb. 279, 261 N. W. 358. 'Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.' Comp. St. 1929, sec. 62-201. 'Value is any consideration sufficient to support a simple contract.' Comp. St. 1929, sec. 62-202. See, also, Cozad State Bank v. McLaughlin, 128 Neb. 87, 258 N. W. 36. 'There are two kinds of consideration,—that which confers a benefit upon the promisor and that which causes a detriment to the promisee. Either is a valid consideration which will support a contract.' United States Fidelity & Guaranty Co. v. Curry, 126 Neb. 705, 254 N. W. 430." See, also, In re Estate of Tynan, 142 Neb. 671, 7 N. W. 2d 628; Petersen v. Dethlefs, 139 Neb. 572, 298 N. W. 155.

As held in Elson & Co. v. Beselin & Son, 116 Neb. 729, 218 N. W. 753, and reaffirmed in Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N. W. 2d 841: "Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement; * * *."

In Scottsbluff Nat. Bank v. Blue J Feeds, Inc., 156 Neb. 65, 54 N. W. 2d 392, we held that: "A negotiable instrument as between the parties requires a consideration the same as any other contract, and when there is no consideration, * * * such absence of consideration is a defense to such instruments.

"In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them."

As said in Restatement, Contracts, § 90, p. 110: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

Fender v. McCain, 144 Neb. 58, 12 N. W. 2d 541, and other authorities relied upon by defendants are entirely distinguishable upon the facts hereinafter recited and law applicable thereto.

In the light of the afore-cited rules, we have examined the record. In that connection defendants assumed the burden of establishing that there was no legal consideration for the note. In doing so, they called plaintiff as their own witness, thus vouched for his credibility and were bound by his material and relevant testimony because it was not contradicted or shown to be unreliable either expressly or by inference except by the mere conclusion of defendant who voluntarily, without any excessiveness, fraud, or imposition being shown by competent evidence executed and delivered the note, but now simply says that: "I received nothing for the note. * * * Well, I had no reason for signing the note. It was a stupid mistake."

The record discloses that the note was concededly executed on June 9, 1955, by defendant in a little cafe in Kearney. Plaintiff furnished the printed form thereof and concededly defendant in his own handwriting appropriately completed every blank space thereon and signed same. As agreed, he then took the note home in order to obtain Mrs. C. L. Treber's signature. There she signed it at her husband's request without asking or knowing what it was for but assuming that it was in connection with defendant's business. The next day,

in compliance with an agreement hereinafter set forth, defendant delivered the note to plaintiff, the payee therein. It was received in evidence without objection.

Evidence adduced by defendant discloses that plaintiff had a corporation known as "Convair Coach Corporation" which had been producing and selling house trailers in Fremont. Defendant, a graduate of the University of Wyoming as an architectural engineer, was employed in February 1953, when he was 26 year old, as production manager and later as purchasing agent for the corporation. His salary until May was $85 a week plus a production bonus of $10 a trailer. Thereafter it was $100 a week plus such a production bonus. That corporation had originally issued $7,000 of stock at par value of $100, but as plaintiff advanced more money to the corporation, $15,000 of stock therein was eventually issued, all of which was owned by plaintiff until in May 1954. That corporation appears to have been in good financial condition during 1953 and 1954, with its stock worth considerably more than $100 a share. On May 11, 1954, defendant purchased five shares of such stock from plaintiff for $2,000, and on December 23, 1954, plaintiff, in appreciation of defendant's efficient services, gave him two more shares. Thus plaintiff and defendants were sole stockholders, and each drew salaries therefrom.

During that period plaintiff conceived the invention of a hot water heater system for trailers. Subsequently, a corporation called the Weatherall System, Inc., was organized for the production and marketing of that product, and both plaintiff and defendant while employed by their Convair Coach Corporation devoted several months of their time to its development. A patent for the invention was ultimately granted. However, while this was being done by plaintiff and defendant, their Convair Coach Corporation became financially involved and ultimately insolvent, with a $12,000 first mortgage on its equipment, and about $24,000 of un-

secured open accounts owing and unpaid by it. In that situation, plaintiff and defendant started west, planning thereby at some point to arrange for production and marketing of their hot water heater belonging to Weatherall System, Inc. In doing so they stopped at Kearney and there, through the Chamber of Commerce, interested two financially responsible men in that project. However, such project did not develop, but at Kearney they did start a new corporation called Convair Mobile Homes, Inc., with which to produce and market trailers. Thus, through plaintiff's efforts defendant was given the position of director, production manager, and engineer for that corporation at a salary of $125 a week together with an interest of 75 shares of stock in such corporation if defendant voluntarily stayed with the corporation as such employee for 3 years. The agreement with regard thereto, executed by plaintiff, defendant, and the two Kearney men aforesaid on May 10, 1955, appears in the record. That agreement provided that plaintiff was to pay to the corporation $10,000 within 120 days after articles of incorporation were perfected, and devote his time and efforts to establish a production line, arrange for supplies, and set up a sales organization for the corporation, for which he was to receive 150 shares of stock in that corporation. Plaintiff devoted his services to that corporation for about 3 months but was unable to make the $10,000 payment when due, so the other two men, who under the agreement of May 10, 1955, were to each provide $7,500 cash and receive 75 shares of stock in that corporation, bought plaintiff out, and defendant was made president of that corporation.

In the meantime, plaintiff and defendant had talked about how much stock defendant should receive in the Weatherall System, Inc., as compensation for the extra engineering work he had performed in perfecting the invention, but no amount therefor had been definitely agreed upon. However, on July 19, 1955, following the

execution of defendants' note on June 9, 1955, defendant was issued 100 shares of original stock in Weatherall System, Inc. Certificate therefor was signed by plaintiff as president and defendant as secretary of that corporation.

