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REPORTS OF CASES

DECIDED BETWEEN

MARCH 18, 1961 and DECEMBER 8, 1961

IN THE

Supreme Court of Nebraska

JANUARY TERM 1961 and SEPTEMBER TERM 1961

VOLUME CLXXII

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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IN MEMORIAM

ADOLPH E. WENKE

And now, at the hour of nine o'clock a.m., on this 2nd day of October, A.D. 1961, the same being the date fixed by the Court for hearing the report of the Committee appointed to draft resolutions in memory of Adolph E. Wenke, the Court being in session and members of the bar in attendance, the Committee makes the following report:

HONORABLE FAY H. POLLOCK.

MAY IT PLEASE THE COURT:

After more than eighteen years of distinguished service as an eminent Judge of the Supreme Court of the State of Nebraska, the judicial career of Adolph Eilert Wenke abruptly ended when he suddenly collapsed and passed away on March 3, 1961, at the age of 63 years.

He was the son of Frederick and Henrietta Wenke, was born January 22, 1898, on a farm near Pender, Nebraska, and received his primary education in the public schools of that city. During World War I he enlisted for service with the United States Army and served overseas with the 312th Motor Division.

"Wenke", as he was affectionately known by his many friends, attended the University of Nebraska from which he received a Bachelor of Laws degree in 1923. He was prominent in campus activities. For three years he was a stellar tackle on some of the most powerful and successful football teams fielded in the annals of the institution, and lettered two years as a member of the track team. He was a member of the "N" Club and of the Innocents Society, men's senior honorary organization.

After graduation from the College of Law and admission to the practice of law, he played professional

football in the National Football League as a member of the Milwaukee, Wisconsin, team.

In 1924 he located at Stanton, Nebraska, where he became a successful attorney and a leading citizen. He served as County Attorney, City Attorney, member of the Board of Education, member of the Stanton County Agricultural Society, Commander of Stanton Post No. 88 of the American Legion, and President of the Stanton Business Men's Club. He served as a member of the Board of Trustees of the Congregational Church, and as a member of the Board of Trustees of Doane College. In 1936 he was an alternate delegate to the Democratic National Convention in Chicago. He was a forceful and elequent public speaker whose services were frequently sought throughout the area.

He found time for useful activity in various youth organizations. He served as District Troop Chairman of the Boy Scouts of America, and a Director of Boys' State.

His judicial career commenced with his appointment as a District Judge in February of 1938. He served in that capacity until he resigned in January of 1943 to become a Judge of the Supreme Court, to which office he had been elected. He was re-elected without opposition in 1948, 1954 and 1960.

In 1943 he served as president of the University of Nebraska Alumni Association. In 1952 he received the Distinguished Service Award from the University of Nebraska. In Lincoln he united with the Westminster Presbyterian Church.

At various times during his service on the bench he served as a referee on the National Railway Adjustments Board, the Airlines System Board of Adjustment and the Railroads System Board of Adjustment, and as a member of the Presidential Railroads Emergency Board. Appointments to these boards were made both by President Harry S. Truman and by President Dwight D. Eisenhower. His services included the study of labor problems and the mediation of strikes. The board first mentioned made disposition of some two hundred cases. The board

last mentioned succeeded in averting a nation-wide strike over labor disputes between 150 railroads and 15 unions.

The Judge was a member of District, State and American Bar Associations, the Masonic Lodge, Knights Templar, Scottish Rite, and Elk's Lodge.

In 1925 he was married to Gertrude H. Bauer of Sutton, Nebraska, who died in 1956. Three children survive that marriage: Robert A. Wenke, of Long Beach, California; William F. Wenke, of Santa Anna, California; and Mrs. James (Harriett) Campbell, of Portsmouth, New Hampshire. Both sons are engaged in the practice of law.

He married Margaret Collins of Stanton in 1958. She survived him, together with three brothers, six sisters and six grandchildren.

Judge Wenke regarded his judicial duties as a sacred trust, and it was his sole ambition to faithfully discharge that trust. He was a capable, courageous, conscientious and industrious judge, possessed of the highest integrity and character. He supplied vigor, vitality, and lofty stature to the great tribunal of which he was a member. He was a strong member of a strong court, and served with dignity, impartiality and dedication.

His passing not only leaves us with grief, but with a lasting memory of his nobility and the quality of his devotion.

The Committee designated by the Court submits this statement as a tribute to the memory of the late Judge Wenke. Its submission will be followed by personal expressions of tribute by individual members of the Committee.

October 2, 1961.

Respectfully submitted,
Charles F. Adams
E. D. Beech
H. Emerson Kokjer
Lloyd J. Marti
Earl J. Moyer
Alfred D. Raun
Fay H. Pollock, Chairman

HONORABLE CHARLES F. ADAMS.

MAY IT PLEASE THE COURT:

It was my privilege to know Adolph Wenke for perhaps more years than any other member of this Committee and perhaps of any other judge or lawyer present for this memorial service. I moved with my family to Pender in the year 1904, my father having purchased a substantial interest in the Pender National Bank. Shortly thereafter he hired Adolph's older brother, Will, as a bookkeeper in the bank. The Wenke and Adams families were thus associated in business over a long period of years. Will Wenke is still connected with the same bank, being the present managing officer. He is also a Past President of The Nebraska Bankers' Association.

Perhaps a brief reference to the family background of Judge Wenke will enhance our appreciation of his life and work. His father, Frederick Wenke, was one of the leading citizens of the community and served in numerous offices including County Commissioner and County Assessor of Thurston County. Although his business and community activities were many and varied, he never lost his love and interest in his old trade of stonemason which he had learned in Germany before emigrating to the United States. Fortunate, indeed, was the homeowner who possessed a fireplace built by "Fred" Wenke. One of my vivid childhood recollections is that of Judge Wenke's father joining the young people on frozen Rattlesnake Creek for a skating party. His colorful costume including a flowing scarf, his old fashioned skates and his skill as a skater, made him a figure long to be remembered.

Because Adolph was three years ahead of me in school, and because three years is a rather substantial gap in age for schoolboys, my admiration for his abilities as a scholar, a gentleman and an athlete may have been somewhat exaggerated. Nevertheless, I knew that I was not alone in recognizing his many fine qualities. During the time he attended Pender High School he played

on the football team all four years and served as captain both his junior and senior years, he was class president his senior year, he had the leading part in the senior play and was the Business Manager of our first high school annual "The Rattlesnake." One of my cherished possessions is a copy of this old annual. I remember that when Adolph asked me to be the Advertising Salesman I accepted without knowing what an "Annual" was. I mention this only because any of us would have accepted any job that Adolph asked us to do. Everyone who knew him respected him and trusted him, even in those faraway high school days. While yet in his teens, Adolph Eilert Wenke had developed those qualities of mind and heart so essentially necessary for a successful judge.

Of course we shall miss him but the administration of justice in Nebraska will not be interrupted by his passing, or by the passing of any other judge, no matter how beloved or how distinguished. This is the way Judge Wenke would want it to be. What he said of Judge Eberly in his tribute to that distinguished jurist during a similar ceremony before this court, I would like to say of Judge Wenke:

> "I could go on to enumerate other of his qualities as the basis for the excellence of the work he performed as a member of this tribunal, such as his intellect, his honesty, his keen sense of justice, his integrity, and many others but it is unnecessary to do so for the reported record of his opinions, in the Nebraska reports, will stand forever as a silent tribute to a work well done."

HONORABLE E. D. BEECH.

MAY IT PLEASE THE COURT:

It is with mixed emotions that I attend and participate in this service of tribute to a former member of this Court, Honorable Adolph E. Wenke. I undergo a feeling of sadness and regret when I think upon his passing.

It was my good fortune to regard him as a personal friend. I am supported, however, by the memories of pleasant and helpful associations with him and the fact that much pleasure and satisfaction resulted from those experiences. He was a man of many accomplishments and excellent traits of character, which are, in the last analysis, the real measurement of his worth to society.

We are assembled here today to recount a part of the many worthy achievements of the deceased and to permanently inscribe them upon the records of this Honorable Court, which he served with great loyalty and distinction. His industry, ability, courage and devotion to the principle of equal legal rights for all people, enabled him to make many permanent contributions to the jurisprudence of our state and nation. The influence of his labors in building the Temple of Justice has established many landmarks for the future solution of legal disputes and to guide new generations in the performance of the difficult task of administering justice through courts of law. The great good which he was permitted to confer upon his fellow citizens will stand as a perpetual memorial to his life's work.

I first met Adolph E. Wenke in the year 1920, while he was attending the College of Law at the University of Nebraska. His ability and strength of character asserted themselves in those early years. He was an industrious student and possessed a brilliant mind. At that time, his high talents and fidelity of purpose received recognition. He was not only a valuable member of a famous football team, but was selected to positions of honor and responsibility by his fraternity, the faculty and the student body of the University of Nebraska. Notwithstanding all these honors and responsibilities, he still possessed the common touch. He was never too busy to lend aid and give encouragement and counsel to those less fortunate. I shall be eternally grateful for the assistance and stimulation which he provided for me during those years. I would be forever thankful, if I could be endowed with the ability to ade-

quately express my admiration and respect for this good man and his splendid work. I can truly and sincerely say that he was a proven and beloved friend. A greater tribute cannot be spoken of any person.

I shall not extend these remarks by attempting to enumerate the outstanding events of his career as an advocate and a jurist or of his many manifestations of love and kindness for the members of his household. Impressive as they are, some might consider them empty and trivial compared with the bereavement of his family and loved ones. Without intending to intrude upon the privacy of their grief, we extend to all of them our deep and sincere sympathy. They should be sustained and comforted in the knowledge that his recompense in eternity will be commensurate with his temporal service. One, who has served so unselfishly and faithfully while dwelling among us, will certainly be rewarded by the Almighty.

Finally, let us here record our resolutions of affection and respect. May the life of Judge Adolph E. Wenke admonish us to follow the noble pattern which shaped all his actions. In so doing, mankind will be further benefited and enriched with the blessings of freedom and justice which he, and all of us, prize so highly.

HONORABLE H. EMERSON KOKJER.

MAY IT PLEASE THE COURT:

In late autum of the yeor 1919 Bob Russell and Fred Dale, lettermen on the Nebraska University football team, were greatly impressed by a friendly, hard-tackling freshman they had met on the practice field and invited him to dinner at the Sigma Phi Epsilon fraternity house. It was there, in an after dinner visit, that I first met Adolph Wenke.

We both had served as common soldiers and were out of World War I O. D.'s a few short months. As we talked it developed that while we had never met, we had been close together in France for a long time. Our

service there included, at the end, several weeks in the wet and muddy camps near the Bassens docks just below Bordeaux on the Gironde River. There we had waited expectantly for troopships to carry us home. Now we had the study and practice of law as a common objective. Our friendship, initiated that night, grew as we lived in the same house and attended the School of Law at the University. It was a friendship that continued to grow as the years went by.

We went on fishing trips together. We were companions on many occasions at State and American Bar Association meetings and at sports events. Several times in the last few years we went on wilderness-area fishing trips in Ontario, Canada. Early last spring he suggested that we plan another such trip for this summer.

In all of these associations with him I came to know him well. My great admiration for him as a man, a lawyer, a husband, a father and a judge was well-founded on the record he established in each capacity. Always pleasant, trustworthy, kind, generous, his most lovable trait was his thoughtfulness for others. He enjoyed life and companionship and lived each day to the fullest, attaining pleasure equally from life in God's great and beautiful outdoors of lakes, woods and fields, and from his studious research in the law bearing upon the problems of his fellow men in their relations with each other in a troubled world.

My favorite quotation, translated for us from the Sanskrit recording of an ancient poet, perfectly describes the pattern of his every-day life:

"Today well lived makes every yesterday a dream of happiness and every tomorrow a vision of hope."

Judge Adolph E. Wenke was truly a great and good man.

HONORABLE LLOYD J. MARTI.

MAY IT PLEASE THE COURT:

I did not know Judge Adolph Wenke at the time he

was a successful lawyer and a leading citizen in Stanton, Nebraska, but I did become well acquainted with him shortly after he became a Judge of the Supreme Court in 1943. From that time until his death we were warm personal friends.

For the sake of brevity I will not repeat what has already been said with reference to his many fine qualities and abilities, but I concur in those statements.

There were three things about Judge Wenke that particularly impressed me and which I will mention briefly.

Judge Wenke was an extremely human individual. He never lost the common touch. His high position as a member of this court called for dignity and a degree of remoteness. However, the aloofness of his position on the bench did not prevent him from having knowledge of, interest in, and understanding sympathy with, the lives and needs of the average ordinary citizen.

He had friends in all walks of life—farmers, professional people, laborers, and businessmen.

He had a wide variety of interests. I first met Judge Wenke, not in a court room, but across the bridge table. He never did fully appreciate or approve of my method of playing the game, and freely told me so. He enjoyed such games and the fellowship connected with them. As a former athlete, both amateur and professional, he retained a keen interest in sports. For many years, a group of us, including Adolph, sat together at all of the home games of the Nebraska football team. He was always anxious that Nebraska win, but more important, he wanted to see the game well played. He enjoyed dancing and other social activities. He was gregarious, liked people, was warm hearted, and magnanimous.

On many Saturday afternoons throughout the years, I sat on your bench with him, participating in the initiatory ceremonies of our legal fraternity, Phi Delta Phi. Judge Wenke was willing and glad to take time for such activities because he was particularly interested in young men who intended to enter the practice of law.

Another trait that I admired in Judge Wenke was his love of family. He was a family man and he was happy with his family. He took a keen interest in the growth and development of his three children, Bob, Bill and Harriet. He was proud of the fact that his two sons had become able, successful lawyers and that his daughter was happily married. He loved to entertain in his home with his family present. He was a devoted and considerate husband and father.

Finally, I was much impressed by Judge Wenke's judicial attitude.

He was a careful and circumspect judge, watchful of the proprieties applicable to judges. He realized that the opinions which he and the Court were rendering would make law not only for the parties involved, but for others to come later. As a result, his opinions were carefully prepared and were written in language that was simple and clear.

He recognized the tremendous responsibility of the Court with the important issues submitted to it and with the great power it had.

He had a passion for justice and a detestation of wrong, but he did not allow sympathy, bias, or prejudice to influence his decisions.

He did not think of law as a body of unyielding rules which a judge is bound to apply with inexorable logic, but he did feel that it was the function of the Court to interpret and apply the law rather than to make it.

He did not take a cramped or narrow view of the law and he recognized the competing claims of certainty and justice, but he felt that it was the function of the Legislature to enact laws.

In most of his opinions he set forth the law as he saw it, applied that law to the facts of the case, and arrived at his conclusion. His opinions reflected straight thinking, cogent reasoning, and logical judgment.

Judge Wenke was a man of unimpeachable integrity with a high sense of public duty. He honored and magnified his profession.

HONORABLE EARL J. MOYER.

MAY IT PLEASE THE COURT:

In these moments of reflection, dedicated to the memory of our departed friend and colleague, may we lift our eyes to the eternal verities and be reminded by the pained absence of our associate of former days, that time in this chaotic world is but for a fleeting instant and that soon we shall join him in that great and perfect democracy of death.

If the life of him whose memory we honor on this occasion should not give us courage and inspiration, he would have failed. But he did not fail. Knowing him rather intimately, as I did, I saw his faithfulness, his devotion and deep sincerity of purpose. With these virtues go unselfishness and humbleness.

The permanent evidence of his judicial labors is abundantly preserved in the official reports of this Court, as a source of pride to us, his co-workers, and of inspiration to the generations of our profession who shall follow us. For myself, as one of his brethern at the bar, I am content simply to submit that record, free from any purposeless embellishment.

We pay tribute to his memory not because he needs our praise; but because we need the inspiration derived from meditation upon his life and achievements. Our lives are richer and have more meaning because of them.

Yet the passing of our friend and colleague poses the age old question, "If a man die, will he live again?"

Countless millions have asked that question. The sages and philosophers have recorded their versions of the question along with the answers made to it.

There has always been within man a hope, a longing, and a thirst for a life that would be endless. An examination of everything about us justifies that hope and that longing. The whole scheme of things in the universe tells us that that search for life will be satisfied.

To hold that life ends when death comes to the body,

is to deny the law of compensation and the law of balance. These laws cannot be fulfilled without a belief in a future life. Our contention that justice ultimately will be done, and that all wrongs will be righted, falls meaningless if death ends all.

Those who believe that justice will triumph and those who believe in an eternal balance know that life must go on. It ends not. The hypothesis of immortality is the only explanation of man's woes and the only solution to the mystery of life.

An appreciation of nature tells us that the Creator is the Master Architect, Designer, Builder and Artist. Man is His highest creation. Is it logical that God's rocks and waterfalls will last for ages, but that his finest creation, man, should perish after three score years and ten? Man, too, is a builder and an artist. Is it probable that man can build a cathedral that lasts for centuries, but that man becomes nothing after a span of life? The canvas that Raphael painted has endured for more than three centuries. Has God ordained that the canvas be preserved while the artist has fallen into dust?

It indeed would be folly to contend that man's creation would last longer than God's finest creation.

Yet in every age doubts will arise and man will be prone to ask "how can these things be?" Is there a life eternal? The man who perhaps possessed one of the most brilliant minds within the legal profession spoke out on this. As death was drawing near Daniel Webster wrote: "Philosophical argument, especially that drawn from the vastness of the universe in comparison with the insignifance of the globe, has sometimes shaken my reason for the faith that is in me. But my heart has always assured and reassured me that the gospel of Jesus Christ must be Divine Reality. The Sermon on the Mount cannot be mere human production. This belief enters into the very depth of my conscience. The whole history of man proves it."

Man was created for a purpose. Man lives for a purpose. The man whose memory we revere today has

but taken an advanced position in the infinite plan and purpose of the Creator, unto an inheritance incorruptible and undefiled and that fadeth not away.

And as we ponder and reflect upon the personality of this close friend and associate, may we emulate the best that was in him and use the best which is in us to the end that we may wisely guide the destinies of a great and noble profession and that it may be said, to whatever degree deserving, "we have wrought a good work."

Judge Wenke lived a full and fruitful life. He wrought a good work, and it will be remembered.

Thus, in affectionate remembrance, we lay upon his lingering personality the memorial of the living to the dead.

HONORABLE ALFRED D. RAUN.

MAY IT PLEASE THE COURT:

It is impossible for me to express the keen sense of loss that came over me when I first learned of the untimely death of Judge Adolph E. Wenke.

It was my pleasure to have known Judge Wenke since the fall of 1921; at that time he was a student in the University of Nebraska College of Law. Judge Wenke was an excellent student of law; this was so clearly demonstrated after he was elevated to Justice of this Court.

In the College of Law, he was on the honor roll, he was the managing officer of his social fraternity, he was the editor of the "Cornhusker", the University's annual year book, and he was a member of the "Innocents", the highest honor group for men at the University. In all of these various capacities, he so clearly demonstrated his ability for clear, practical thinking. His dealings with those with whom he was associated were always fair and considerate. He was always willing to lend a helping hand to a worthy cause.

Judge Wenke spent a lot of time on the Alumni Board of his Social Fraternity on the Nebraska campus

and it was largely as a result of his constant efforts that it was able to build a new fraternity house in the late twenties, and then was able to keep going during the depression years. Every year he was a moving force in organizing their annual dinners.

The Judge engaged in outdoor life and was a good companion on a fishing or hunting trip. He was always willing to carry his full share of any burden that might develop. The Judge was a good conversationalist and it was a pleasure to be in his company whether it be on a business deal or a pleasure excursion.

The Judge was a Man's man and to those of us who knew him so well, his untimely passing was a severe shock and a distinct loss.

ASSOCIATE JUSTICE EDWARD F. CARTER.

We meet on this occasion to revere the memory of a former member of this court. For more than eighteen years Judge Wenke occupied a place on the Supreme Court bench of this state. Four of those now sitting were his associates during the whole of that period. It is hardly necessary to say that during these years we learned first-hand the qualities of the man.

Judge Wenke was a hard worker. Time was of no consequence in his search for the controlling facts and the applicable law. He convinced himself of the correctness of his position before drafting his final conclusion. In this respect his integrity and sincerity repeatedly manifested themselves.

He had great respect for precedents except, infrequently, when he was convinced that their logic was fallacious. The honesty of his conviction and the impartiality of his approach were noteworthy attributes of his personality.

The thoroughness of his work, supported by his experience as a practicing lawyer and district judge, created an adeptness in detecting errors and indefiniteness in the writings of others. He fitted into a definite

place in the workings of the court and made many contributions to any success that the court can justly claim during the years of his service.

Impartial justice was a fundamental principle with Judge Wenke. The integrity and dignity of the court were of prime concern to him. He served the people of the state well and, consequently, the court as well. He will be remembered by his contemporaries on the bench for his honesty, sincerity of purpose, his responsibility to lawyers and litigants, and his dedication to the law.

In his passing the court lost a fair and impartial judge and the state a fine upright citizen. Judge Wenke has left an enviable record. Physically he is no longer among us, but the memory of the man will continue to exert its influence upon all who knew him. While time must take its toll from among the living, sometimes prematurely, there are those so taken whose acts and deeds will influence those who survive in the years to come. So it is with Judge Wenke whose contributions to the jurisprudence of this state will continue to play their part in shaping the law though he is no longer among us. We as a court suffer great loss in the passing of a judge so dedicated to the fair and impartial administration of justice. We shall cherish his memory for what he was, and console ourselves with the thought that the state, the judiciary, and the bar have been improved and dignified by his having lived his allotted time among us.

CHIEF JUSTICE SIMMONS.

We are honored by the presence of Mrs. Wenke, the Judge's son, Bob, and other members of his family.

We are grateful to Judge Pollock and the members of his committee for work well done.

The addresses made here this morning will be printed in the next permanent volume of our reports. Mrs. Wenke will be furnished with a copy of these proceedings.

The court will now recess.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1961

LEROY E. ELLIOTT ET AL., APPELLANTS, V. CITY OF AUBURN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

108 N. W. 2d 328

Filed March 24, 1961. No. 34883.

1. **Pleading.** 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.
2. ———. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof.
3. **Municipal Corporations: Taxation.** Section 17-509, R. R. S. 1943, provides that the governing body of any city of the second class shall have power to pave any street, streets, alley, or alleys, at public cost, or by levy of special assessments on the property especially benefited thereby, proportionate to benefits, and by ordinance to create paving districts; provided, that none of the improvements named shall be ordered except as provided in sections 17-510 to 17-512.
4. ———: ———. Section 17-510, R. R. S. 1943, provides that whenever a petition signed by 60 percent of the resident owners, owning property directly abutting upon the street, streets, alley, or alleys proposed to be improved, shall be presented to and filed with the city clerk, the governing body shall by ordinance create a paving district or districts, and shall cause such work to be done, shall contract therefor, and shall levy assessments on the lots or parcels of land abutting on or adjacent to such street, streets, alley, or alleys especially benefited thereby in such district in proportion to such benefits, to pay the cost of such improvement.

5. ———: ———. Section 17-513, R. R. S. 1943, provides that the sufficiency of the protests or petitions referred to in sections 17-510 and 17-511, as to the ownership of the property, shall be determined by the record in the office of the county clerk or register of deeds at the time of the adoption of said ordinance.
6. **Fraud.** In a charge of fraud the facts showing such fraud must be pleaded, and a mere allegation of fraud is not sufficient.
7. **Appeal and Error.** Section 25-1901, R. R. S. 1943, provides that the judgment rendered, or final order made, by a county court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court.
8. ———. Section 25-1903, R. R. S. 1943, provides that the proceedings to obtain such reversal, vacation, or modification shall be by petition entitled "petition in error," filed in a court having power to make such reversal, vacation, or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action.
9. **Judgments.** A collateral attack is an attempt to impeach the judgment by matters dehors the record, before a court other than the one in which it was rendered, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.
10. **Taxation: Appeal and Error.** The Legislature has so far provided no appeal to the district court from the act of a city council of a city of the second class sitting as a board of equalization to levy special assessments for paving. In such a situation, the only way a district court gets jurisdiction is by proceedings in error.
11. **Constitutional Law: Taxation.** In this jurisdiction an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the Constitutions of Nebraska and the United States.
12. **Taxation.** Section 17-524, R. R. S. 1943, provides that assessments made under the provisions of sections 17-509 to 17-523 shall be made by the council or board of trustees at a special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amount charged against the same; and notice of the time of

holding such meeting, and the purpose for which it is to be held, shall be published in some newspaper published or of general circulation in such city before such meeting is held, or, in lieu thereof, personal service may be had upon persons owning or occupying property to be assessed.

APPEAL from the district court for Nemaha County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Dwight Griffiths, for appellants.

John Ferneau, Yale C. Holland, Dale Cullen, Clarence E. Heaney, Jr., and *Donald F. Stanley,* for appellees.

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

MESSMORE, J.

The plaintiffs, LeRoy E. Elliott and Gertie B. Elliott, brought this action in equity in the district court for Nemaha County against the City of Auburn, a municipal corporation, the mayor of the city, the members of the city council, the city clerk, and the county treasurer of Nemaha County, defendants. The purpose of the action was to have special assessments for paving improvements declared void, to enjoin collection of the special assessments, to have the levy against the plaintiffs' property stricken from the tax rolls in the county treasurer's office, and to quiet title to the plaintiffs' property against the levy and assessment for paving taxes.

All of the defendants except the county treasurer of Nemaha County demurred to the second amended petition on the grounds that the second amended petition did not state facts sufficient to constitute a cause of action; that the trial court was without jurisdiction over the subject matter of the action; and that the actions and proceedings of the mayor and city council could be reversed, vacated, or modified only by proceedings in error. The trial court sustained the defendants' demurrer and dismissed the plaintiffs' action. The plaintiffs filed a motion for new trial which was overruled. The plaintiffs perfected appeal to this court.

The plaintiffs' second amended petition, in substance, alleged that the plaintiffs, since March 31, 1958, were the owners of Lots 11 and 12, Block 8, in Courthouse addition to the city of Auburn, acquiring fee simple title thereto by warranty deed of record March 24, 1958; that the plaintiffs moved into the premises March 31, 1958; that the real estate owned by the plaintiffs was included in and constituted a part of paving district No. 27; that on or about April 7, 1958, a petition was presented to the mayor and city council requesting that body to improve the designated streets located within the limits of said city, and to create a paving district to be known as paving district No. 27; that on April 7, 1958, there were 19 or more resident owners of real estate directly abutting upon the streets petitioned to be improved, but that the petition presented to the mayor and city council was signed by not more than 11 resident owners owning property directly abutting upon the streets petitioned to be improved; that the 11 owners signing the petition did not constitute 60 percent of the resident owners as required by section 17-510, R. R. S. 1943; that the petition for the creation of paving district No. 27 was therefore insufficient to confer jurisdiction or authority upon the city or upon its mayor and city council to enact an ordinance for the creation of a paving district as required by section 17-510, R. R. S. 1943; that the plaintiff, LeRoy E. Elliott, prior to April 7, 1958, had informed the city attorney, one of the defendant councilmen of the city, and the city engineer that the plaintiffs were the resident owners of record of real estate, and had not signed the petition for the creation of the paving district, were opposed to the creation of said district, and would not sign the petition; that the petition lacked a sufficient number of signatures of the resident owners to authorize or empower the city to proceed with the creation of the proposed paving district; that on April 7, 1958, the mayor and city council wrongfully enacted ordinance No. 756 of the city of

Auburn, then made an erroneous finding that 18 resident owners owned real estate directly abutting upon the streets proposed to be improved; that the mayor and city council on February 9, 1959, did sit as a board of equalization to assess the costs of improvements made in the purported paving district No. 27 created under ordinance No. 756 and levied a special assessment of $1,285.37 against the property of the plaintiffs for the cost, assessment, and benefit of said paving; that the city clerk failed to send notices by mail to the property owners or interested parties in each of such paving districts prior to the council meeting on February 9, 1959, and consequently another meeting of the board of equalization was held on June 9, 1959, after mailing copies of the published notice of that meeting to each of the property owners and interested parties; that at the second meeting of the board of equalization there was made a reassessment and relevy, and the amount of special assessments as against the plaintiffs' property was fixed in the amount of $1,285.37; that the mayor and members of the city council, through the city clerk, caused the levy and assessment of February 9, 1959, to be certified to the office of the county treasurer of Nemaha County, and placed on the tax rolls as a tax and special assessment against the plaintiffs' property; that the certification was made on April 20, 1959, after the plaintiffs had commenced this action by filing their original petition on March 28, 1959; and that the relevy and reassessment of the meeting of the board of equalization on June 9, 1959, was certified to the office of the county treasurer June 17, 1959.

Attached to the plaintiffs' petition as an exhibit is a legal notice published in the Auburn newspaper dated April 11, 1958, showing that ordinance No. 756 creating paving district No. 27, was passed and approved by the mayor and city council April 7, 1958. This notice sets out the ordinance in full. As shown by the title, it was an ordinance finding and determining the suffi-

ciency of the petition filed in the office of the city clerk by certain property owners in said proposed paving district.

Section 1 of the ordinance stated: "The Mayor and Council of the City of Auburn, in County of Nemaha, State of Nebraska, hereby find and determine: That a petition has been presented to and filed with the City Clerk of the City of Auburn, Nebraska, petitioning for the creation of a paving district and for the paving and improving of the following described streets within the City of Auburn, Nebraska, * * * by grading, guttering, draining, curbing and paving the same; that said petition has been signed by 11 resident owners owning real estate directly abutting upon the streets to be improved; * * *."

It is agreed that the city of Auburn is a city of the second class. Likewise, it is agreed that this is a collateral attack upon the action of the city of Auburn, its mayor, and city council in creating the paving district as aforesaid.

"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." Gerard v. Steinbock, 169 Neb. 828, 101 N. W. 2d 194.

In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof. See Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150.

In the instant case the published notice of adoption of ordinance No. 756, attached to the second amended petition as an exhibit, is to be considered in passing on the demurrer.

Section 17-509, R. R. S. 1943, provides in part: "The governing body of any city of the second class * * * shall have power to * * * pave * * * any street, streets, alley, alleys, * * * at public cost, or by levy of special assessments on the property especially benefited there-

by, proportionate to benefits, and by ordinance to create paving * * * districts * * *; Provided, that none of the improvements hereinbefore named shall be ordered except as provided in sections 17-510 to 17-512."

Section 17-510, R. R. S. 1943, provides in part: "Whenever a petition signed by sixty per cent of the resident owners, owning property directly abutting upon the street, streets, alley, alleys, * * * proposed to be improved, shall be presented and filed with the city clerk or village clerk, petitioning therefor, the governing body shall by ordinance create a paving * * * district or districts, and shall cause such work to be done * * *, and shall contract therefor, and shall levy assessments on the lots and parcels of land abutting on or adjacent to such street, streets, alley or alleys especially benefited thereby in such district in proportion to such benefits, to pay the cost of such improvement."

Section 17-511, R. R. S. 1943, provides another method, separate and distinct from that stated in section 17-510, R. R. S. 1943, relating to the same subject matter, as does section 17-512, R. R. S. 1943.

Section 17-513, R. R. S. 1943, provides in part: "The sufficiency of the protests or petitions referred to in sections 17-510 and 17-511, as to the ownership of the property, shall be determined by the record in the office of the county clerk or register of deeds at the time of the adoption of said ordinance."