After discovering that their Convair Coach Corporation had become insolvent as aforesaid, with suits threatened against the corporation, and that it was pretty hopeless to recover, pay its debts, and keep the corporation operating successfully, plaintiff and defendant discussed that situation on several occasions. Each of them agreed at all times that as persons of character that corporation's unsecured debts, created by them as its sole stockholders, should be paid by them as a moral obligation in order to successfully raise some money and promote their business interests in Kearney. In January 1955 they sent out a letter to all creditors indicating their intention, without binding themselves personally, to see that the corporation eventually would pay its obligations. They thereafter decided that after the first mortgage was satisfied, they would sell those assets remaining and pay unsecured creditors the proceeds therefrom as far as they would reach. That was done but there wasn't much left to pay such creditors. Confronted with that situation, and desiring to successfully get back into business with Convair Mobile Homes, Inc., in Kearney and make some money, plaintiff and defendant met in Kearney on June 9, 1955, where plaintiff was then employed by Convair Mobile Homes, Inc., at $100 a week and defendant was employed by that corporation at $125 a week. After having been together there during the day discussing the problem, they met in a little cafe in the evening. There one or the other or both of them figured out the percentages or shares of the amount of unsecured obligations owing by the Convair Coach Corporation which each should assume to pay in some appropriate manner. Thus they arrived at a figure of $4,000 as the share

thereof which defendants should assume by giving plaintiff a note for that amount. However, to do that defendant wanted plaintiff to guarantee that all unsecured creditors of that corporation would be paid in full by plaintiff. Plaintiff did not feel that he could go that far but agreed to personally pay a $3,000 note owing the bank in Fremont and certain other unsecured obligations amounting to some $14,000 if defendants would give him their note due in 180 days for $2,500, which would clear and release defendants from all responsibility for the unsecured obligations of their failed corporation and place that responsibility entirely upon plaintiff. That arrangement was then agreed upon by plaintiff and defendant, and pursuant thereto defendants executed and delivered their note for $2,500 to plaintiff who thereafter in reliance thereon and without dispute concededly performed his part of their agreement and paid $17,362.28 of their Convair Coach Corporation's unsecured obligations.

In the meantime, on August 5, 1955, at a stockholders' meeting whereat plaintiff and defendant, as sole stockholders, were present, it was moved, seconded, and unanimously carried, that the Convair Coach Corporation should be dissolved pursuant to law, and plaintiff should be appointed to act as liquidating agent should any future action be required. Whether or not such corporation was actually dissolved in compliance with law is not clearly shown. Thereafter, however, when defendants' note was due on December 9, 1955, and plaintiff sought payment thereof from defendant, he was informed for the first time that it would not be paid.

In the light of the authorities heretofore set forth and the undisputed evidence heretofore recited, we conclude that there was a valid legal consideration for the note and that the judgment of the trial court was clearly wrong. It should be and hereby is reversed and the cause is remanded. All costs are taxed to defendants.

REVERSED AND REMANDED.

IRENE AKINS, APPELLANT, V. FLORENCE CHAMBERLAIN, APPELLEE.
82 N. W. 2d 632

Filed April 19, 1957. No. 34163.

1. **Judgments.** The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded.
2. **Trial.** If the evidence is insufficient to sustain a verdict in favor of the plaintiff, the trial court may instruct a verdict for defendant or discharge the jury and dismiss the case.
3. ———. A motion of a litigant to dismiss because of insufficiency of evidence to sustain a recovery has the identical purpose and should be treated the same as a motion for a directed verdict.
4. **Appeal and Error.** An order of the district court sustaining a demurrer to a cause of action and dismissing it with or without prejudice is a final order and is appealable.
5. ———. This court cannot have jurisdiction of an appeal from the district court unless, as required by section 25-1912, R. R. S. 1943, a notice of appeal is filed in the office of the clerk of the district court and the docket fee is deposited with the clerk within 1 month after the rendition of the judgment or decree, or the making of the final order, or within 1 month from the denial of a motion for a new trial timely filed in the cause.

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

Eisenstatt, Seminara & Lay and *Donald P. Lay*, for appellant.

Wear, Boland & Mullin and *A. Lee Bloomingdale*, for appellee.

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

BOSLAUGH, J.

The third cause of action in the amended petition, with which this appeal is concerned, states that on June 7, 1952, appellant was a passenger in an automobile driven

by her husband; that appellee negligently operated the automobile she was then driving and caused it to collide on the wrong side of the highway with the automobile of the husband of appellant; that he was thereby injured and as a result thereof lost the part of his left arm from immediately below the elbow; and that because of the injury to her husband appellant has been damaged by reason of the loss of services of her husband and loss of consortium including society and companionship which appellant would normally expect and have reason to receive by virtue of their marital relationship.

By general demurrer appellee contested the legal sufficiency of the third cause of action to state a case against her in favor of appellant. It was, on August 30, 1956, a day of the May 1956 term of the court, sustained and a judgment of dismissal without prejudice of the third cause of action was rendered. Thereafter, on October 15, 1956, a day of the October 1956 term of the court, the district court ordered that the ruling of August 30, 1956, should be and it was "amended nunc pro tunc as of August 30, 1956 as follows: Demurrer of defendant to plaintiff's 3rd cause of action in amended petition sustained and 3rd cause of action dismissed with prejudice." The notice of appeal of appellant was filed November 14, 1956.

The parties to this cause disagree as to the nature and effect of the order of the trial court sustaining the demurrer of appellee and dismissing the third cause of action without prejudice. Appellant thinks it was not a final order and would not therefore have supported an appeal to this court. Appellee believes it was a final order and was appealable.

The order of August 30, 1956, was written in the journal of the court on the date it was made. This was in the May 1956 term of the court. It provoked no attention or action until October 15, 1956, which was after the commencement of the October 1956 term of the court and more than 1 month after the entry of the order.

There was no attempt to appeal from the order of dismissal of the cause of action without prejudice. There was no written application filed seeking action nunc pro tunc by the court but on October 15, 1956, it was by the court ordered "that ruling of August 30, 1956 is amended nunc pro tunc as of August 30, 1956 as follows: Demurrer of defendant to plaintiff's 3rd cause of action in amended petition sustained and 3rd cause of action dismissed with prejudice." The only change made was a substitution of the word "with" for the word "without."

The record is convincing that the entry of the order of August 30, 1956, was strictly correct and that it truly and fully recites the precise order made in the case on that date. There is no claim made now that the court on that date intended to or did dismiss the third cause of action with prejudice. The record and the statements of appellant indicate convincingly that the journal of the court correctly records and evidences the exact order the court intended to and did make on August 30, 1956.

Appellant says it has always been her contention that there was not a valid order to appeal from "as of the date of the August 30th entry." The proceeding of October 15, 1956, was to amend the order of August 30, 1956, "so that the Appellant might have an appealable order to bring before this Court." The precise purpose of obtaining the entry of October 15, 1956, was to correct the entry of August 30, 1956, "so that there was a dismissal upon the merits of the case, which * * * would then be a proper and appealable order." It is simply the contention of appellant that where a court enters an order which it has no statutory authority to do, "then that portion of the order which the court did not have authority to make is a nullity until corrected at a subsequent date." It could hardly be made more certain that the order of August 30, 1956, was "corrected at a subsequent date" by the substitution of a new and different order from that which was made and duly re-

corded on the date of the first action of the court. There was no order made on that date which was not correctly recorded. The result was that it could not be corrected nunc pro tunc because the order was correct as it was spread upon the journal. The purpose of a nunc pro tunc order is to make the record evidence the truth and not to exhibit a misrepresentation. In North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 149 Neb. 823, 32 N. W. 2d 869, it is said: "The proper function of a nunc pro tunc order is not for the purpose of correcting some affirmative action of the court which ought to have been taken, but its true purpose is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded." 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.

The assertions of appellant that there was not a valid order to appeal from as of the date of the August 30, 1956, entry; that the purpose of the proceeding of October 15, 1956, was to amend the former so that there could be an appealable order to bring to this court; and that the fact that the time for appeal had elapsed before October 15, 1956, make appropriate the following from Morrill County v. Bliss, 125 Neb. 97, 249 N. W. 98, 89 A. L. R. 932: "It is obvious from the history of this case that the purpose in vacating the original decree and reentering the same decree was to extend the time for perfecting an appeal. The legislature has general power to fix the time limit for taking an appeal, and having prescribed such time, the trial court has no power to extend the time directly or indirectly." The order of October 15, 1956, did not extend the time within which to prosecute an appeal in this case. It is neither significant nor important.

The argument of appellant is that the words in the order of August 30, 1956, "and said Third Cause of

Action dismissed without prejudice" were superfluous since the court had no authority to make such a decision under the state of the record; that the demurrer assailed the third cause of action for insufficiency of statement of facts to constitute a cause of action; and that an action may be dismissed without prejudice only upon five statutory grounds and that failure of the petition to state a cause of action is not one of them. The gist of this claim is that the order of the court was effective only to sustain the demurrer and that such an order is not appealable. The conclusion is undeniable if the premise is not faulty. Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808; Shipley v. Shipley, 154 Neb. 872, 50 N. W. 2d 103.

The statutory grounds for dismissal of an action without prejudice to a future action are: By plaintiff before final submission of the case; and by the court if the plaintiff fails to appear at the trial, for want of necessary parties, on application of some of the defendants if there are others whom the plaintiff fails to diligently prosecute, or for disobedience by plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action a decision must be upon the merits. § 25-601, R. R. S. 1943. Appellant insists that dismissal without prejudice of the third cause of action was not directed or permitted by the statute but, on the contrary, that the mandate thereof was that any dismissal of it must be "upon the merits of the action" so that the case would be finally disposed of in that court. It is urged by appellant that this court has pointed out that if a trial court dismisses an action without prejudice upon a ground other than stated in the statute, its action in this regard is without authority. In Zittle v. Schlesinger, 46 Neb. 844, 65 N. W. 892, it is said: "Under our code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal, because the plaintiff fails by his evidence to establish his cause of action. In such case the proper

practice is to instruct the jury to return a verdict for the defendant." The opinion made reference to section 430 of the Code of Civil Procedure, which is identical with the provisions of the statute last above referred to, and stated: "By virtue of this section, in the five cases stated, a judgment of dismissal without prejudice may be entered by the court; and by the last sentence of the section such a judgment cannot be entered in other cases. * * * Where the evidence is insufficient to warrant a verdict for the plaintiff the court may, and should, instruct the jury to return a verdict for the defendant; but it has no authority without a verdict to enter a nonsuit and judgment of dismissal." That decision was approved and applied in Thompson v. Missouri Pacific Ry. Co., 51 Neb. 527, 71 N. W. 61. However, it should be observed that in each of those cases this court said that where the evidence entitled the defendant to have a verdict so directed it was error without prejudice to the plaintiff that the trial court entered a nonsuit. It is obvious, therefore, that this court did not determine that the district court was without jurisdiction to render a judgment of dismissal.

The cases discussed above have not been in this respect by express language disapproved or overruled. They have been, if not repudiated, disregarded by numerous subsequent decisions. It is said in Campbell v. Columbia Casualty Co., 125 Neb. 1, 248 N. W. 690: "Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit." See, also, Rzeszotarski v. American Smelting & Refining Co., 133 Neb. 825, 277 N. W. 334; Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118; Kline v. Metcalfe Construction Co., 148 Neb. 357, 27 N. W. 2d 383; Hammer v. Estate of Hammer, 155 Neb. 303, 51 N. W. 2d 609; McLeod v. Andrew Murphy & Son, Inc., 155 Neb. 318, 51 N. W. 2d 620. The conclusion has more recently been expressed that a motion of a litigant to

dismiss because of insufficiency of evidence to sustain a recovery has the same purpose and is treated the same as a motion for a directed verdict in the district court and in this court on appeal. Wax v. Co-Operative Refinery Assn., 154 Neb. 42, 46 N. W. 2d 769, sustains this view: "A motion to dismiss on the ground that the evidence does not sustain a cause of action for all practical purposes is the same as a motion for directed verdict and this court has uniformly so treated it." The district court had jurisdiction to made the order that the cause of action was insufficient as a matter of law and that it should be and was dismissed without prejudice.

This court is authorized to review and take lawful action in reference to a judgment or final order of the district court for errors exhibited by the record of the case. § 25-1911, R. R. S. 1943. An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, is a final order. § 25-1902, R. R. S. 1943. Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614, defines a final order in this language: "The law * * * is that an order is final for the purposes of an appeal when it determines the rights of the parties * * *." A dismissal of a cause of action is the equivalent of a discontinuance of it in the court. It is thereby sent out of court. The rights of the parties in the cause of action are determined insofar as the court rendering the order of dismissal is concerned. Temple v. Cotton Transfer Co., 126 Neb. 287, 253 N. W. 349.

Davis v. Jennings, 78 Neb. 462, 111 N. W. 128, concerned an order of the trial court which sustained special appearances of defendants that contested the jurisdiction of the court over the person of each of them and dismissed the case without prejudice. This court in deciding that it was an appealable order in the case said: "In conclusion, it is insisted that the order quashing the service was not a final order, and was therefore not appealable. Without stopping to inquire whether an order quashing service is a final order, it is suffi-

cient to say that the judgment of dismissal was a final judgment. It enabled the plaintiff to appeal, and thus bring the case here for a review of the whole proceeding." See, also, Hamsher v. Fisher, 133 Neb. 854, 277 N. W. 380.

The order of August 30, 1956, was a final order in the case. Appellant could have presented the error she now argues concerning the validity of the third cause of action stated in the amended petition by a timely appeal from that adjudication.