Without repeating the allegations of the plaintiffs' second amended petition, the plaintiffs allege that the finding of the city council with reference to the number of property owners within paving district No. 27 was wholly false, and that the assessment made with reference to their property was illegal, fraudulent, void, without authority of law, and of no force and effect. This constitutes nothing more than an allegation of fraud in general terms, and alleges no more than that the city council erred in such matters. A mere mistake in computation, if one is made, does not constitute

fraud. It is a well-settled rule that in a charge of fraud and misrepresentation the facts showing such fraud must be pleaded, and a mere allegation of fraud is not sufficient. See Chapman v. Meyers, 84 Neb. 368, 121 N. W. 245, and cases cited therein.

In the instant case we are concerned with a collateral attack on the proceedings of the governing body of the city of Auburn, a city of the second class, and primarily with the question as to whether or not the trial court could render injunctive relief in such a proceeding.

The following sections of the statutes relating to proceedings in error are applicable in the instant case.

Section 25-1901, R. R. S. 1943, provides: "A judgment rendered, or final order made, by a county court, justice of the peace or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

Section 25-1903, R. R. S. 1943, provides in part: "The proceedings to obtain such reversal, vacation or modification shall be by petition entitled 'petition in error,' filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action."

In Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692, an action brought by resident taxpayers and members of a school board against the county superintendent and county treasurer of Gage County for a permanent injunction, this court said: "In 49 C. J. S., Judgments, § 408, p. 809, citing numerous cases including In re Estate of Ramp, 113 Neb. 3, 201 N. W. 676, In re Guardianship of Warner, 137 Neb. 25, 288 N. W. 39, and County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569, it is said: 'A collateral attack is an attempt to impeach the judgment by matters dehors the record, before a court other than the one in which it

was rendered, in an action other than that in which it was rendered; an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it; * * *.'"

In Cacek v. Munson, *supra,* the petition alleged that school district No. 74, with other districts and district No. 78, filed petitions with the county superintendent praying that the boundaries should be changed so that they would be made a part of district No. 74; and that if the petitions were correct, the county superintendent would be required by statute to include school district No. 78 which would cause that district to lose its identity and require its residents to pay taxes for the support of consolidated school district No. 74. The plaintiffs' petition alleged that the petition filed with the county superintendent, purporting to be signed by 55 percent or more of the legal voters of district No. 78, did not factually represent 55 percent or more of such legal voters because one signer, although a resident of district No. 78, was not a qualified legal voter and should not have been so counted by the county superintendent, and therefore, the action of the county superintendent in including district No. 78 in the merger plan was null and void, and injunction should issue. The amended petition was dismissed, and it was held that the county superintendent had jurisdiction to hear and determine the matters about which the plaintiffs complained. The county superintendent made a determination of the subject matter. It was held that his order was reviewable only by proceedings in error, and the action requesting the injunction could not prevail. This court said that the question as to whether 55 percent or more of the legal voters of the district had signed the petition, and the findings and determination of the facts from the evidence adduced with relation thereto, were judicial in character. The opinion cited Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566, where-

in the court said that the power so vested in the superintendent was to a certain extent judicial in its character and subject to review on proceedings in error, and that the provisions of the statutes relating to proceedings in error afford an adequate remedy at law in such cases. This court also said that where the record of the proceedings and final order affirmatively disclose that the county superintendent had mandatory authority and jurisdiction to enter an order changing the boundaries of school districts, such order may not be collaterally attacked unless fraud is alleged, but may be reviewed by proceedings in error which provide an adequate remedy.

This court in Gergen v. The Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558, said: "This court adheres to the rule that if a court is one competent to decide whether or not the facts in any given proceeding confer jurisdiction, decides that it has jurisdiction, then its judgments entered within the scope of the subject matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its jurisdiction, are not subject to collateral attack but conclusive against all the world unless reversed on appeal or avoided for error or fraud in a direct proceeding. Brandeen v. Lau, 113 Neb. 34, 201 N. W. 665; County of Douglas v. Feenan, 146 Neb. 156, 18 N. W. 2d 740, 159 A. L. R. 569."

The case of Hiddleson v. City of Grand Island, 115 Neb. 287, 212 N. W. 619, was a collateral attack by injunction to restrain the city from completing the paving in a certain paving district. Grand Island was a city of the first class and was proceeding under what are now sections 16-619 and 16-620, R. R. S. 1943, which provide that when a governing body shall deem it necessary to make any of the improvements named in section 16-619, said governing body shall by ordinance create paving or other improvement districts, and after the passage, approval, and publication of such ordinance,

shall publish notice of the creation of any such district. If a majority of the resident owners of the property directly abutting on the streets to be improved shall file with the city clerk within 20 days after the first publication of said notice, written objections to the creation of such district, said improvement shall not be made as provided in said ordinance, but said ordinance shall be repealed. The court said: "This required the council to exercise a judicial function in determining a question of fact, and from which error might have been prosecuted, * * *."

In Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515, the court said: "The section of the statutes giving power to the district court to reverse, vacate or modify the judgment or order of a 'tribunal' like a city council, is section 20-1901, Comp. St. 1929 (now section 25-1901, R. R. S. 1943). Another section of the same chapter provides for the review by the district court of a '"petition in error," filed in a court having power to make such reversal, vacation or modification.' Comp. St. 1929, sec. 20-1903 (now section 25-1903, R. R. S. 1943).

"Whether a proceeding shall be taken by appeal from a tribunal, clothed by the legislature with power to decide in the first instance, for review by the district court, is fixed by the statute creating such tribunal and giving it its powers. The right of appeal is purely statutory. Unless the statute provides for appeal in the specific instance under examination at any time, such right does not exist. * * * In cities of the second class, the city council is the 'tribunal' * * *."

The city council was the proper party to determine in the first instance whether or not the petition presented to it was signed by the required number of property owners. The power to determine that question was judicial. Its determination of the question was made within the scope of the subject matter over which its authority extended and, the council having decided

that the facts existed which were necessary to give it jurisdiction to act, the finding is conclusive and cannot be collaterally attacked even though the finding may have been erroneous.

The second amended petition discloses that the plaintiffs had knowledge that the city council was contemplating passing an ordinance creating a paving district of which their property was a part. The plaintiff, LeRoy E. Elliott, was aware that a petition had been presented by certain of the property owners.

The plaintiffs contend that they had no notice that the ordinance would be enacted. It is true that section 17-510, R. R. S. 1943, makes no provision for notice to property owners, nor does it make a provision that the property owners may appear before the city council with reference to the subject matter contained in said section. However, there is nothing in section 17-510, R. R. S. 1943, prohibiting the right of a property owner, whose property is involved in the creation of a paving district, to appear. Considering the knowledge the plaintiffs had with reference to the subject matter, there was nothing to prevent them from appearing before the city council, had they elected to do so.

The error the city council made, if any, related to the counting of the number of abutting property owners to be within the confines of the paving district to be created. In proceedings in error the plaintiffs could have alleged that the city council had computed the property owners in the paving district to be only 18, whereas in fact there were 19, and this matter could be reviewed by proceedings in error by the district court.

The plaintiffs contend that section 17-510, R. R. S. 1943, is in violation of Article I, section 3, Article II, section 1, and Article VIII, section 6, of the Constitution of Nebraska, and in contravention of Amendment V and section 1 of Amendment XIV of the Constitution of the United States in that it delegates legislative functions to private individuals and results in the taking

of private property for a public use without just compensation and without due process of law.

The source of section 17-510, R. R. S. 1943, shows this section, in one form or another, to have been in existence as a statutory law of this state since 1879. Its constitutionality has never been questioned.

In Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67, the constitutionality of section 17-511, R. S. 1943, was questioned. This court said: "It is now elementary in this jurisdiction as well as elsewhere that an opportunity to be heard with right of review upon the question of assessments for benefits is all that is required to satisfy the due process provisions of the constitutions. Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397. See, also, Hoopes v. City of Omaha, *supra* (99 Neb. 460, 156 N. W. 1047), citing and quoting with approval from Londoner v. City and County of Denver, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103."

Section 17-510, R. R. S. 1943, does not provide for a notice of hearing to be given the property owners within the confines of a paving district created as provided in said section to appear before the city council for the purpose of determining whether or not the improvement is beneficial or necessary, or whether the property owners included within the paving district will be benefited or injuriously affected. The following is applicable on this phase of the case.

Section 17-524, R. R. S. 1943, provides in part: "Assessments made under the provisions of sections 17-509 to 17-523 shall be made and assessed in the following manner: (1) Such assessment shall be made by the council or board of trustees at a special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements, and the amount charged against the same, which, with the vote thereon by yeas and nays, shall be spread

at length upon the minutes; and notice of the time of holding such meeting, and the purpose for which it is to be held, shall be published in some newspaper published or of general circulation in said city or village, at least four weeks before the same shall be held, or, in lieu thereof, personal service may be had upon persons owning or occupying property to be assessed; * * *."

This section of the statutes protects a complaining property owner's rights.

All of the sections of the statutes relating to the subject matter here considered must be read in pari materia.

As stated in Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N. W. 2d 397: "In Utley v. St. Petersburg, 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155, it was said: 'There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge upon the land * * * or in proceedings for collection afterwards.'"

In Hoopes v. City of Omaha, 99 Neb. 460, 156 N. W. 1047, the court, quoting from Londoner v. City and County of Denver, 210 U. S. 373, 28 S. Ct. 708, 52 L. Ed. 1103, said: " 'In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. (In the instant case the city council so adjudged as a question of fact.) * * * The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment, or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done with-

out hearing to the landowners, provided a hearing upon the assessment itself is afforded.' "

We conclude that the plaintiffs' contention that section 17-510, R. R. S. 1943, is unconstitutional is without merit.

There are many assignments of error in this case. We have covered the propositions deemed necessary to a determination of the matters raised herein.

For the reasons given herein we find that the trial court did not err in sustaining the defendants' demurrer to the plaintiffs' second amended petition, and the plaintiffs had an adequate remedy by proceedings in error.

AFFIRMED.

WENKE, J., not participating.

GEORGE PUPKES, APPELLEE, V. ORAL V. WILSON, DOING BUSINESS AS WILSON BEER DISTRIBUTOR, APPELLANT.

108 N. W. 2d 220

Filed March 24, 1961. No. 34888.

1. **Automobiles: Highways.** The driver of an automobile entering an intersection of two highways is obligated to look for approaching vehicles and to see those within that radius which denotes the limit of danger.
2. **Automobiles: Negligence.** If the driver of an automobile entering an intersection looks for approaching vehicles and fails to see one which is favored over him under the rules of the road, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law.
3. ———: ———. Where the driver of an automobile entering an intersection looks but fails to see an approaching vehicle not shown to be in a favored position, the presumption is that the driver of the approaching vehicle will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question.

APPEAL from the district court for Richardson County: VIRGIL FALLOON, JUDGE. *Affirmed.*

Chambers, Holland, Dudgeon & Hastings and *Paul P. Chaney,* for appellant.

Lester L. Dunn and *J. H. Dickens,* for appellee.

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

CARTER, J.

Plaintiff sued to recover damages for injuries sustained in an automobile accident. The jury returned a verdict for the plaintiff and defendant has appealed.

The case was first tried in the district court for Lancaster County. A verdict was there directed in favor of the defendant. On appeal the judgment was reversed and the cause remanded for a new trial. Pupkes v. Wilson, 165 Neb. 852, 87 N. W. 2d 556. The plaintiff thereafter dismissed the case without prejudice and filed the present action in the district court for Richardson County.

The evidence adduced by the plaintiff is substantially the same as in the former trial. We held on the former appeal that the trial court was in error in directing a verdict for defendant for the reason that the evidence did not establish that defendant's driver was in a favored position as he approached the intersection. The rule is that where the evidence establishes that one entering an intersection fails to see an approaching vehicle which is favored over him, he is guilty of contributory negligence sufficient to bar a recovery as a matter of law. Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235. But where a driver of an automobile entering an intersection looks but fails to see an approaching automobile not shown to be in a favored position, the presumption is that the driver of the approaching automobile will respect his right-of-way, and the question of his contributory negligence in proceeding to cross the intersection is a jury question. Kohl v. Unkel, 163 Neb. 257, 79 N.

W. 2d 405. Since the evidence does not show that defendant's vehicle was in a favored position when plaintiff entered the intersection, the question of plaintiff's negligence in entering the intersection was for the jury. The evidence in this case on that issue is the same as in the former case and requires the same result. The trial court did not err in refusing to direct a verdict.

The evidence shows that on April 19, 1955, the plaintiff, at about 6:15 p.m., approached the intersection of Preston Road and State Highway No. 4 from the north. Plaintiff testified that he stopped at the stop sign on Preston Road and looked both ways before entering the intersection. The stop sign was 39 feet from the north edge of the pavement, although the plaintiff testified that it was from 15 to 20 feet therefrom. Plaintiff testified that he looked both ways and saw no traffic. His wife testified that she also looked both ways and told the plaintiff that the road was clear. Plaintiff proceeded across the intersection at a speed of 10 miles an hour or less, without looking again for approaching traffic on State Highway No. 4. When the rear end of his automobile was in the center of the intersection and its front wheels were off the pavement on the south, plaintiff's car was struck on the left rear end by defendant's truck approaching from the east. The evidence shows that the truck was traveling at about 55 miles an hour at a point one-half mile east of the intersection. There is evidence in the record that the speed of the truck was in excess of 50 miles an hour immediately prior to the accident. A witness testified that the truck driver told him he saw plaintiff's automobile approach the intersection as he was coming over the hill, which is 722 feet east of the intersection, that he thought plaintiff was going to make a right turn to go into Falls City, and that he started to pass plaintiff to his left, but when plaintiff proceeded south and did not turn right, the truck driver tried to get back on

his own side of the road to avoid a collision with plaintiff's automobile but could not make it.

The truck driver testified that when he was about 150 feet east of the intersection he saw plaintiff's car approaching the intersection from the north. He assumed plaintiff would stop at the edge of the pavement, and when he did not, the truck driver applied his brakes. He stated he was traveling about 50 miles an hour. He testified that he did not observe whether or not plaintiff stopped. The truck driver testified that his truck was about 4 feet to the left of the center line of State Highway No. 4 when he applied his brakes and also when his truck collided with plaintiff's automobile. He denied he made the statement that he assumed the plaintiff would turn right into Falls City, and that when plaintiff continued south across the pavement, he, the truck driver, was unable to get back on his side of the road.

Under the evidence before us the questions of negligence and contributory negligence were for the jury. The mere happening of an accident does not establish negligence. The failure of the plaintiff to maintain a continuous lookout is not such evidence of negligence as would bar a recovery unless it be conclusively shown that the truck was in the area of danger, and thus had the right-of-way over one entering the intersection from a nonfavored road. Whether or not defendant's truck was within the limit of danger when plaintiff entered the intersection is a matter on which the evidence is in conflict, and consequently, was for the jury to determine. Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon.

The driver of a vehicle is not required to notice every car that happens actually to be within his range of

vision, but only those within that radius which denotes the limit of danger. Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury. Whitaker v. Keogh, *supra.*

The defendant relies on Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848. It is clearly distinguishable. In that case eyewitnesses testified that plaintiff's intestate was within that radius which denotes the limit of danger and that defendant slowed down and then "spurted out" into the path of the deceased's car. Defendant testified that he stopped at the stop sign but had no memory as to what happened from that time on. It is clear in that case that defendant did not look, or if he had looked he did not see the deceased's automobile which was within the limit of danger. There was no conflict in the evidence on those facts. The defendant was guilty of negligence sufficient to defeat a recovery by him as a matter of law, or, as the trial court determined in that case, the plaintiff was entitled to a judgment as a matter of law.