The notice of appeal was filed November 14, 1956, much more than 1 month after the rendition of the order of August 30, 1956, dismissing the third cause of action. This court is without jurisdiction to entertain an appeal from the district court unless notice of appeal is filed and the docket fee is deposited within 1 month of the making of the judgment, decree, or final order in the cause. This is fundamental and mandatory. § 25-1912, R. R. S. 1943; Sloan v. Gibson, 156 Neb. 625, 57 N. W. 2d 167; Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894. There has been conferred upon this court no jurisdiction of this appeal and it is without authority to consider and decide any other matter attempted to be presented.

This appeal should be and it is dismissed and the costs should be taxed to appellant.

APPEAL DISMISSED.

HERBERT F. BULLER ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION OF THE METROPOLITAN CLASS, ET AL., APPELLEES.
82 N. W. 2d 578

Filed April 19, 1957. No. 34167.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, rele-

vant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

2. ———. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant.

3. **Constitutional Law: Municipal Corporations.** The mandate prescribed in Article III, section 5, Constitution of Nebraska, gives the Legislature exclusive power and authority to legislatively divide the state into legislative districts. It prescribes the time and manner of so doing, and annexation ordinances enacted by municipalities as authorized by and in conformity with statutes relating thereto cannot and do not change the territorial boundaries of legislative districts theretofore established by the Legislature.

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

George B. Boland, Harry B. Otis, and *A. Clark Murdock,* for appellants.

Edward F. Fogarty, Eugene F. Fitzgerald, John C. Burke, Bernard E. Vinardi, Neal H. Hilmes, and *Irving B. Epstein,* for appellees.

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

CHAPPELL, J.

Plaintiffs, Herbert F. Buller, Robert F. Clauss, Max E. Freeman, and Robert E. Wear, for themselves and others similarly situated, brought this action against defendants, City of Omaha, a municipal corporation of the metropolitan class located in Douglas County, its named mayor and city councilmen, the named county commissioners, county clerk, and county assessor of Douglas County, and the named treasurer of said city and county, seeking to have annexation ordinance No. 18906, enacted by the city council, declared to be unconstitutional and void as in violation of Article III, section 5, Constitution of Nebraska. In such respect, plaintiffs' theory was that

"although otherwise lawful," the ordinance allegedly changed the territorial boundaries of legislative districts Nos. 9 and 10 in which the annexed lands lie. Plaintiffs also sought to enjoin enforcement of said ordinance and obtain general equitable relief. Defendants filed general demurrers to plaintiffs' petition, which the trial court sustained. Thereupon plaintiffs elected to stand upon their petition and, having refused to further plead, the trial court dismissed their petition. Thereafter, plaintiffs' motion for new trial was overruled and they appealed, assigning that the trial court erred in sustaining defendants' demurrers and dismissing their petition. We conclude that the assignment has no merit.

Plaintiffs' petition may be summarized as follows: They alleged that plaintiffs were residents of Douglas County and owners in possession of real estate within the area described in annexation ordinance No. 18906, a copy of which was attached to and made a part of their petition, and that this action was brought on behalf of themselves and all other persons similarly situated.

They alleged that defendant city of Omaha was a city of the metropolitan class, located in Douglas County, and that the other named defendants were respectively mayor and city councilmen of Omaha, county commissioners, county clerk, and county assessor of Douglas County, and treasurer of Douglas County and the city of Omaha. They alleged that said city is governed by a home rule charter under the Constitution and laws of Nebraska, which charter, with the exception of immaterial amendments, is found in Chapter 14, R. R. S. 1943, wherein the sections relating to the power and authority of defendant city and its council in the matter of extending its corporate limits by annexation of territory will be found.

Plaintiffs alleged that on July 3, 1956, defendant city council purported to pass annexation ordinance No. 18906; that defendants and each of them contend that said ordinance was duly passed and is a valid and sub-

sisting ordinance of defendant city; and that unless restrained and enjoined, they will enforce same upon the area therein described, and such area will be considered and dealt with as a part of the city of Omaha.

Plaintiffs' petition then recited the provisions of Article III, section 5, Constitution of Nebraska, and alleged that pursuant thereto the Nebraska State Legislature at its 1935 session enacted applicable section 5-104, R. R. S. 1943, which divided the State of Nebraska into 43 legislative districts, each consisting of certain described territory, and provided that each legislative district should be entitled to one member.

Thereafter, plaintiffs recited the provisions of said section, which legislatively described the territory included in legislative districts Nos. 9 and 10, and alleged that purported ordinance No. 18906 violated the integrity of such legislative districts by changing the corporate limits of the city of Omaha between Pacific Street and Howard Street, and between Pacific Street and Charles Street, and in so doing, it changed the territorial boundaries of legislative districts Nos. 9 and 10 in direct violation of Article III, section 5, Constitution of Nebraska, and laws of the state, which deprived plaintiffs of the right to vote for the legislative candidate for legislative district No. 10, a privilege theretofore enjoyed by them.

In Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692, we reaffirmed that: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

"In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant."

The exclusive mandate requiring the Legislature to divide the state into legislative districts and prescribing

the time and manner of their creation is found in Article III, section 5, Constitution of Nebraska, which provides as follows: "At the regular session of the Legislature held in the year nineteen hundred and thirty-five the Legislature shall by law determine the number of members to be elected and divide the state into Legislative Districts. In the creation of such Districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct Legislative Districts, as nearly equal in population as may be and composed of contiguous and compact territory. After the creation of such districts, beginning in nineteen hundred and thirty-six and every two years thereafter, one member of the Legislature shall be elected from each such District. The basis of apportionment shall be the population excluding aliens, as shown by next preceding federal census. In like manner, when necessary to a correction of inequalities in the population of such districts, the state may be redistricted from time to time, but no oftener than once in ten years."

Pursuant to that concededly exclusive power and authority, the Legislature proceeded to divide the state into legislative districts by enacting Laws 1935, chapter 109, section 1, page 350, which is now section 5-104, R. R. S. 1943.

As here involved, that section provides: "District No. 9. Includes the following territory in the county of Douglas and the city of Omaha: North from Pacific to Howard, between the western corporate limits and 60th Street; north from Pacific to Dodge, between 56th and 60th Streets; north from Pacific to Charles, between the western corporate limits and 56th Avenue; north from Leavenworth to Charles, between 46th Avenue and 36th Street; north from Leavenworth to Cuming, between 30th and 36th Streets; north from Leavenworth to Farnam, between 30th and Park Avenue.