The defendant contends that the trial court erred in submitting to the jury the question of speed when there was no evidence to support it. The instruction stated in part: "In driving said truck at high and dangerous rate of speed and at a rate of speed greater than reasonable and proper, having regard for traffic and condition of road, and at a rate of speed so as to endanger life and limb of plaintiff, and at a speed in excess of 60 miles per hour." The evidence shows that the truck driver applied his brakes and made tire marks on the pavement for a distance of 112 feet east of the point of impact. The truck skidded an additional 114 feet beyond the point of impact. The truck driver testified that he was driving at 50 miles per hour. We think there is sufficient evidence of speed to submit that issue

to the jury. Whether the defendant was driving at a speed greater than was reasonable and proper under the circumstances was an issue under the pleadings and the evidence adduced.

Defendant also contends that the trial court erred in giving instruction No. 8 which provided: "Motorists should keep to their side of the road at all times, except when passing a car, and then keep vehicle under reasonable control so as to avoid collision with another car or traffic, and in this regard should not pass another vehicle as it is crossing an intersection, but should keep to its own side of the highway, and failure to do what an ordinarily prudent person would do, under like conditions and circumstances, may be evidence of negligence on his part." While it would have been better to have left out the clause relating to the passing of another vehicle at an intersection, we fail to see how it could be prejudicially erroneous. The facts were such that the jury could not have been misled by the questioned part of the instruction.

We think that the issues were for the jury and that the instructions fairly stated the law applicable thereto. The judgment of the district court is affirmed.

AFFIRMED.

WENKE, J., not participating.

WAYNE T. CARROLL AND THOMAS L. CARROLL, TRUSTEES UNDER THE TESTAMENTARY TRUST CREATED UNDER THE WILL OF THOMAS L. CARROLL, DECEASED, APPELLANTS, V. HASTINGS COLLEGE, A CORPORATION, ET AL., APPELLEES.
108 N. W. 2d 223

Filed March 24, 1961. No. 34893.

1. **Wills.** The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in his will, and to give it effect, unless the testator attempts to accomplish a purpose or make a disposition contrary to some rule of law or public policy.

2. ———. The intention of a testator is to be ascertained from a liberal interpretation and comprehensive view of all the provisions of a will.
3. ———. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
4. ———. In the interpretation of language used in a will where a word or words are used in a definite and clearly stated sense, and again used in the same paragraph, it is presumed to be meant in the same sense unless there is a clear intention to the contrary.
5. ———. The intention of the testator is to be ascertained from the whole will and from a consideration of all of its provisions, not merely from isolated clauses, sentences, or words.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

Spier, Ellick & Spire, for appellants.

Harry F. Russell, Morsman, Maxwell, Fike & Sawtell, and *William S. Padley,* for appellees.

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

SPENCER, J.

This is an action by Wayne T. Carroll and Thomas L. Carroll, two of three testamentary trustees, to construe the will of Thomas L. Carroll. The question involved is whether a majority of the trustees have the authority to use both income and corpus of the trust to increase the specific amounts payable to the beneficiaries of the trust.

The trial court in substance construed the will to permit the trustees to increase the specific amounts paid to the beneficiaries so long as the income would permit such increase. It further held that the corpus of the trust could only be used if the income was insufficient to pay the specific amounts payable. Wayne T.

Carroll and Thomas L. Carroll, hereinafter referred to as trustees, appealed.

The third trustee, The United States National Bank of Omaha, was named as defendant. It likewise asked the court to construe the will. The other defendants herein are the Presbyterian Church of Gothenburg, Nebraska, hereinafter referred to as church; Hastings College; and the other beneficiaries of the will. The church answered in substance that all it desired was a continuance of its specific annual payment. Hastings College, hereinafter referred to as appellee, filed an answer and a cross-petition. The other defendants filed voluntary appearances but no pleadings.

The present controversy revolves around a construction of paragraph (6) of the will, but to properly understand said paragraph the following portions of the will are set out:

"(4) I give all the remainder of my property, after payment of my debts, funeral charges, and expenses of administration, to Peters Trust Company, of Omaha, Nebraska, Wayne T. Carroll, of Gothenburg, Nebraska, and Harvey M. Johnsen, of Omaha, Nebraska, in trust, for the following purposes:

"(a) To pay to the present Presbyterian Church of Gothenburg, Nebraska, until the termination of this trust as hereinafter provided for, the sum of five hundred ($500.00) dollars annually, for use in the maintenance and upkeep of the property of the church.

"(b) To pay to my wife, Nellie E. Carroll, until her death, the sum of six thousand ($6,000.00) dollars annually.

"(c) To pay to each of my sons, Dorr H. Carroll, Leslie R. Carroll, Leigh C. Carroll, and Wayne T. Carroll, until the death of my wife, or until such son's death, if previously occurring, the sum of one thousand ($1,000.00) dollars annually, subject to the conditions and limitations of paragraph 4 (i) hereof.

"(d) To pay to each of my sons who survive my wife,

after her death and for the remainder of such son's life, the sum of one thousand ($1,000.00) dollars annually, subject to the conditions and limitations of paragraph 4 (i) hereof.

"(e) To pay to the present wife of each of my sons, after her husband's death, if she survives him, during such part of the remainder of her life as she shall remain a widow, the sum of five hundred ($500.00) dollars annually, subject to the conditions and limitations of paragraph 4 (i) hereof. * * *

"(g) To pay to each of my grandchildren living at the time of my death, after such grandchild attains the age of twenty-five years and for the remainder of his or her life, the sum of five hundred ($500.00) dollars annually, subject to the conditions and limitations of paragraphs 4 (h) and 4 (i) hereof. * * *

"(i) If any of my sons shall be indebted to me at the time of my death, all the payments provided for in paragraphs 4 (c) to 4 (h) inclusive hereof, shall be applied toward the satisfaction of such indebtedness until such time as it is paid, and neither my said son, nor his wife, nor any of his children shall have the right to claim or receive the benefit of any payments herein provided for until such indebtedness shall have been paid in full with accumulating interest.

"(j) To terminate the trust herein created and all of its obligations, upon the death of the last surviving of my grandchildren living at the time of my death, and, after converting the remaining assets, if any, into cash to turn over such money unconditionally and in absolute ownership to the Presbyterian College, at Hastings, Nebraska, commonly known as Hastings College.

"(5) The interests created in the foregoing trust are intended solely for the personal support of the respective beneficiaries, and no part of the income therefrom shall be alienable or subject to the claim of any creditor of the beneficiaries.

"(6) If it shall appear to the trustees at any time

that such of my estate as remains on hand will be insufficient to pay the incomes provided for, during the period intended, in their full amount, a majority of the trustees shall have the power to make such pro-rata reduction in the amount of the incomes as they may deem necessary in order to conserve and continue the trust. Similarly, if, by reason of the death of some of the beneficiaries, or for other reason, the amount of the incomes shall appear to the trustees to be capable of being increased, a majority of the trustees shall have the power to make such pro-rata increase, — my intention being that the respective beneficiaries (except the Presbyterian Church of Gothenburg, Nebraska, to whose bequest the power of modification shall not apply), shall receive the maximum amount of income possible from my estate, consistent only with the continuance of the trust until the death of the last surviving of my grandchildren as provided for in paragraph 4 (h)."

Wayne T. Carroll, son of the deceased and one of the trustee appellants, made a settlement with the trust estate under paragraph (4) (i) and has completely waived any further interest as a beneficiary. Other than the church and the appellee, the beneficiaries are the widow of a deceased son of the testator and six grandchildren of the deceased, all of whom are over 25 years of age.

The following principles are applicable herein: "The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in his will, and to give it effect, unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy." In re Estate of Dimmitt, 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704.

"The intention of a testator is to be ascertained from a liberal interpretation and comprehensive view of all the provisions of a will." Wall v. Wall, 157 Neb. 360, 59 N. W. 2d 398.

"In searching for the intention of the testator the

court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used." Abbott v. Continental Nat. Bank, 169 Neb. 147, 98 N. W. 2d 804.

It is apparent that there is no latent ambiguity involved nor is such contention made by the parties. Appellee, however, objected to the testimony of an actuarial witness as an attempt to present oral testimony to explain provisions of the will. We do not so understand the evidence, and find no error in its admission. It was not introduced to explain any provision of the will, but rather to show the feasibility of appellants' construction. We have many times held that: " 'Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain.' " In re Estate of Pfost, 139 Neb. 784, 298 N. W. 739.

Appellee contends that no construction is justified which would liquidate the corpus of the trust during the lifetime of the beneficiaries other than appellee and the church. It further contends that: "a construction of the will must show that the testator had in mind a maximum sum of $500.00 equally for the education, maintenance and support of such of his grandchildren as should qualify under the trust. There is no logical or lawful interpretation that the testator had any intention of any higher annual sum being paid to any such grandchildren than the sum of $500.00."

In reviewing the will, we observe that the original payments were in such an amount that it would appear there can be no question but that the testator intended the use of the corpus to pay the specified amounts. Otherwise, there would not have been enough to pay the beneficiaries for the first year. This is also the inference to be drawn from the authority given the trustees in paragraph (6) to make pro rata reductions if necessary

to continue the trust. Our problem is the construction of the following language: "Similarly, if, by reason of the death of some of the beneficiaries, or for other reason, the amount of the incomes shall appear to the trustees to be capable of being increased, a majority of the trustees shall have the power to make such pro-rata increase,—my intention being that the respective beneficiaries (except the Presbyterian Church of Gothenburg, Nebraska, to whose bequest the power of modification shall not apply), shall receive the maximum amount of income possible from my estate, consistent only with the continuance of the trust until the death of the last surviving of my grandchildren as provided for in paragraph 4 (h)."

It is to be noted that in paragraph (6), testator, previous to the use of the words "maximum amount of income" in the last sentence of the paragraph, three times used the word "incomes." From the context, "incomes provided for," it is evident that testator was using the word "incomes" as synonymous with payments. Appellants insist it would be inconsistent with the rest of paragraph (6) to hold the word "income" in the last sentence to mean investment or earned income only, as contended by appellee. The rule we believe applicable is as follows: "In the interpretation of language used in a will, where a word or words are used in a definite and clearly stated sense, and again used in the same paragraph, it is presumed to be meant in the same sense unless there is a clear indication to the contrary." Dennis v. Omaha National Bank, 153 Neb. 865, 46 N. W. 2d 606, 27 A. L. R. 2d 674. Is there a clear indication to the contrary? We find none.

The word "income" appears in paragraph (5). Certainly appellee's definition is not applicable. It is apparent that testator is using the word at that point to describe the annual payment to the beneficiary.

Contrary to appellee's contention, we find nothing in the will indicating a limitation of payments only from

income. We do not think the will can be so construed. We hold that the intention of the testator is to be ascertained from the whole will and from a consideration of all its provisions, not merely from isolated clauses, sentences, or words.

We feel there is some significance to the language in paragraph (4) (j): "To terminate the trust herein created and all of its obligations, upon the death of the last surviving of my grandchildren living at the time of my death, and, after converting the remaining estate, *if any*, * * *." (Italics supplied.) This provision would indicate that testator contemplated that the corpus might be depleted at the termination of the trust. The words "if any" appear to bear out this construction.

We also note in paragraph (6) the restriction on the power of modification upward of the bequest to the church and the words "shall receive the maximum amount of income possible from my estate, *consistent only* with the continuance of the trust * * *." (Italics supplied.) It would seem that testator's intention was that the $500 would be paid to the church until the death of the last grandchild, and that during that period the other living beneficiaries would receive at least $500, but more if the trustees thought it possible. The discretion was vested with the trustees.

It seems apparent to this court that testator's primary and paramount concern was to provide for his family and his church and not the appellee. He limited the amount the church could receive but not his family. We are convinced that testator did not intend that the corpus of the trust should be preserved in toto for appellee. We believe rather that the testator, in order to accomplish his purpose of providing for his beneficiaries to the death of his last grandchild, realized a sizeable part of the corpus must of necessity remain, and this he intended should go to appellee.

It is our conclusion that the testator intended the payments to beneficiaries other than the church to be based

on the condition of the trust estate as distinguished from the income. It is obvious he contemplated a decreasing trust estate which he was anxious should provide at least the minimum payment. He gave his trustees an area of discretion as to the amount of payments, but charged them to conserve and continue the trust itself until the death of the last grandchild.

Under this interpretation, the trustees are authorized to pay any and all funds to beneficiaries except such as are needed to carry out the purpose of the trust to the date of termination, the date of the death of the last grandchild who was living at the death of the testator. In this respect, however, the trustees must provide ample margins of safety so that at least the specific amount can be paid to all beneficiaries until the termination of the trust.

For the reasons above given, we reverse the judgment of the trial court and remand the cause with directions to enter a judgment construing the will in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., not participating.

IN RE APPLICATION OF BASIN TRUCK COMPANY ET AL. BASIN TRUCK COMPANY ET AL., APPELLANTS, V. ALL CLASS I RAIL CARRIERS IN NEBRASKA ET AL., APPELLEES.

108 N. W. 2d 388

Filed March 31, 1961. No. 34847.

Public Service Commissions: Appeal and Error. An order of the Nebraska State Railway Commission which fails to make findings of ultimate facts is irregular and will be set aside upon appeal.

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

Nelson, Harding & Acklie and *Robert S. Stauffer*, for appellants.

James E. Steffarud and *Harvey L. Goth,* for appellees.

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

BOSLAUGH, J.

This is an appeal from the Nebraska State Railway Commission in proceedings involving the application of Basin Truck Company and the application of Vernon Lloyd Miller for authority to transport cement in bulk as common carriers between points in Nebraska over irregular routes.

Protests were filed to the applications and a hearing was held before an examiner upon a consolidated record. The examiner recommended that the applications be granted.

Exceptions were filed to the examiner's report and recommendation; and after hearing and argument on the exceptions before the commission, the commission entered separate orders sustaining the exceptions to the examiner's report and denying the applications. Motions for rehearing were filed and overruled.

The order of the commission denying the application of Basin Truck Company, after reciting the proceedings had up to that time in reference to the application, is as follows:

"The Commission, upon due consideration of the evidence adduced at the hearing, the Examiner's report and recommendation, the exceptions thereto and the oral arguments thereon, and being fully advised in the premises, is of the opinion and finds the Exceptions to the Examiner's report should be Sustained, the Examiner's report Overruled and the application Denied.

"ORDER

"IT IS THEREFORE ORDERED by the Nebraska State Railway Commission that Application No. M-10747, Supplement No. 5 of Basin Truck Company, Denver, Colorado be, and the same is hereby, Denied." The order in reference to the application of Vernon Lloyd

Miller is the same except for the name of the applicant.

The appellants assign as error the failure of the commission to make findings of fact. In the motions for rehearing the appellants alleged that the orders were contrary to law.

Section 84-915, R. S. Supp., 1959, provides in part as follows: "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law."

In Young v. Morgan Drive Away, Inc., 171 Neb. 784, 107 N. W. 2d 752, the court held that a finding by the commission of the ultimate facts substantially in the language of the statute was a sufficient compliance with this section. In Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915, the court held that an order of the commission making ultimate findings of fact in the language of the statute was not void.

In this case the commission made no findings of fact. There is no basis upon which to review the order of the commission and determine whether it is reasonable or arbitrary. In Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715, the court said: "The commission should consider each of the several items and make findings of fact thereon. In that way if the applicant is dissatisfied, we, on appeal, may consider the matter in the light of the rule that: On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Chicago, B. & Q. R.R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541."

The following from Oakdale Tel. Co. v. Wilgocki, 171 Neb. 425, 106 N. W. 2d 486, is applicable here: "The applicant and this court are left facing the question unan-

swerable from the record: Why was the application denied?"

In In re application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, the court set aside as irregular an order of the railway commission changing and revoking in part a certificate of public convenience and necessity. The statute authorized a revocation for "wilful failure" to comply with the act. The commission found that a violation had occurred but failed to find that it was willful. The court said: "The fact that a violation was found to exist does not meet the requirements of the statute. When a finding of willfulness is not made, the order of revocation is irregular and will, on appeal, be vacated and set aside."

The orders of the commission appealed from are irregular and must be set aside. It is unnecessary to consider the other assignments of error made by the appellants.

REVERSED.

WENKE, J., not participating.

ROLLAND CHRISTENSEN, APPELLEE, V. HAROLD H. ROGERS ET AL., APPELLANTS.
108 N. W. 2d 389

Filed March 31, 1961. No. 34855.

1. **Automobiles: Negligence.** Under the family purpose doctrine recognized in this state the head of a family, who maintains a motor vehicle for the general use, pleasure, and convenience of the family, is liable for the negligence of a member of the family having general authority to drive it while the vehicle is so used.
2. ———: ———. The family purpose doctrine is a departure from the law of master and servant, principal and agent, and respondeat superior. It is a development from these principles based solely on public policy.
3. ———: ———. If the negligent operation of motor vehicles has become such a menace as to require the imposition of extra-

ordinary remedies, which exceed the scope of common-law liability, it is a matter for the Legislature and not the courts.

4. ———: ———. The initial permission of an owner of a motor vehicle to members of his family to use a family-purpose car does not include authority to delegate the driving of the motor vehicle to a third person not a member of the family.

5. **Appeal and Error.** Under the rules of this court errors assigned but not discussed will not be considered.

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

Spear, Lamme & Simmons, for appellant Rogers.

Kennedy, Holland, DeLacy & Svoboda and *R. A. Skochdopole,* for appellant Wilkenson.

Richards, Yost & Schafersman, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

This is an action to recover damages sustained by plaintiff's truck in a collision with an automobile owned by the defendant Rogers and operated by the defendant Wilkenson. The jury returned a verdict for the plaintiff against both defendants and judgment was rendered thereon. The defendants have appealed.

The evidence shows that during the early morning hours of June 28, 1959, William L. Rogers, Kenneth L. Wilkenson, and Robert A. LaFurge were returning to Rockford, Illinois, after 2 weeks of Marine Corps Reserve training at Hawthorne, Nevada. They were driving an automobile belonging to the defendant Rogers, the father of William L. Rogers. It is not disputed that William L. Rogers had the consent of his father to make the automobile trip. It is likewise not questioned that the car was a family-purpose car and that William L. Rogers, the minor son, was permitted to drive it whenever he wanted to do so.

William L. Rogers was accompanied by Wilkenson and

LaFurge as his guests with the knowledge of the father. The three young men took turns at driving, each one driving about two or three hundred miles. When they arrived about 4 miles east of North Bend, Nebraska, at about 3 a.m., on the morning of June 28, 1959, their automobile collided with a truck being driven by the plaintiff. William L. Rogers was killed in the accident. LaFurge was riding in the front seat to the right of the driver and was asleep at the time of the collision. William L. Rogers was asleep in the back seat when the accident occurred. Wilkenson, as the jury found, was driving the car but had no recollection of it due to retrograde amnesia suffered as a result of the accident.

The testimony and physical facts, including the tire marks on the pavement, show that the Rogers automobile was encroaching to the left of the center of the highway when it was struck. The trial court found the driver of the automobile guilty of negligence as a matter of law and withdrew that issue from the jury. The jury returned a verdict against the defendants Wilkenson and Rogers. The finding of liability on the part of Wilkenson was clearly sustained by the evidence. The defendant Rogers contends that he is not liable for the negligence of Wilkenson under the family purpose doctrine under the circumstances here shown. The question appears to be one of first impression in this jurisdiction.

The question for our determination is, therefore, whether or not the owner, in permitting his son to use his car, was liable for the accident occasioned while the car was being operated by Wilkenson, with the son's permission but without the father's knowledge or consent.

The family purpose doctrine which holds the owner of a car, who gives it over to the use of his family and permits it to be operated by the members thereof, liable for injuries inflicted while being negligently operated by a member of the family, is a departure from the law of master and servant, principal and agent, and re-

spondeat superior. The imposition of liability under the family purpose doctrine is generally stated to be that where the head of the family maintains a motor vehicle for the general use, pleasure, and convenience of the family, the use of the vehicle for the pleasure and convenience of the family is in the furtherance of his purpose in providing it, and that, under such circumstances, it will be treated as if it was being used in the conduct of an owner's business. While many jurisdictions have rejected the doctrine, some have adopted it. It was declared to be the law of this state in Stevens v. Luther, 105 Neb. 184, 180 N. W. 87, and the scope of the rule was expanded in Linch v. Dobson, 108 Neb. 632, 188 N. W. 227. We are now asked to expand the rule further to impose liability on the father for negligence while the family car was being operated by a third party with the son's permission but without the father's knowledge or consent.

To extend the family purpose doctrine to third persons not members of the owner's family who operated the family-purpose automobile without the direction of the owner and not in the performance of his work, solely upon the theory that automobile accidents are numerous and injured persons should be provided a more certain means for recovering damages for injuries sustained, is to establish a rule of liability based wholly on public policy and not on legal principle. Automobiles are not in themselves dangerous instrumentalities. They become dangerous to the users of highways only when negligently operated. If the negligent operation of automobiles has become such a menace as to require the imposition of extraordinary liabilities which exceed the scope of the common-law liability, it is a matter for the Legislature and not the courts. Turoff v. Burch, 50 F. 2d 986. We conclude that the initial permission of an automobile owner to members of his family to use a family-purpose car does not include authority to delegate the driving of the automobile to a third per-

son not a member of the family. Consequently, liability does not attach to the owner for the negligence of such third person. The trial court therefore erred in failing to direct a verdict for the defendant Rogers. This holding makes it unnecessary to consider other assignments of error asserted by the defendant Rogers.

The defendant Wilkenson complains of the failure of the trial court to direct a verdict in his favor. The evidence establishes without conflict that the driver of the automobile was negligent in driving on the left side of the highway at the time of the accident. The jury found that Wilkenson was the driver of the automobile at the time of the accident and this finding is amply sustained by the evidence. We know of no theory by which Wilkenson is entitled to a directed verdict.

The defendant Wilkenson contends also that the defendant Rogers is liable under the family purpose doctrine, although it is not made clear how such liability, if it existed, would excuse the negligence of Wilkenson. In any event, our holding as to the nonliability of the defendant Rogers under the family purpose doctrine disposes of this contention.

The defendant Wilkenson assigns many errors that are not discussed in his brief. Under the rules of this court we consider only such claimed errors as are assigned and discussed. Rule 8 a 2 (4), Revised Rules of the Supreme Court.

We conclude that the judgment against the defendant Rogers should be reversed and the cause remanded with directions to dismiss. The judgment against the defendant Wilkenson is affirmed.

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

BERNYCE BELITZ, APPELLEE, V. CITY OF OMAHA, NEBRASKA, APPELLANT.
108 N. W. 2d 421

Filed March 31, 1961. No. 34889.

1. **Municipal Corporations: Pensions.** Article VII-A of the home rule charter of the city of Omaha, added to such charter in 1942, by vote of the electorate, did not repeal Article VI, section 2, of such charter.
2. **Words and Phrases.** When a matter is held in abeyance it is in a condition of being undetermined. It is not finally settled.
3. **Trial.** A final order within the meaning of section 25-1902, R. R. S. 1943, is one which determines the action and prevents a judgment.
4. ———. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory.
5. **Statutes.** In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
6. **Pensions.** The purpose of pension laws is beneficial, and statutes of that character should be liberally construed in favor of those intended to be benefited.
7. **Municipal Corporations: Pensions.** Under Article VI, section 2, of the home rule charter of the city of Omaha, all rights to a fireman's pension are fixed at the date of his retirement, and his wife would be entitled to a pension upon his death in accordance with the charter provision as it then existed, and subject to the condition therein contained that if she remarried her pension rights would terminate.
8. **Statutes.** Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.

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

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and *Steven J. Lustgarten,* for appellant.

Tesar & Tesar, Eugene F. Fitzgerald, and *Young, Holm, Miller & McEachen,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

MESSMORE, J.

Bernyce Belitz brought this action in equity as plaintiff in the district court for Douglas County against the City of Omaha, a municipal corporation, defendant, to obtain a judgment directing the defendant to pay plaintiff a pension in the sum of $102.50 a month from May 16, 1954, to the date of plaintiff's death or remarriage. The trial court rendered judgment in favor of the plaintiff, granting a pension of $102.50 a month from and after May 26, 1954, so long as she remained unmarried. The defendant filed a motion for new trial. The trial court overruled the defendant's motion for new trial and defendant appealed to this court.

Michael J. Belitz, referred to in the record as M. J. Belitz, was appointed to the fire department of the city of Omaha on December 3, 1908, served in such department for 24 years, 9 months, and 23 days, and retired from such service on September 26, 1933. Upon his retirement, M. J. Belitz was placed on the defendant's pension list and was paid a pension of $102.50 a month from the date of his retirement until the date of his death, May 16, 1954. On September 12, 1939, M. J. Belitz married the plaintiff. On May 24, 1954, the plaintiff made application for a widow's pension. The city council of the city of Omaha, by resolution adopted June 8, 1954, awarded plaintiff, widow of retired fireman M. J. Belitz, a widow's pension effective May 16, 1954, the date of the death of M. J. Belitz. The city council, at a regular meeting held June 22, 1954, revoked and repealed the resolution granting the application of the plaintiff and ordered the application held in abeyance pending the result of pending litigation. The pending litigation referred to involved the question of whether or not widows, who were not married to firemen at least 1 year prior to the date of their retirement, were

eligible to receive a widow's pension.

Subsequently, the plaintiff, by her attorneys, renewed her request that her claim for a pension be allowed, and the claim was denied by a resolution adopted by the city council March 19, 1957. All procedural steps were taken to appeal to the district court from the denial of the plaintiff's claim for a widow's pension as ordered by the city council on March 19, 1957, and a petition was filed in the district court on April 3, 1957.

The city of Omaha is a city of the metropolitan class and operates under a home rule charter. We will refer to the city of Omaha as the city.

The city assigns as error that the trial court was without jurisdiction to render a judgment, and that the trial court's judgment was not supported by sufficient evidence and was contrary to law.

Article VI, section 2, of the city charter of the city of Omaha is a part of the original home rule charter of the city adopted July 18, 1922, pursuant to Article XI, section 5, of the Constitution of Nebraska, and is a verbatim adoption of the language now contained in 14-705, R. R. S. 1943. It provides in part: "All metropolitan cities having a paid fire department, shall pension all firemen of the paid fire department, whenever such firemen shall have first served in such fire department for the period of twenty-one years, and shall elect to retire from active service and go upon the retired list. Such pension shall be paid by the city in the same manner as firemen upon the active list are paid, and such pension shall be at least fifty per cent of the amount of salary such retiring fireman shall be receiving at the time he goes upon the pension list; Provided, in no case shall the amount of such pension be less than fifty dollars per month. *At the death of any retired fireman the same rate of pension as herein provided shall be paid to the widow of such deceased fireman during such time as she shall remain the widow of such deceased fireman* * * *." (Emphasis supplied.)

Article VII-A of said city charter was added to the city charter by ordinance adopted by the electorate of the city, and became effective June 30, 1942. Sections 2, 8, and 15 of Article VII-A are the only sections pertinent here. On the date of the death of M. J. Belitz, they provided in part: "Section 2. Notwithstanding the provisions of Sections 13 and 13A of Article V and Section 2 of Article VI of the existing City Charter of the City of Omaha, and the provisions of any other section, or any amendment or supplement thereto, when any member of the Police or Fire Department of the City of Omaha shall have served twenty-five (25) years, or over, in the aggregate, as a member, in any capacity or rank whatever, of the regularly constituted Departments of the City of Omaha, being of the age of fifty-five (55) years, or over, such person shall have the absolute right and be entitled, on his application made in writing to the City Council, to retire from active service on such Departments and shall be allowed a pension of Seventy ($70.00) Dollars per month; PROVIDED, that any such applicant must be a member of either of said Departments at the time of making such application in order to be entitled to the benefits of this act, and PROVIDED, further that when any member shall have served twenty-six (26) years he shall be entitled to an additional dollar of pension per month, and for each additional year of service, such member shall be entitled to an additional dollar of pension per month, but in no case shall a member receive a pension in excess of a total of Eighty ($80.00) dollars per month. *If, upon the death of any such retired member of the Departments, he leaves surviving him a widow who was legally married to said member at least one (1) year before his retirement, a pension of Forty ($40.00) Dollars a month shall be paid to such widow for the benefit of herself and minor children, so long as she shall remain the widow of such retired member, * * *.*" (Empasis supplied.)

"Section 8. This Act shall apply to all members of

the Departments of the City of Omaha who are members at the time this Act becomes effective or who are thereafter appointed, except such members who are eligible to retire, at the time this Act becomes effective, under the provisions of Section 13 of Article V or Section 2 of Article VI of the City Charter of Omaha, but who have not retired, under either of the foregoing Charter provisions and they shall be allowed a pension as provided by Section 13 of Article V for members of the Police Department, and Section 2 of Article VI for members of the Fire Department, at anytime thereafter, on application in writing to the City Council in accordance with said Sections. Members who have retired on a pension, and widows and minors receiving a pension, prior to the effective date of this Act, shall not be affected by any of its provisions. * * *"

"Section 15. This Act shall become effective at 12:00 midnight of June 30, 1942."

Article VI, section 2, of the city charter was not repealed by the amendment adding Article VII-A, and Article VI, section 2, remained a part of the city charter.

The city contends that the trial court did not have jurisdiction of the subject matter because the action of the city council taken on June 22, 1954, revoking and repealing the previous action and holding the granting of the pension in abeyance pending other litigation, was a final order; and that a jurisdictional question may be raised at any stage of the proceedings.

The question of filing the appeal out of time was not raised by the city in the trial court.

In Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49, this court held that the want of jurisdiction may be taken advantage of during any stage of the proceedings. See, also, Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120.

The city asserts that in the action taken by the city council on June 22, 1954, wherein it revoked and repealed the pension granted to the plaintiff, the language

that the application be "held in abeyance" was mere surplusage; that the plaintiff was entitled to an adjudication on the merits of her claim in 1954; and that by failing to appeal at that time plaintiff had waived her rights, and jurisdiction of the subject matter was now lacking. We are not in accord with the contention of the city.

The term "abeyance" means certain rights or conditions are "in expectancy." It clearly implies that the situation is not yet fully completed. When a matter is held in abeyance it is in a condition of being undetermined. It is not finally settled. See, Willard v. Ward County, 72 N. D. 291, 6 N. W. 2d 566; Fenn v. American Rattan & Reed Mfg. Co., 75 Ind. App. 146, 130 N. E. 129; Illinois C. R. R. Co. v. Bosworth, 133 U. S. 92, 10 S. Ct. 231, 33 L. Ed. 550.

In Otteman v. Interstate Fire & Cas. Co., Inc., 171 Neb. 148, 105 N. W. 2d 583, this court said: "A final order within the meaning of section 25-1902, R. R. S. 1943, is one which determines the action and prevents a judgment; one which affects a substantial right in a special proceeding; * * *. An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory."

In the light of the above authority we conclude that the order was interlocutory and not final. Consequently, the right of the plaintiff to a widow's pension remained to be determined.

In determining this appeal, the following rules of law are applicable to the provisions of the home rule charter of the city to be considered here.

"In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular

part considered separately." City of Seward v. Gruntorad, 158 Neb. 143, 62 N. W. 2d 537.