"District No. 10. Includes the following territory in

the county of Douglas and the city of Omaha: North from Charles to Blondo, between western corporate limits and 49th Street; north from Blondo to Lake, between 66th Street and 50th Street; all north of Lake between 72nd Street and 48th Street; and all of the rural precincts."

Annexation ordinance No. 18906, as authorized by section 14-117, R. R. S. 1943, extended the corporate limits of the city of Omaha over certain extensively described lands in Douglas County. It incorporated such lands into and made same a part of the city of Omaha, and repealed any and all ordinances insofar as they conflicted with that ordinance. Its provisions are too verbose to recite in this opinion. It is sufficient for us to say that its provisions made no reference whatever to and in no manner attempted either directly or indirectly to change the boundaries of territory legislatively included in the legislative districts as prescribed aforesaid by section 5-104, R. R. S. 1943.

We find no essential connection between annexation ordinance No. 18906 and section 5-104, R. R. S. 1943, which defines and fixes the territory included in legislative districts Nos. 9 and 10. Any reference in the latter to "corporate limits" is simply descriptive and casual but fixes their permanent legislative territorial boundary lines. To hold otherwise would require us to read into section 5-104, R. R. S. 1943, a legislative intention to bar annexation under previously enacted section 14-117, R. R. S. 1943, beyond the lines at which the "corporate limits" form a common boundary. We find no such legislative intention. The two statutes are not conflicting but may be harmonized by logically concluding that the Legislature had no intention by using the expression "corporate limits" to limit the annexation statutes beyond any possibility of reasonable operation which would lead to palpable injustice or absurdity. In Kelley v. Gage County, 67 Neb. 6, 93 N. W. 194, affirmed on rehearing at 67 Neb. 11, 99 N. W. 524, and

reaffirmed in State ex rel. Reed v. Grimes, 98 Neb. 762, 154 N. W. 544, this court stated the applicable rule as follows: "In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity."

Article III, section 5, Constitution of Nebraska, requires that legislative districts shall be "separate and distinct." Those words require that the boundaries of a legislative district shall be fixed boundaries and the only manner in which such boundaries can be changed is by legislative action and then "no oftener than once in ten years." Therefore, when the Legislature fixed the boundary lines of legislative district No. 9 in part as "North from Pacific to Howard, between the western *corporate limits* and 60th Street" (italics supplied) in the city of Omaha, and the boundary lines of legislative district No. 10 in part as "North from Charles to Blondo, between western *corporate limits* and 49th Street" (italics supplied) in the city of Omaha, they must be construed to mean the corporate limits of the city as they existed at the time of the adoption of section 5-104, R. R. S. 1943, until further appropriate action is taken by the Legislature as authorized by Article III, section 5, Constitution of Nebraska. In other words, the boundaries of legislative districts Nos. 9 and 10 in Douglas County and the city of Omaha must remain as originally established until changed by the Legislature in the manner provided by Article III, section 5, Constitution of Nebraska, and they cannot be changed or affected in any manner by any changes in the corporate limits of the city of Omaha by its annexation ordinances.

As stated in 50 Am. Jur., Statutes, § 236, p. 224: "Because it is easy to be wise after one sees the results of experience, there is always a tendency, it has been said, to construe the language of a statute in the light in which it appears when the construction is given. Such an approach to the question is erroneous. Since, in de-

termining the meaning of the terms of a statute, the aim is to discover the connotation which the legislature attached to the words, phrases, and clauses employed, the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the statute must be construed as it was intended to be understood when it was passed." That statement has application here.

Issues comparable with those presented in the case at bar were raised and like conclusions were reached in the recent case of Fish Creek Park Co. v. Village of Bayside (Wis.), 80 N. W. 2d 437. In that opinion, quoting from Town of Greenfield v. City of Milwaukee, 273 Wis. 484, 78 N. W. 2d 909, the court said: " 'Another immediate answer to the Town's argument is that the effect of its argument, if good, would only render void the changed boundaries of the legislative districts. It would not invalidate the annexation, which is the question now before us.' " Thereafter, the opinion went on to say: "That determines the question before us. We affirm the trial court's determination that the annexation proceedings were valid and that the annexed area in the town of Mequon remains a part of the Ozaukee county assembly district. Provision will have to be made by the village so that persons residing in the annexed area may vote for candidates for the assembly in the Ozaukee county district."

That precedent has logical application here. By analogy, ordinance No. 18906, which is otherwise concededly valid, is not unconstitutional as in violation of Article III, section 5, Constitution of Nebraska, because the territory thereby annexed to the city of Omaha remains a part of the legislative districts prescribed by section 5-104, R. R. S. 1943. Lawful provision will have to be made so that persons residing in such annexed territory may vote for legislative candidates in such districts. In that connection, authorities relied upon by plaintiffs are entirely distinguishable upon the facts,

applicable statutes, and constitutional provisions unlike our own.

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

AFFIRMED.

DOYLE M. CARLSON, APPELLANT, V. ANNA SCHROEDER ET AL., APPELLEES.
82 N. W. 2d 416

Filed April 19, 1957. No. 34183.

Attachment: Malicious Prosecution. In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred.

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

Paul Rhodes, for appellant.

Townsend & Youmans, 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 Morrill County by Doyle M. Carlson, plaintiff, to recover damages for wrongful attachment against Anna Schroeder as attaching creditor, Earl Yeoman, the sheriff of Morrill County, and Paul Hair, deputy sheriff of said county. The defendants demurred to the plaintiff's petition on the ground that the facts stated therein were insufficient to constitute a cause of action. This demurrer was sustained. The plaintiff refusing to plead further, the trial court dismissed the plaintiff's action. From this order, the plaintiff appeals.

The plaintiff's petition, insofar as it need be considered in this appeal, alleged in substance that Earl Yeoman was the duly elected, qualified, and acting sheriff of Morrill County, and Paul Hair was the duly acting and qualified deputy sheriff of said county from August 19, 1952, to November 23, 1952; that on August 19, 1952, Anna Schroeder commenced an action for attachment in the county court of Morrill County against the plaintiff, Doyle M. Carlson, for money damages; that thereafter, on August 19, 1952, Earl Yeoman and Paul Hair proceeded to the premises of the plaintiff and then and there did take possession of certain livestock and a saddle, all being property of the plaintiff; and that thereafter the plaintiff filed various motions for dissolution of attachment, the last of such motions being filed in the district court on October 18, 1952. This motion was predicated on section 25-1008, R. R. S. 1943. The petition further alleged that the attachment be dissolved for the reason that the execution of the order of attachment by the sheriff was not made in the presence of two residents of the county as required by said section. The attaching creditor resisted this motion. The trial court sustained the motion and the property attached by the sheriff was discharged from the attachment. The petition further set forth that the sheriff and his deputy, from August 19, 1952, to November 22, 1952, wrongfully held livestock belonging to the plaintiff and improperly cared for such livestock. In addition, the petition set forth other elements of damage alleged to have been suffered by the plaintiff by reason of the wrongful attachment, and prayed for damages.