The purpose of pension laws is beneficial, and statutes of that character should be liberally construed in favor of those intended to be benefited. See, Colton v. Board of Trustees of Pension Fund, 287 Ill. 56, 122 N. E. 73; McCarthy v. City of Oakland, 60 Cal. App. 2d 546, 141 P. 2d 4; Schock v. Chappell, 231 Ind. 480, 109 N. E. 2d 423.

The city contends that Article VII-A, sections 2, 8, and 15, govern the rights of the plaintiff to a pension, and under such sections she is not entitled to a pension for the reason that a vested right to a pension does not exist in the employee's widow until the event happens upon which the obligation to pay the pension depends.

The city cites Lickert v. City of Omaha, 144 Neb. 75, 12 N. W. 2d 644, wherein this court said: "Until the particular event happens upon which the pension is to be paid there is no vested right in the police officer to such payments." This case did not involve the right of a widow to a pension under any article or section of the city charter.

A case in point with the factual situation in the instant case is Schock v. Chappell, *supra*. The question there was whether a widow of a policeman was entitled to be placed on the pension roll of the South Bend police pension fund and to be paid the widow's allowance under said fund during her life while unmarried. Her husband joined the police force in 1898, and retired in November 1920. On September 30, 1922, while a widower, he married the claimant. He died January 16, 1950. The widow asserted her rights under certain provisions of the Acts of 1905, which were amended in 1907. The entire Acts of 1905 were repealed by the Acts of 1925. Under the latter act, the police pension funds were reorganized and reestablished, and the widow, under the 1925 Act, was barred from receiving any

benefits from such fund. The court said that the deceased husband drew benefits from the fund at the rate provided for in the 1905 Act, as amended, from the time of the passage of the 1925 Act until his death, and since he was, by the terms of the act under which he was recovering benefits, exempt from the provisions of the Acts of 1925, and the Acts of 1925 did not apply to him during his life, for the same reason it would not apply to his widow whose rights flowed from her deceased husband, therefore the widow's rights were governed by the Acts of 1905.

In the above-cited case, the pensioner qualified for a pension under a prior act. After his retirement, a new pension law was enacted under which he did not qualify. That pension act put restrictions on a widow's pension not contained in the act under which he retired. The court held that absent some clear expression that the subsequent act was intended to be effective other than prospectively, neither the pensioner's rights nor the rights of any widow left by him would be altered by the subsequent act. This is analogous to the situation in the instant case.

In the case of West v. Anderson, 187 Ga. 587, 1 S. E. 2d 671, the court said: "We now hold that where, before the act of 1935, reducing the amounts of 'pensions,' an Atlanta fireman had been retired in 1932, and was receiving a 'pension' of $100 a month under the prior acts up to the time of his death in 1937, and where, during the period of such payments and at the time of his death, he had a wife, such widow, even though she had not yet drawn the 'pension' at the time of the act of 1935, and was not entitled thereto until after the death of the husband, nevertheless had such a vested right as, by virtue of art. 1, sec. 10, par. 1, of the constitution of the United States (Code, § 1-134), and art. 1, sec. 3, par. 2, of the constitution of the State (Code, § 2-302), could not be altered by the later act. Such a right was not merely contingent, but was more

analagous to a vested remainder or salable interest, subject to be divested and to go to other beneficiaries upon her dying or remarrying before receiving payments."

There are cases, none from this jurisdiction, cited by the city to the effect that the widow's right to a pension vested at the time of her husband's death under certain acts set forth in such cases. These acts are dissimilar to the articles and sections of the city charter considered here, and are not applicable to a determination of this appeal.

Under Article VI, section 2, of the home rule charter of the city of Omaha, all rights to a fireman's pension are fixed at the date of his retirement and his wife would be entitled to a pension upon his death in accordance with the charter provision as it then existed, and subject to the condition therein contained that if she remarried her pension rights would terminate.

In the light of what has heretofore been stated, Article VII-A is not applicable to any rights the plaintiff has to receive a widow's pension. Her rights to such a pension are governed by Article VI, section 2.

There also appears in the record an exhibit showing a list of the widows of retired firemen granted pensions by the city council pursuant to provisions of section 14-705, R. S. 1943, or section 14-702, C. S. 1929, since June 30, 1942. On this exhibit are shown the date the original pensioner retired, the date of death, the pensioner's salary, and the monthly pension to his widow, all of which were in accordance with Article VI, section 2, of the charter, from and after the effective date of the adoption of Article VII-A and all of the sections relating thereto. The amount of the pensions paid to such widows was determined pursuant to Article VI, section 2, and that is the manner in which the city determined the pension right of such a widow, as shown by the exhibit, which was not less than 50 percent of the deceased member's last salary while serving in the fire department.

Section 14-705, R. S. 1943, section 14-702, C. S. 1929, and section 14-705, R. R. S. 1943, adopt the same language appearing in the home rule charter of the city as Article VI, section 2.

It is obvious that the city admits that the widows shown in the exhibit were granted their pensions under the terms of Article VI, section 2, not under Article VII-A, which was never a part of the Nebraska statutes.

In Flint v. Mitchell, 148 Neb. 244, 26 N. W. 2d 816, this court said: "The determination of the questions involved in this case depends upon the proper meaning, interpretation, and application of certain statutory provisions. * * * In Rohrer v. Hastings Brewing Co., 83 Neb. 111, 119 N. W. 27, it was said: 'Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.' This statement of principle was approved in Laub v. Furnas County, 104 Neb. 402, 177 N. W. 749, and again in State ex rel. Western Bridge & Construction Co. v. Marsh, 111 Neb. 185, 196 N. W. 130."

Bearing in mind that the pensions paid to such widows as shown by the exhibit were computed under Article VI, section 2, that most of these pensions were paid after 1954, that none were less than 50 percent of the member's last salary, and that the city's previous construction of these portions of the city charter was followed for 12 years prior to this litigation, we believe such interpretation should be followed in this case.

The foregoing is another reason supporting the plaintiff's right to a widow's pension under Article VI, section 2, of the city charter.

Other matters are raised which we deem unnecessary to determine.

We conclude that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

WILLIAM RICKERTSEN, APPELLEE, V. CLAY CARSKADON, APPELLANT.

108 N. W. 2d 392

Filed March 31, 1961. No. 34890.

1. **Contracts: Work and Labor.** One who undertakes for a consideration to do work requiring special skill impliedly represents that he possesses, and will exercise, such reasonable degree of skill as the nature of the service may require; and if he is to furnish his own tools, implements, or machinery, there is an implied representation as to their fitness for the use to which they are to be put.
2. **Contracts: Evidence.** When the terms of an express contract are clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage, and this is true whether the contract is oral or written.
3. ———: ———. Such evidence is admissible where there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract.
4. **Contracts.** One cannot maintain an action on contract without a prior substantial compliance on his part, but this principle must have a reasonable application. If there is a substantial performance, the action may be maintained but without prejudice to any showing of damages on the part of the defendant for the failure to receive full and complete performance.
5. **Contracts: Pleading.** If defendant relies on the nonperformance of the contract by the plaintiff, he must allege that fact in his answer.
6. ———: ———. In pleading such nonperformance, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract.
7. **Appeal and Error.** Where an issue is treated by the parties at the trial as though it were controverted, even though not sufficiently pleaded, it will be so considered in this court.
8. **Contracts.** In a contract action, if the plaintiff has fully performed his contract he is entitled to the contract price.
9. ———. If plaintiff has substantially performed his contract he is entitled to the contract price less any damage proved by the defendant to be occasioned by less than full performance.
10. **Contracts: Trial.** In a contract action where the defendant may have received benefits which cannot be returned, and defendant contests on the theory that he received little or no benefit, he is entitled to an instruction that if such fact is proved the

jury should allow the defendant to rescind the contract and pay only for the benefit, if any, he received.

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

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

Smith Brothers, for appellee.

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

SPENCER, J.

This is the second appearance of this case before this tribunal. The previous opinion is Rickertsen v. Carskadon, 169 Neb. 744, 100 N. W. 2d 852. The second trial, like the first, resulted in a jury verdict for the plaintiff, William Rickertsen, hereinafter referred to as plaintiff. The defendant, Clay Carskadon, hereinafter referred to as defendant, appeals. The previous opinion contains a full statement of the facts and issues involved, which will not be set out herein except as necessary to explain the issues.

Defendant in this second appeal does not assign or discuss any specific error as to the submission of the issue as to whether he contracted with plaintiff or the Gothenburg Co-Operative Oil Company. The jury, under proper instructions, decided that issue in favor of the plaintiff. The case then is one of contract between the plaintiff and the defendant.

Defendant's brief lists 13 assignments of error. We will consider those specifically relating to the court's instructions Nos. 5, 6, and 7.

The court in instruction No. 5 correctly told the jury that even in express contracts there is an implied promise that the work will be done in a proper manner. He advised the jury that merely by taking a job, one contracts that he has the requisite skill to perform it. We

said in Numon v. Stevens, 162 Neb. 339, 76 N. W. 2d 232: "One who undertakes for a consideration to do work requiring special skill, impliedly represents that he possesses, and will exercise, such reasonable degrees of skill as the nature of the service may require; and if he is to furnish his own tools, implements, or machinery, there is an implied representation as to their fitness for the use to which they are to be put."

The contract alleged by the plaintiff covered only the purchase and application of anhydrous ammonia to defendant's farm. It did not include any provisions as to the method of application. The defendant in his answer alleged: "That should it be found upon any theory, which defendant denies, that he is bound by purchase or otherwise, to the plaintiff for said anhydrous amonia (sic) or the application thereof upon defendant's lands, that said anhydrous amonia(sic) was improperly, negligently and carelessly applied to defendant's lands in such manner that the same was wholly worthless and of no value whatsoever to defendant's said lands * * *." It is evident that if the defendant was contending that the plaintiff was to perform the work in other than a workmanlike or proper manner, he has not properly pleaded that issue. We have no quarrel with the authorities cited by the defendant on evidence of usage or custom. However, in the present state of the record, they are inapplicable.

The correct rule is that when the terms of an express contract are clear and unambiguous, they cannot be varied or contradicted by evidence of custom or usage, and this is true whether the contract is oral or written. Conversely, such evidence is admissible where there is a conflict as to the terms of the contract to explain the meaning of the words or phrases used, or where the contract is silent as to certain points which may be inherent in the nature of the contract. See, O'Gara Coal Co. v. Chicago, M. & St. P. Ry. Co., 114 Neb. 584, 208 N.

W. 742; James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273.

If in this case the evidence indicated the contract was one with express terms, conditions, and directions, those would prevail and nothing would be left for implication. Instruction No. 5 would then be prejudicially erroneous. This is not the situation.

Instruction No. 6, so far as material herein, is as follows: "When a party to a contract has not strictly performed his promises, his efforts at performance may under some circumstances be found sufficient to amount to substantial performance.

"Substantial performance is shown when the following circumstances are established by the evidence:

"(1) The party has made an honest endeavor in good faith to perform his part of the contract.

"(2) The results of such endeavor are beneficial to the other party, and

"(3) Such benefits are retained by the other party.

"If any one of said circumstances is not established, the performance is not substantial and the party has no right of recovery."

We know of no rule of law which holds that a party has substantially performed merely because he in good faith endeavors to perform his contract. The other party should receive at least approximately what he bargains for. As to point (2) above, it would appear evident also that the degree of benefit should have some materiality. Certainly defendant would be entitled to receive substantially that for which he contracts. With reference to point (3) above, covering the retention of benefits, is the possibility of return material?

We feel that the court in instruction No. 6 told the jury that if the plaintiff made an honest endeavor in good faith to perform his contract regardless of whether he succeeded, and if that endeavor conferred any benefit on defendant, and defendant retained that benefit, however meager, and regardless of the fact that anhy-

drous ammonia once applied could not be returned, that the plaintiff had substantially performed his contract. This is not the law and the instruction was prejudicially erroneous.

In Nebraska Plumbing Supply Co. v. Payne, 84 Neb. 390, 121 N. W. 243, we approved the following instruction: " 'If you find from the evidence that the plaintiff has substantially performed its contract in this regard, you should find for the plaintiff on this issue. And in passing upon this issue you are instructed that, if you believe the plaintiff in good faith substantially performed the terms of its contract, but that there are some slight omissions or defects which are not so essential as to defeat the object of the parties, but could be readily remedied, then the plaintiff can recover the contract price less the damages occasioned by the omission or defect. Such damages are what it would have cost the defendant to remove the defect or omission, and thus give to the defendant what his contract called for.' "

The law in Nebraska is well settled that one cannot maintain an action on contract without a prior substantial compliance on his part, but this principle must have a reasonable application. If there is a substantial performance, the action may be maintained but without prejudice to any showing of damages on the part of defendant for the failure to receive full and complete performance. McGowan v. Gate City Malt Co., 89 Neb. 10, 130 N. W. 965.

The pleadings in this case leave much to be desired. Plaintiff in his petition adequately conformed to section 25-836, R. R. S. 1943, which provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance." Defendant in his answer, however, did not properly put in issue the performance of conditions precedent.

Commenting on this statute in Morearty v. City of McCook, 119 Neb. 202, 228 N. W. 367, we said: "Under such statutory provision the rule appears to be: 'If defendant relies on the nonperformance of the contract by the plaintiff, he must allege that fact in his answer. In pleading such nonperformance, the facts which constitute the breach must be alleged, and the breach assigned must conform to the terms of the contract.' "

We held in Peters v. Wilks, 151 Neb. 861, 39 N. W. 2d 793: "If a defendant relies upon the nonperformance of a contract by plaintiff, he must allege that fact in his answer, and in pleading nonperformance, the facts which constitute the breach must be alleged."

This is the well-settled law in Nebraska. If the issue had properly been called to the attention of the trial court, this rule would govern. This, however, was not done, and the case was tried on the theory that the issue was properly raised. Actually, the plaintiff in his case-in-chief went into detail as to his manner of performance. In this state of the record, we must hold the parties to the theory on which the case was tried.

In Johnson v. Weskamp, 122 Neb. 381, 240 N. W. 514, we said: "In Hensley v. Chicago, St. P., M. & O. R. Co., 118 Neb. 690, it was held: 'The general rule that the allegations of the pleadings and proof thereunder must agree will not be applied to reverse a judgment, where an issue is tried by both parties without objection from either that such issue is not sufficiently pleaded. Under such conditions, the appellate court will consider the pleadings as sufficient to raise the particular issue.' Holdings to like effect by this court have been made in Auld v. Walker, 107 Neb. 676; Sjogren v. Clark, 106 Neb. 600; and Boyd v. Lincoln & N. W. R. Co., 89 Neb. 840." We again say that where an issue is treated by the parties at the trial as though it were controverted, even though not sufficiently pleaded, it will be so considered in this court.

On the question of damages, if the plaintiff has fully

performed his contract he is entitled to the contract price. If the plaintiff has substantially performed his contract he is entitled to the contract price, less any damage proved by the defendant to be occasioned by less than complete performance. This is the rule given in Nebraska Plumbing Supply Co. v. Payne, *supra*. Thus far, instruction No. 7 covers the issues.

The defendant, however, tried this case on the theory that he received little or no benefit from the application of the anhydrous ammonia. The court should have included an instruction on the defendant's theory substantially to the effect that if the jury found that the anhydrous ammonia was so negligently applied that it was of little or no benefit to the defendant, then the plaintiff had not performed his contract and could only recover for the benefit, if any, which he could prove the defendant had received.

For the reasons given above, the judgment is reversed and the cause is remanded for a new trial. For the purpose of the third trial, we suggest that the question as to whether defendant contracted with the Gothenburg Co-Operative Oil Company or the plaintiff is no longer an issue.

REVERSED AND REMANDED.

WENKE, J., not participating.