For convenience we will refer to the parties as they were designated in the district court.

The plaintiff assigns as error that the trial court committed prejudicial error in sustaining the demurrer of the defendants and dismissing the plaintiff's action.

The question to be determined in this appeal is whether or not the plaintiff's petition states a cause of action for

damages for wrongful attachment against the attaching creditor, the sheriff, and the deputy sheriff of Morrill County.

At the outset it might be said that section 25-1008, R. R. S. 1943, was violated by the sheriff as heretofore set forth.

The plaintiff's petition contains no allegation to the effect that he brought the present action upon any attachment bond, or that his action was brought upon the official bond of the sheriff or his deputy.

This is an action for wrongful attachment. Section 25-1003, R. R. S. 1943, provides in part that: "* * * the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment if the order be wrongfully obtained."

In Storz v. Finklestein, 48 Neb. 27, 66 N. W. 1020, this court held: "In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred and shown." While this case was reversed in part on rehearing, 50 Neb. 177, 69 N. W. 856, such reversal did not change the rule as set forth in this opinion and as shown by other authorities cited herein.

In Jones v. Fruin, 26 Neb. 76, 42 N. W. 283, the court held: "To sustain an action for malicious attachment of property, it is necessary to prove want of probable cause, malice, and damage to the plaintiff from the issuing of the attachment." See, also, Parmer v. Keith, 16 Neb. 91, 20 N. W. 103.

As stated in Storz v. Finklestein, *supra:* "In an action upon the attachment undertaking, malice need not be either alleged or proven. We have no statute in this state which permits an attaching debtor to recover damages for the mere wrongful suing out of a writ of attachment, except upon the bond; and, in the absence of such a statutory provision, such an action cannot be

maintained." But, where the plaintiff does not sue upon the bond, but independent of it, then the action is one in the way of an action for malicious attachment, in which case the plaintiff would be compelled to allege and prove want of probable cause and malice. See Jones v. Fruin, *supra.*

Independently of statute and aside from the remedy on the bond, an action can be maintained against the attaching plaintiff for a wrongful and malicious attachment, and the action is similar to one for malicious prosecution and governed by substantially the same rules. Both malice and want of probable cause must be shown. Jones v. Fruin, *supra;* Storz v. Finklestein, *supra.* In the absence thereof, the only remedy is upon the attachment bond, there being no liability for wrongful attachment as such. See 1 Fisher, Courts of Limited Jurisdiction, § 134, p. 227.

In Mitchell v. Silver Lake Lodge, 29 Or. 294, 45 P. 798, the court held: "In an action for unlawful attachment, not brought upon the attachment bond, the complaint must allege that the attachment was sued out maliciously and without probable cause, * * *." The court further said: "It is certain that a defendant who has sustained an injury by the attachment of his property maliciously and without probable cause, has two remedies for the recovery of his damages,—first, by an action on the undertaking; and, second, by an action for the malicious attachment."

As stated in Vesper v. Crane Co., 165 Cal. 36, 130 P. 876, L. R. A. 1915A 541: "When, however, the attachment defendant undertakes to proceed against the attachment plaintiff alone and independent of any right of action upon the bond, he must allege and show malice and want of probable cause on the part of the attachment plaintiff as required by the principles of the common law in actions for malicious prosecution. The averment of malice and want of probable cause go to the very gist of the action by the attachment defendant, and

no recovery can be had unless these essential elements of liability are alleged and established by the evidence."

There is no averment in the plaintiff's petition that the attaching creditor maliciously and without probable cause procured the attachment to be issued and levied. Therefore, cause of action is not made as against the attaching creditor. The plaintiff's petition does not allege that the attachment was obtained by any of the defendants without probable cause, and does not allege malice on the part of any of the defendants.

For the reasons herein given, we conclude that the judgment of the trial court in sustaining the defendants' demurrer to the petition of the plaintiff and dismissing the plaintiff's action was correct and should be, and is hereby, affirmed.

AFFIRMED.

HARLEY A. SIPPRELL, APPELLEE, V. MERNER MOTORS ET AL., APPELLANTS.
82 N. W. 2d 648

Filed April 26, 1957. Nos. 34078 and 34083.

1. **Landlord and Tenant.** In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property.
2. ———. Subject to limited exceptions, the general rule is that guests and invitees of a tenant derive their right to enter upon leased premises through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.
3. ———. The exceptions contemplated by the foregoing statement of principle generally have no relation to conditions arising after leasing and surrender of control but only to those existing at the time of leasing.
4. ———. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.

5. **Municipal Corporations: Negligence.** A lot owner in the city of Omaha is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in the absence of such notice he is not liable to pedestrians for damages for personal injuries.
6. ———: ———. A lot owner may be held in damages where defects in a sidewalk have been caused by his affirmative wrong doing or wrongful use of a sidewalk.
7. **Negligence.** In an action for negligence the burden is on the plaintiff to show 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.
8. ———. The proprietor of a salesroom is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose.
9. ———. The fact that an invitee falls upon steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of res ipsa loquitur does not apply.

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

Fraser, Crofoot, Wenstrand, Stryker & Marshall, Kennedy, Holland, DeLacy & Svoboda, and *William P. Mueller,* for appellants.

Robert W. Haney and *Thomas J. Walsh,* 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 and medical treatment by Harley A. Sipprell, plaintiff and appellee, against Merner Motors, N. Burt Merner, Gilbert C. Merner, and J. F. Bloom & Company, a corporation, defendants and appellants. The action was tried to a jury and a verdict was returned against all defendants for $4,500. Judgment was rendered on the verdict. The defendants Merner filed a motion for new trial as did also the defendant J. F. Bloom & Company.

J. F. Bloom & Company also filed a motion for judgment notwithstanding the verdict. These motions were overruled. From the judgment and the order overruling the motions separate appeals have been taken. The appeals have been consolidated. The defendants Merner will be hereinafter referred to as Merner Motors and J. F. Bloom & Company will be referred to as Bloom.