WALTER R. MEIER ET AL., APPELLEES, V. GEORGE D. MAGUIRE ET AL., APPELLANTS, IMPLEADED WITH CHRIS WUNDERLICH ET AL., APPELLEES.
108 N. W. 2d 397

Filed March 31, 1961. No. 34910.

1. **Vendor and Purchaser.** Where the owner of two adjoining tracts of land sells one of them, the purchaser takes the tract sold with all the benefits and burdens which appear at the time of the sale to belong to it as between it and the tract which the vendor retains.

2. ———. Whether or not a conveyance is one of implied grant or implied reservation is dependent on whether or not the dominant or servient estate is first conveyed. If the dominant estate is first conveyed, the question is one of implied grant. If the servient estate is first conveyed, the doctrine of implied reservations is applicable.
3. ———. Whether or not the law applied is that of an implied grant or an implied reservation, the rule of strict necessity is inherently in it and neither an implied grant nor an implied reservation will be decreed unless it is established that it is strictly necessary to the enjoyment of the estate.
4. ———. The extent of an implied grant is that which is reasonably necessary to convey the benefit intended to have been conveyed by the vendor.

APPEAL from the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Wagner, Wagner & Homan, for appellants.

Dougherty & Reed, for appellees Meier.

Walter, Albert & Leininger and *William H. Grant,* for appellees Wunderlich.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

This is a suit in equity in which the plaintiff sought a reformation of two deeds which are alleged to have erroneously described two adjoining parcels of real estate conveyed by the defendants Wunderlich to the plaintiffs and the defendants Maguire respectively. The trial court reformed the deeds in accordance with the prayer of plaintiffs' petition and the defendants Maguire have appealed.

The evidence shows that in 1954 the defendants Wunderlich and others caused a certain tract of land to be subdivided and platted as the Wunderlich Subdivision to Columbus, Nebraska, and dedicated certain roads designated therein for the benefit of the public. Certain restrictive covenants were filed with the plat of the

subdivision. In 1957 the Wunderlichs were the owners of Lots 6, 7, and 8, Block C, of this subdivision.

Plaintiffs entered into an oral agreement with Wunderlich in 1957 for the construction of a residence on a part of Lots 6 and 7. The plaintiffs agreed to pay $16,500 for the property upon its completion. On May 22, 1957, plaintiffs paid $1,000 to bind the contract and Wunderlich commenced the construction of the residence thereon about May 28, 1957. Plaintiffs moved into the residence on August 15, 1957. The house was completed and final payment made about August 23, 1957. The deed was delivered on August 23, 1957.

In June 1957, the defendants Maguire entered into an oral agreement with Wunderlich for the construction of a residence for an agreed price of $14,400, which was to be built on a part of Lots 7 and 8. The Maguires moved into their home in September 1957. The construction was completed sometime after that date. Final settlement was had and the deed was delivered to the Maguires on December 10, 1957. The defendant Equitable Building, Loan and Savings Association, which was the holder of mortgages on the properties, did not participate in the trial.

The two deeds described the parcels of real estate with a common boundary line. The legal descriptions of the property were accurately set out in the pleadings and we do not deem it necessary to repeat them here. Suffice it to say that the parties more than a year later discovered that plaintiffs' house and driveway were 8 feet over on the Maguire property as the boundary line between them was described in their respective deeds from Wunderlich.

The building of plaintiffs' house 8 feet over on defendants' property appears to have been the result of a mutual mistake wholly unexplained by the record. When plaintiffs' driveway was being constructed some question as to the location of the common boundary line was raised. Wunderlich caused the city engineer to

locate the corners of plaintiffs' property. The driveway was constructed in accordance with the stakes placed by the city engineer. The city engineer testified that he made no survey to establish the corners and placed the stakes from other lot lines that he mistakenly assumed to be correct. The evidence clearly shows that the encroachment on defendants' property was the result of a mutual mistake which was not discovered until long after the parties had occupied their respective homes and accepted the deeds from Wunderlich.

We point out that on the date Wunderlich delivered the deed to the plaintiffs he was the owner of all of Lots 6, 7, and 8. He had not entered into a written contract of sale with either the plaintiffs or the defendants Maguire. In other words, he had not contractually bound himself to convey any specific property to the plaintiffs or the Maguires, although there appears to have been some understanding as to the land on which each house was to be built.

It appears to be the rule that when the owner of two adjoining tracts of real estate sells one of them, the purchaser takes the tract sold with all the benefits and burdens which belong to it as between it and the tract retained. Certainly, the plaintiffs had the right to assume that the deed would include the land upon which the house was built for the benefit of plaintiffs.

In Znamanacek v. Jelinek, 69 Neb. 110, 95 N. W. 28, 111 Am. S. R. 533, this court cited the following with approval: " 'Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains.' " See, also, Fremont, E. & M. V. R. R. Co. v. Gayton, 67 Neb. 263, 93 N. W. 163.

In Christensen v. Luehrs, 133 Neb. 50, 273 N. W. 839, in a similar situation involving an easement, this court

adopted the theory of an implied grant of the benefits which appeared, at the time of the sale, to belong to it as between it and the land which the vendor retained. This case, and the authorities therein cited, is authority for the proposition that, under the facts of the present case, the plaintiffs are entitled to a deed to the real estate upon which the house and driveway were located. Wunderlich as the owner of both parcels of the real estate involved is required to convey to the Meiers as the first grantees the portion sold with all benefits which appeared at the time of the sale to belong to it as against the portion retained by him. Since Wunderlich as grantor cannot properly convey to the Maguires that which he had conveyed to the Meiers, the remedy of the Maguires is necessarily something other than the ejectment of the Meiers from the strip of land occupied by their house and driveway.

The extent of the implied grant is so much of the land as is reasonably necessary to convey the benefit openly and visibly attaching at the time of the severance. Christensen v. Luehrs, *supra*. The trial court found that there was an implied conveyance of a strip of ground 8 feet wide and 64 feet long, which was specifically described in the court's decree. The evidence sustains this finding of the trial court, and its decree ordering the reformation of the deeds in accordance therewith is a correct disposition of the issue.

The defendants Maguire rely upon Bennett v. Evans, 161 Neb. 807, 74 N. W. 2d 728. This case deals with the question of an implied reservation as distinguished from the implied grant we have in the present case. Whether the question is one of implied grant or implied reservation is dependent on whether or not the dominant or servient estate is first conveyed. In Bennett v. Evans, *supra,* the servient estate was first conveyed and a question of an implied reservation was involved. In the instant case the dominant estate was first conveyed and the question is one of implied grant. As we stated in

that case, implied grants are not favored, although they are more favored than implied reservations. The factor of necessity is involved in both. In Bennett v. Evans, *supra,* we held that the evidence did not show any strict necessity for the plaintiffs' encroachment and that the grant of an implied reservation, though convenient, was not necessary. In the instant case an implied grant is necessary in order that plaintiffs have the title to the land upon which their house and driveway were built by the grantor. The case of Bennett v. Evans, *supra,* is correct on the facts of that case, but it has no application to the situation existing in the instant case.

The defendants Maguire claim damages for the violation of a restrictive covenant providing for a 10-foot side line set back for houses constructed in the area. There was no evidence of damage sustained by the defendants Maguire, and the trial court properly dismissed the claim for damages for want of proof.

The trial court came to the same conclusion as does this court. The judgment of the district court is therefore affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JANICE E. BARRY, APPELLANT, V. KEITH T. MOORE, APPELLEE.
108 N. W. 2d 401

Filed March 31, 1961. No. 34920.

1. **Trial.** In a case where it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.
2. **Trial: Appeal and Error.** It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that

prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal.

3. ———: ———. The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure to do so constitutes prejudicial error.

4. **Torts: Damages.** 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.

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

Richards, Yost & Schafersman, for appellant.

Chambers, Holland, Dudgeon & Hastings, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Janice E. Barry, plaintiff and appellant, against Keith T. Moore, defendant and appellee, to recover damages for personal injuries alleged to have been sustained as the result of negligence of the defendant in the operation of an automobile by him on a public highway in Dodge County, Nebraska, on the evening of September 28, 1959. The action was originally commenced in the name of James L. Baker, guardian of Janice E. Baker, a minor. Before the trial of the case she was married and thereby attained her majority. She was then substituted as the plaintiff. The case was tried to a jury which returned a verdict in favor of the defendant. Judgment was rendered on the verdict. A motion for new trial was duly filed. This motion was overruled. An appeal was duly taken by plaintiff from the judgment and the order overruling the motion for new trial.

By the petition filed in the case it is declared and the evidence discloses without dispute that at the time in

question the plaintiff was riding as a guest in an automobile operated by one Larry Gitt on what is known as U. S. Highway No. 30 westward out of Fremont, Nebraska, and that when they reached a point estimated at from 2 to 4 miles west of Fremont the automobile in which the plaintiff was riding was struck in the rear by an automobile owned and operated by the defendant. Both automobiles were proceeding westward on this highway at the time. The hour was between 10:30 and 11 p.m.

By her petition the plaintiff pleaded that the collision was the result of negligence on the part of the defendant in numerous particulars, only three of which were submitted to the jury by the instructions. Error is not predicated on this. These were that the defendant was driving at an excessive rate of speed; that he failed to observe the automatic turn signals in operation on the automobile in which plaintiff was riding; and that he was negligent in attempting to pass the automobile in which plaintiff was riding while it was making a left-hand turn. She pleaded of course that as a result of this negligence she was injured.

To the petition the defendant filed an answer in which he denied that he was guilty of any negligence. Further the defendant alleged the collision was caused by the negligence of the driver of the automobile in which the plaintiff was riding. From the acts of negligence charged the court submitted only the charge that this driver failed to keep a proper lookout; that he failed to signal a left-hand turn; and that he failed to ascertain whether or not a left-hand turn could be made safely. No question of sufficiency of instruction in this area is presented.

By the answer it was also pleaded that the plaintiff was guilty of contributory negligence, but the charge was not supported by evidence and instructions as to it were not submitted to the jury. It therefore requires no further mention herein.

The facts in the case are not in any large degree in dispute. The plaintiff, then unmarried, was riding with Gitt in the front seat of his automobile. They proceeded westward with the intention of turning left across the south lane of Highway No. 30 onto a road leading south to what has been referred to as the lakes. Gitt said in substance that when he was about 175 feet east of the intersection where the turn was to be made he looked in his rear-vision mirror and saw an automobile which the evidence indicates was the one operated by the defendant about ¼ mile away; that he pulled down his left-turn light lever and commenced a movement to the left or eastbound driving lane of the highway; that thereafter he never looked back again; that after his car was over the center line about 1 foot or 1½ feet he heard a screeching sound of tires and a horn and his car was hit from the rear; that at the time he was traveling about 20 or 25 miles an hour; that at the time of the collision his car was about 4 or 5 feet from the south edge of the pavement; and that the collision took place about 50 feet east of the intersection where he intended to turn to the left off Highway No. 30. The collision was between the left rear of the Gitt automobile and the right front of that of the defendant. It is clear from all the evidence that the collision occurred when the automobile of Gitt was at least in part in the south lane, or as related to the direction the parties involved were traveling in the left-hand lane. It is also clear that it was not in the process of making a turn in an intersection but before reaching it.

The defendant testified in his own behalf and in substance said that he observed the Gitt automobile from the time he left the western limits of Fremont and followed it up to the time of the collision; that he drove faster than Gitt or at a speed of 55 miles an hour; that he pulled to the south lane to pass and without warning signal the Gitt automobile pulled in front of him into the left lane whereupon he applied his brakes and his

car skidded forward and struck the rear end of the Gitt car when the Gitt car was about 50 feet east of the intersection. The other evidence on behalf of the defendant is in accord with his testimony.

On the evidence of which this is a summary the question of whether or not the defendant was guilty of actionable negligence and the question of whether or not the collision was caused by the negligence of Gitt was submitted to a jury. Neither party urges here that these questions were not properly submissible for determination by a jury.

As grounds for reversal the brief of appellant contains seven assignments of error. The first and second are too general to require special consideration. By the fifth it is urged that an instruction should have been given telling the jury that negligence of plaintiff's driver could not be imputed to her. The giving of such an instruction would have been on a matter which was in nowise presented by pleading or evidence. It would have been a negative instruction on a nonexistent issue. The cases cited do not support the contention that instruction as to imputed negligence should have been given. The assignment is without merit.

By the sixth assignment of error it is urged that the court erred in giving an instruction without the presence of the parties or their counsel. This was given at the request of the jury. The instruction fails to respond to the request. It is a mathematical answer and as made could have doubtless been computed accurately by any of the jurors. It gave therefore no incorrect information and none which did not flow from what was before the jury. In the light of pertinent rules with regard to instruction of juries it appears that this should be regarded as error, however without prejudice since it could not in reason be said to have misled the jury.

The proper procedure in a case where additional instructions are to be given to a jury is as follows: "If it becomes necessary to give further instructions to a

jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel." Taulborg v. Andresen, 119 Neb. 273, 228 N. W. 528, 67 A. L. R. 642. See, also, Wiegand v. Lincoln Traction Co., 123 Neb. 766, 244 N. W. 298.

By the seventh assignment of error it is urged that the court erred in failing to instruct concerning statutory provisions concerning overtaking and passing at an intersection. The simple answer to this is that here was no intersection accident, but one which without dispute occurred before an intersection was reached. The statute relates to "traversing" an intersection and not approaching one. See § 39-7,110, R. R. S. 1943.

By the two remaining assignments of error the plaintiff challenges the propriety and sufficiency of the instructions relating to proximate cause.

By instruction No. 5 the jury was told that if it found that the negligence of plaintiff's driver was the proximate cause of the accident it must find for the defendant. The particular objection is that the instruction was insufficient because the term "proximate cause" was used instead of "sole proximate cause." Proximate cause was defined in instruction No. 10. No objection is made to this definition. That definition is as follows: "By the term 'proximate cause' is meant the primary or moving cause or fault where no other and independent cause disconnected therewith and self-operating, intervenes to produce the result." The two considered together properly and adequately informed the jury as to the meaning of proximate cause for the purpose for which the instruction was given. That purpose was to say that if the accident was the result alone of the negligence of Gitt the plaintiff could not recover against the defendant.

It is true that the term proximate cause has significations other than the one contained in the two instructions which have thus far been examined, but they are

not important in the determination of the propriety of these for the purpose for which they were given. The third assignment of error taken separately must be said to be without merit.

The fourth assignment of error on its face lacks clarity, but the argument in support of it makes it clear that the complaint is that the court submitted the case on a theory which limited the right to recover only on proof of negligence of the defendant which was the proximate cause of the accident.

Examination of the instructions sustains this contention. Whether or not this was sufficient must be ascertained by a reference to the evidence adduced.

From the evidence which has been sufficiently summarized herein there was a jury question as to whether or not negligence of the defendant was the sole cause of the accident; there was a jury question as to whether or not negligence of Gitt was the sole cause of the accident; there was a question of whether or not negligence of the defendant and Gitt concurred to cause the accident; and of great significance was a question of whether or not there was negligence by the one or the other which was the proximate cause of the accident and negligence by the other which proximately contributed to cause the accident. Here were issues to be determined by a jury which, except as stated, were never submitted by instructions.

The jury was informed by the instructions that the plaintiff could recover only if it was proved by a preponderance of the evidence that the proximate cause of the accident was the negligence of the defendant in one or more of the particulars alleged, or that the accident would not have occurred but for the negligence of the defendant in one or more of the particulars alleged.

Specifically, the jury was not informed as to the theory of concurrent negligence as the proximate cause, and the respective legal rights and liabilities of the

plaintiff and defendant in such an instance. It was not informed as to the legal rights and liabilities in the event that negligence of the defendant was found which was the proximate cause which cause was proximately contributed to by Gitt. Also it was not informed as to the legal rights and liabilities of the parties in the event that the negligence of Gitt was the proximate cause of the accident but that negligence of the defendant proximately contributed thereto.