As grounds of action the plaintiff by petition pleaded, to the extent necessary to set forth herein, that on September 2, 1953, Merner Motors were doing business at Twentieth Street and Ames Avenue in Omaha, Nebraska, in a building leased from Bloom; that on that date plaintiff was a customer and while leaving the premises by a regular exit he stepped from the doorway onto a step just outside from which he stepped to the sidewalk and fell whereby he sustained serious and permanent injuries; that the step was broken, worn, and irregular, and projected such a short distance from the door itself that the sudden drop to the pavement constituted a hazard to one leaving the doorway; that the plaintiff in encountering the step by reason of its condition was caused to partially lose his balance and forced to step onto a portion of the sidewalk immediately below the step which walk was broken and uneven, on account of which he completely lost his balance and fell to the sidewalk; that the step and sidewalk had remained in the condition described for a long time prior to the accident which condition was known to all of the defendants; and that the proximate cause of the accident and injuries to the plaintiff was the negligence of the defendants in failing to provide a safe means of exit from the building and in failing to warn plaintiff of the condition of the step and sidewalk.

The defendant Bloom filed a separate answer. In the answer it denied any negligence on its part. It alleged that the plaintiff was guilty of contributory negligence; that the sidewalk was owned by the city of

Omaha and that this defendant was under no obligation to repair the sidewalk even if repairs were necessary, which it denied, in the absence of notice by the city; that it had never been notifed to make repairs; that in no event was it chargeable with negligence on account of the condition of the step or the sidewalk; that the step was not defective; and that the step was in plain sight and that the risk, if any, was assumed by plaintiff.

Merner Motors filed a separate answer. By the answer negligence was denied and contributory negligence was charged against the plaintiff. By the answer it was alleged substantially that no repairs were necessary; that the entrance was in open and constant use and the condition of it was in plain sight; that as tenants they were not required or permitted to make repairs; that the area west of the building was a sidewalk owned by the city of Omaha; and that they had received no notice to make repairs.

The plaintiff filed a reply in which he generally denied the allegations of the answers which did not amount to admissions of the allegations of the petition. The trial was had upon the issues thus joined. The result has already been pointed out. As pointed out Bloom and Merner Motors have taken separate appeals. Each has assigned numerous errors which it is contended are grounds for reversal. The assignments of error advanced by Bloom, to the extent necessary to a determination of the appeal, will be considered first herein.

By the first four assignments of error the propriety of the rulings on the motions for directed verdict, the motion for new trial, and the motion for judgment notwithstanding the verdict were attacked.

The question presented collectively by these assignments is that of whether or not, assuming that the plaintiff had a right of action against some one, he had a right against Bloom on account of the condition of the step or condition of the sidewalk or both. Bloom insists that he did not.

One proposition substantially urged in this connection is, assuming that the step is to be regarded as on the premises occupied by Merner Motors, that no responsibility for its condition devolved upon Bloom, the lessor, unless it was shown that the dangerous condition existed at the time of leasing which condition was known at that time; that there was an obligation upon the lessor to repair and keep in repair; and that it had sufficient control for that purpose. Bloom contends that it has not been shown that these conditions or any of them did or were known to exist at the time of leasing.

The factual contention of Bloom in this respect must be accepted as true. There was no effort made to show that the condition of which plaintiff complains was in existence at the time of leasing which was in 1949.

No authorities have been cited the effect of which is to say that a lessor is under any obligation to repair conditions on leased premises which are under the exclusive control of a lessee which came into being after the lessee went into possession. The rule in this jurisdiction is to the contrary. In Bartholomew v. Skelly Oil Co., 144 Neb. 51, 12 N. W. 2d 122, it was said: "In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property." This was quoted with approval in Quist v. Duda, 159 Neb. 393, 67 N. W. 2d 481.

This being true it must be said under the facts that the plaintiff had no right of action against Bloom on account of the alleged dangerous condition. This is so because he had no greater right than the lessee would have had, and the lessee would have had no right at all.

In Van Avery v. Platte Valley Land & Investment Co., 133 Neb. 314, 275 N. W. 288, it was said: "Subject to limited exceptions, the general rule is that guests and invitees of the tenant derive their right to enter upon the premises leased through the tenant, and have the same but no greater right to proceed against the land-

lord for personal injuries resulting from alleged defects on the premises than the tenant has."

A reading of the opinion discloses that the exceptions contemplated by this statement have no relation to conditions arising after leasing and surrender of control but only to those existing at the time of leasing.

In the same case with reference to the lessee and others it was said: "Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession." The exceptions are those attaching to the previous quotation, namely, the obligation to make repairs and retention of control for that purpose. See, also, Nelson v. Hokuf, 140 Neb. 290, 299 N. W. 472.

In the light therefore of the failure of proof that the step was in a dangerous condition at the time the lease was entered into between Bloom and Merner Motors and proof that Bloom was under obligation to make repairs the plaintiff had no cause of action against Bloom based upon the condition of the step.

Another proposition urged by Bloom is that the sidewalk was the property of the city of Omaha; that as owner of the abutting property it had no obligation to repair in the absence of notice by the city so to do; and that it had never been so notified. This contention must be sustained.

In Andresen v. Burbank, 157 Neb. 909, 62 N. W. 2d 135, it was said: "A lot owner is not required to repair an adjacent sidewalk until he has been notified by the city to do so, and in absence of such notice he is not liable to pedestrians for damages for personal injuries." See, also, McAuliffe v. Noyce, 86 Neb. 665, 126 N. W. 82; Hanley v. Fireproof Building Co., 107 Neb. 544, 186 N. W. 534, 24 A. L. R. 382; Connolly v. City of Omaha, 159 Neb. 380, 66 N. W. 2d 916.

This of course is not to say that a lot owner may not be held in damages where defects in a sidewalk are caused by affirmative wrong doing nor negligent use by the lot owner. Andresen v. Burbank, *supra*. No such question is before the court in the case at bar.

In the light of these observations it becomes necessary to say that no cause of action was proved against the defendant Bloom and accordingly it is entitled to have its motion for judgment notwithstanding the verdict sustained. This makes unnecessary a consideration of any other assignments of error.

Turning now to Merner Motors, it is pointed out that at the close of the evidence of the plaintiff a motion was made for a directed verdict which was overruled. This motion was renewed at the close of all the evidence and again overruled. A motion for new trial was made and this was overruled.

By the first four of numerous assignments of error the sufficiency of the evidence to sustain a cause of action against Merner Motors has been challenged. Substantially Merner Motors contends that, assuming but not admitting that these defendants were required to keep in repair the step and the sidewalk in question and that for failure to do so they could be held in damages for negligence, the evidence was not sufficient in this case to prove a cause of action or a right of recovery against them. They urge that within the meaning of controlling principles of law there was absence of proof of any negligent act or omission, and also there was an absence of proof of proximate cause or of proximately contributing cause.

It is a well-settled rule that in an action for negligence, the burden is on the plaintiff to show 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. Brown v. Slack, 159 Neb. 142, 65 N. W. 2d 382.

As to the facts the evidence discloses that the acci-

dent in question happened around 1 to 2 o'clock p.m., on a bright day. It was at the regular exit or door on the west side of the showroom of the Merner Motors. The plaintiff was on the premises as a business invitee. The threshold was of stone or concrete as was a step outside and 6 or 7 inches below. The step outside was elevated several inches above a sidewalk which extended westward from the step. At the time in question an awning overhung the exit.

Coming now directly to the testimony of plaintiff relating to the causative factor he said that he stepped down on the step with his left foot and hit something with the sole of the left shoe, slipped, and was thrown forward over the edge of the step; that he went forward onto the sidewalk with his right foot and it turned and flopped over and he went down on his knees and hands; that after he got up he could see that the step and sidewalk were badly broken; that it was irregular like an indentation or a broken piece or cracked, with the edge rounded off and uneven; that the portions at the edge of the step were chipped out and it was wavy and uneven; that he could not quite figure out how it happened but it looked like there was an indentation where possibly a piece of concrete or stone had chipped out and it appeared that when he put his foot on it it threw him a little bit to the left and over the edge; that the chipped portion was, as he estimated, from ¾ to 1½ inches in depth; and that the sidewalk was badly broken and raised. As a part of his case-in-chief the plaintiff adduced in evidence photographs of the exit which included a view of the step in question and the adjacent sidewalk. On cross-examination he testified as to what happened on the step and that it was sort of slipping or tripping for just a few inches which threw him over the edge of the step.

This, it is believed, is a fair summary of the evidence from which a determination as to whether or not the plaintiff has sustained the burden of proving a cause

of action or, in other words, whether or not there is evidence that Merner Motors were guilty of negligence which was the proximate cause or proximately contributed to the accident of which plaintiff complains.

The determination of this question must be made in the light of certain rules in addition to those previously stated herein. One of these is the following: "* * * the proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose." Glenn v. Grant Co., 129 Neb. 173, 260 N. W. 811. See, also, Rankin v. J. L. Brandeis & Sons, 135 Neb. 86, 280 N. W. 260; Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711.

Another rule is the following: "The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner, and the doctrine of res ipsa loquitur does not apply." Thompson v. Young Men's Christian Assn., 122 Neb. 843, 241 N. W. 565.

The first question which must be answered is that of whether or not the plaintiff has sustained the burden of showing by his evidence that Merner Motors were guilty of negligence. The determination of it of course depends upon the probative effect of the evidence summarized including the photographs. The oral description in the testimony of witnesses of the condition of both the step and the sidewalk is indefinite and uncertain and gives no clear conception of either but it may be that taken alone this would be sufficient to sustain a charge of negligence against Merner Motors. There is however photographic evidence which makes the condition of both the step and the sidewalk reasonably apparent. As to the step the photographs show no break in the upper surface of the step or at any of its edges. The most that can be said is that this surface shows a

slightly depressed area, probably brought about by wear from usage over a period of years. As to the sidewalk the photographs do show a crack extending outward from the step with an unevenness of surface which becomes pronounced probably about 18 inches from the outer edge of the step. These photographs are so clear in outline that they must be accepted as a controlling portrayal of the condition of both the step and the sidewalk.

Allowing the step to get into the condition which has been disclosed, in the light of what this court has said, did not amount to actionable negligence on the part of Merner Motors. Thompson v. Young Men's Christian Assn., *supra,* was an action based upon alleged negligence on account of a condition including a depression in a step. In that case the depression was caused by usage. Its depth ranged from 7/16 of an inch to 1¾ inches. The court held to the view in that case that it was not negligence to allow continued use.

As to defects in sidewalks this court in Sullivan v. Chicago & N. W. Ry. Co., 128 Neb. 92, 258 N. W. 38, cited with approval the following from Northrup v. City of Pontiac, 159 Mich. 250, 123 N. W. 1107: "A grating which projects two inches or less above a sidewalk is not such a defect as to violate the duty of a municipality to keep its streets and walks in a condition of reasonable safety."

In the same case the following was quoted from Van der Blomen v. City of Milwaukee, 166 Wis. 168, 164 N. W. 844: "A slight depression in one block and an elevation in the adjoining block of a cement sidewalk, the difference in level being about one and one-quarter inches, was, as a matter of law, not an actionable defect."

In the light of this, assuming but not deciding that Merner Motors under certain circumstances could be held liable for negligence in the maintenance of the step and sidewalk in question, it must be said that in

this case there is no proof of actionable negligence by Merner Motors.

If however it should be said that there was proof of negligence still no right of recovery has been shown. There is an absence of proof of proximate cause. As has been pointed out the plaintiff is entitled to no presumption that his fall was caused by negligence on the part of Merner Motors.

The plaintiff gave no authentic information as to what caused him to slip on the step or on what his foot struck on the sidewalk. The effect of his testimony was to say that for some reason his left foot slipped on the step in consequence of which he stepped with his right foot onto the sidewalk and his ankle turned. Thereafter he looked at the step and at the walk. A fair statement, it is thought, is that after he looked at these he assumed that the condition of the step which he observed caused him to slip and he further assumed that with his right foot he stepped upon the defective place in the sidewalk.

In order to accept this assumption as proof of proximate cause would be to make applicable to this situation the doctrine of res ipsa loquitur. In Thompson v. Young Men's Christian Assn., *supra,* it has been pointed out that this may not be done.

It follows therefore that no cause of action was proved against Merner Motors. Accordingly the motion for new trial should have been sustained.

The judgment against J. F. Bloom & Company and against Merner Motors, N. Burt Merner, and Gilbert C. Merner is reversed. As to J. F. Bloom & Company the cause is remanded with directions to sustain the motion for judgment notwithstanding the verdict. As to Merner Motors, N. Burt Merner, and Gilbert C. Merner, since there is no motion for judgment notwithstanding the verdict, the cause is remanded for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.