On these issues the court was required to instruct whether request was made or not. The rule is stated in Thurow v. Schaeffer, 151 Neb. 651, 38 N. W. 2d 732, as follows: "The trial court has the duty to instruct the jury on issues presented by the pleadings and evidence, whether requested to do so or not, and a failure so to do constitutes prejudicial error." See, also, Hackbart v. Rohrig, 136 Neb. 825, 287 N. W. 665; In re Estate of Keup, 145 Neb. 729, 18 N. W. 2d 63; Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571.

There was no request made by the plaintiff for instruction in this area. That failure however did not absolve the court from the duty to instruct. This is true since the plaintiff's claim was based on the broad ground of negligence for which the defendant was required to respond in damages. If he was guilty of negligence which solely, or in concurrence with Gitt, or which proximately contributed to the accident, the plaintiff being in nowise responsible for it, the plaintiff was entitled to a recovery of her damages, if any, from him. The jury was entitled to be so informed, and a failure so to do by the court was prejudicial error.

The rule which is the basis for this conclusion is stated as follows 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, Rogers v. Brown, 129 Neb. 9, 260 N. W. 794; Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683; Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

For the reason that the court failed to properly instruct the jury on the issues presented by the pleadings and supported by evidence the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

LAVERN WOLFF, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
108 N. W. 2d 410

Filed March 31, 1961. No. 34946.

1. **Criminal Law.** A plea of guilty waives all defenses except that the complaint or information is not sufficient to charge an offense.
2. **Criminal Law: New Trial.** In a criminal case, a new trial may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial, and which the exercise of due diligence could not have discovered and produced at the trial.
3. **Trial: Appeal and Error.** Affidavits used in the trial of issues of fact must be preserved in the form of a bill of exceptions in order to be available to the complaining party on appeal or petition in error.

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

F. W. Carstens, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Melvin K. Kammerlohr,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

BOSLAUGH, J.

The plaintiff in error, hereinafter referred to as the defendant, was charged with assault and battery in the district court for Gage County, Nebraska. Upon arraignment the defendant, who was represented by counsel, pleaded guilty. A presentence hearing was held and evidence was taken. This is the only evidence which appears in the bill of exceptions. At the conclusion of the hearing the defendant was sentenced to imprisonment in the county jail for 130 days and ordered to pay the costs of the prosecution.

Thereafter a motion for new trial alleging error in the "trial" of the defendant was filed. Later a second motion for new trial upon the ground of newly discovered evidence was filed. The affidavit of a person who resided near the place where the assault occurred was attached to the second motion. Both of the motions for new trial were overruled.

The defendant's assignments of error are that the judgment of the trial court is contrary to the evidence and the law, and that the court erred in overruling the motion for new trial upon the ground of newly discovered evidence.

The defendant in this case entered a plea of guilty to the crime charged. In Stewart v. Ress, 164 Neb. 876, 83 N. W. 2d 901, the court said: "Accused, by making a plea of guilty, waives all defenses except that the complaint or information is not sufficient to charge an offense. Such a plea makes a jury trial or any trial unnecessary. A plea of guilty accepted by the court is a conviction or the equivalent of a conviction of the highest order. The effect of it is to authorize the imposition of the sentence prescribed by law on a verdict of guilty of the crime charged. Martin v. Sanford, 129 Neb. 212, 261 N. W. 136, 100 A. L. R. 179; Duggan v. Olson, 146 Neb. 248, 19 N. W. 2d 353, certiorari denied 327 U. S. 790, 66 S. Ct. 803, 90 L. Ed. 1016;

Taylor v. State, 159 Neb. 210, 66 N. W. 2d 514; Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716."

The defendant does not contend that the information is not sufficient to charge an offense. It is also clear that the sentence imposed is authorized by the statute. § 28-411, R. R. S. 1943. The defendant's first two assignments of error are without merit.

A new trial in a criminal case may be granted for newly discovered evidence which is competent, material, and credible, which might have changed the result of the trial, and which the exercise of due diligence could not have discovered and produced at the trial. §§ 29-2101, 29-2103, R. R. S. 1943; Gates v. State, 160 Neb. 722, 71 N. W. 2d 460. It is necessary that the evidence presented at the hearing on the motion be preserved in a bill of exceptions if the ruling of the trial court on the motion is to be presented for review. Holt v. State, 62 Neb. 134, 86 N. W. 1073; Wright v. State, 45 Neb. 44, 63 N. W. 147. It is not sufficient to attach the affidavit to the motion which is made a part of the transcript. Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858.

The bill of exceptions in this case does not show what, if any, evidence was presented to the trial court at the hearing on the motion for new trial. Thus, there is no basis for a review in this court of the ruling of the trial court upon this motion.

The judgment of the trial court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

A. B. RAPP ET AL., APPELLANTS, V. EMERALD F. RAPP ET AL., APPELLEES.

108 N. W. 2d 412

Filed April 7, 1961. No. 34932.

1. **Subrogation.** Originally the right of subrogation was limited to transactions between principals and sureties, but courts of equity have expanded the doctrine so that now it will be applied where one, not acting voluntarily, pays the debt for which another is primarily liable, and which in equity and good conscience, the latter should have discharged. The doctrine will be applied to all cases where demanded by the dictates of equity, good conscience, and public policy.
2. ———. Subrogation is generally classified into two classes: Legal subrogation, which is allowed in cases where one who pays the debt of another stands in the situation of a surety and is compelled to pay the debt to protect his own rights; and conventional subrogation, which arises when one pays the debt of another under an agreement existing at the time of payment with the debtor or creditor that the person paying it shall be subrogated to the rights of the creditor.
3. ———. The doctrine of subrogation is not a fixed and inflexible rule of law or equity. It does not owe its origin to statute or custom. It is a creature of the equity courts, invented and applied by them to do justice or to prevent an injustice being done in a particular case and under a particular state of facts, where the law is powerless in the premises.
4. **Subrogation: Mortgages.** The mere fact that with the proceeds of a later mortgage a prior one was paid, for the purpose of removing the lien thereof, affords no ground for subrogating the junior mortgagee to the rights of the former mortgagee upon it being discovered that a lien has arisen intermediate between the two mortgages.
5. **Subrogation.** The right of one seeking subrogation must have greater equity than the rights of those opposing it.

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

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

Maupin, Dent, Kay & Satterfield, for appellee Sidney National Bank.

Clinton & McNish and *Heaton & Heaton*, for appellee Deaver.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

SPENCER, J.

This is an action in equity to restrain the foreclosure of a chattel mortgage on a sales pavilion and to subrogate plaintiffs' chattel mortgage for one released by the Sidney National Bank. The trial court denied the relief sought and found defendant Deaver's mortgage to be a first lien on the property in question.

Plaintiffs A. B. Rapp and Freida Rapp, husband and wife, hereinafter referred to as A. B. Rapp, appealed. The defendants are Charles N. Deaver, hereinafter referred to as Deaver; Sidney National Bank, Sidney, Nebraska, hereinafter referred to as bank; and Emerald F. Rapp and Delores E. Rapp, husband and wife, hereinafter referred to as Emerald Rapp. Emerald F. Rapp is the son and Delores E. Rapp the daughter-in-law of the plaintiffs A. B. Rapp.

We determine the material facts to be substantially as detailed hereinafter. On February 20, 1958, Emerald Rapp borrowed $26,694.56 from the bank, secured by a chattel mortgage recorded February 26, 1958. This obligation was renewed on June 24, 1958, and secured by a chattel mortgage recorded August 4, 1958. The loan being in excess of the allowable loan limit of the bank, $12,100.96 thereof was made by participation of the Denver National Bank. A. B. Rapp took no part in the negotiation of this loan, the renewal thereof, nor any subsequent dealings with the bank in any way, and had no interest in any of the property mortgaged as security before October 1, 1958.

On July 28, 1958, Emerald Rapp, without any security or agreement therefor, borrowed $4,000 from A. B. Rapp for the purpose of meeting outstanding checks issued in connection with his sales ring business. On

July 29, 1958, after several attempts over a period of 2 weeks, Emerald Rapp borrowed $20,000 from Deaver for the purpose of financing livestock transactions. This note was secured by a chattel mortgage upon the Sidney Livestock Sales Pavilion, which will hereinafter be referred to as sales barn. This sales barn was included in the bank mortgage. The Deaver mortgage was actually prepared by bank employees. Deaver had called Krieger, the bank president, and asked him to transfer $20,000 from his savings account and give it to Emerald Rapp, and to take a mortgage on the sales barn. Deaver's mortgage was not recorded until October 1, 1958.

During September 1958, A. B. Rapp offered to borrow from the Federal Land Bank and to lend at a lower rate of interest sufficient money to Emerald Rapp to satisfy the Sidney and Denver banks. A. B. Rapp did not know of, and Emerald Rapp did not mention, the indebtedness to Deaver or the fact that he had given Deaver a mortgage. A. B. Rapp, during the last week of August 1958, inquired at the bank concerning the indebtedness of Emerald Rapp. A. B. Rapp was not a customer of the bank, and this was the first and only time he had been in the bank. He talked to Christ, an inactive vice-president, and there is a dispute as to whether he received the correct information about the balance. However, he knew from Emerald Rapp the correct balance before September 27, 1958. He told Christ he was getting a loan to help Emerald pay the money he owed the bank. He also inquired whether Christ knew of any other indebtedness. Christ stated that he did not, and the evidence fails to show that Christ had any knowledge whatever of the debt and note between Emerald Rapp and Deaver, who was a director of the bank. At this time, unknown to Christ, the Deaver mortgage was in the possession of the bank or its president for safekeeping.

At some time before October 1, 1958, Emerald Rapp

promised A. B. Rapp that he would give him a first mortgage upon the sales barn. On October 1, after some indecision and discussion, Emerald Rapp also agreed to give a mortgage on some growing wheat.

The evidence fails to show that there was ever any discussion, offer, or demand that A. B. Rapp should be secured by all of the security previously mortgaged to the bank, but rather the discussions focused upon the sales barn.

On September 24, 1958, Emerald Rapp signed a check in blank on the Potter State Bank, to be completed by the Denver National Bank for the balance due it. When the check was presented for payment on September 27, A. B. Rapp advanced $12,500 to Emerald Rapp to cover it. This check bears the notation, "Loaned on Sale Barn," which A. B. Rapp testified he put on the check after it was paid by the bank and returned to him.

On September 30, 1958, A. B. Rapp made a check of the records through an attorney, and found no other mortgage on record but the two mortgages to the bank. On October 1, 1958, A. B. Rapp gave Emerald Rapp a check for $13,500 to cover the check Emerald Rapp had given to the bank to pay the balance of the bank note. This check bears in the lower left-hand corner the printed word "For" and the typed word "Loan" without further explanation. During the afternoon of October 1, 1958, Emerald Rapp executed a $30,000 note to A. B. Rapp, sufficient to cover the previous loans and advances made to him by A. B. Rapp, together with the mortgage, exhibit 3, covering the sales barn and the wheat. A. B. Rapp personally filed this mortgage for record soon after its execution, but did not check other filings and did not learn that the Deaver mortgage had been recorded a few hours earlier, until sometime in December 1958.

The evidence does not show that Deaver had knowledge or notice of the transactions between the Rapps, or that he failed to record his mortgage earlier for any

fraudulent reason, or that he deceived A. B. Rapp in any way. The only misrepresentation shown by the evidence was made by Emerald Rapp to A. B. Rapp.

The wheat which was included in the A. B. Rapp mortgage had not been included in any of the other mortgages. This wheat was subsequently sold by A. B. Rapp, and $8,041.53 was credited on the mortgage.

The evidence does not show the disposition of the remainder of the security covered by the bank mortgages not included in the A. B. Rapp or Deaver mortgages. This included life insurance policies, farm machinery, 103 head of cattle, grain, miscellaneous equipment, and an agreement for a real estate mortgage on 160 acres of land in Cheyenne County.

A. B. Rapp did not attempt to secure any assignment of the chattel mortgages given to the bank, did not object to the release thereof by the bank, and did not make any claim of a right to subrogation prior to the filing of this action.

Emerald Rapp in 1959 voluntarily surrendered possession of the sales barn to Deaver, who advertised it for sale upon chattel mortgage foreclosure. Sale was not held because of a temporary injunction issued in this action.

The following principles have application herein: " 'Originally, the right of subrogation was limited to transactions between principals and sureties, but courts of equity have expanded the doctrine so that now it will be applied where one, not acting voluntarily, pays the debt for which another is primarily liable, and which, in equity and good conscience, the latter should have discharged. The doctrine will be applied in all cases where demanded by the dictates of equity, good conscience and public policy.' " Equitable Life Assurance Society v. Person, 135 Neb. 800, 284 N. W. 260.

Law writers have generally classified subrogation into two classes: Legal subrogation, which is allowed in cases where one who pays the debt of another stands

in the situation of a surety and is compelled to pay the debt to protect his own rights; and conventional subrogation, which arises when one pays the debt of another under an agreement existing at the time of payment with the debtor or creditor that the person paying it shall be subrogated to the rights of the creditor. Luikart v. Buck, 131 Neb. 866, 270 N. W. 495.

The doctrine or rule of subrogation is not a fixed and inflexible rule of law or equity. It does not owe its origin to statute or custom. It is a creature of the equity courts, invented and applied by them to do justice or prevent an injustice being done in a particular case and under a particular state of facts, where the law is powerless in the premises.

"The mere fact that with the proceeds of a later mortgage a prior one was paid, for the purpose of removing the lien thereof, affords no grounds for subrogating the junior mortgagee to the rights of the former mortgagee upon its being discovered that a lien had arisen intermediate between the two mortgages." Hoagland v. Green, 54 Neb. 164, 74 N. W. 424.

The trial court found as follows: "The plaintiffs acted in good faith but did not make any agreement with the defendant Rapp that they should be substituted for the Sidney National Bank, with its rights and security; that their conduct, in securing a chattel mortgage not including all the security of the Sidney National Bank mortgage, and in taking additional security, to-wit: growing crop, not covered by the bank mortgage, and in failing to demand the right of subrogation promptly after gaining knowledge of the facts is inconsistent with and a waiver of any right of subrogation; that equities between the plaintiffs and the defendant Deaver are at least equal, and that the mortgage to Deaver takes priority by reason of the earlier recording thereof; that the only fraud or misrepresentation shown by the evidence is shown in the statements and conduct of the defendant Rapp; * * *."

A. B. Rapp argues: "Denial of subrogation of A. B. Rapp to the bank's mortgage as against Emerald Rapp who lied to and defrauded A. B. Rapp in getting his father to pay his debt is unthinkable. Deaver has in no manner changed his position to his detriment or been injured in any manner by A. B. Rapp paying the bank's mortgage."

A. B. Rapp further argues that Deaver's position has actually been bettered because of a decrease in the interest rate. The argument sounds logical, but is not accurate. If the bank had foreclosed its mortgages with all additional security, it should be evident that there could not possibly have been as much of a lien against the sales barn as A. B. Rapp now claims to be due. It seems only logical to assume that the bank, if A. B. Rapp had not paid Emerald's obligation, would have foreclosed on all of the property covered by its mortgages. Deaver then would not have had to advance as much money to protect his security as would be required if A. B. Rapp's contention is correct.

A. B. Rapp is not claiming subrogation to all the security covered by the bank mortgages, but only to that portion covering the sales barn, which is the only security Deaver has.

In any event, we said in Rice v. Winters, 45 Neb. 517, 63 N. W. 830: "The fact that a subsequent mortgagee's lien will occupy the same relation to the property, if one who has advanced money, secured by a mortgage on the real estate to pay off the prior mortgage, is subrogated to the rights of the holders of such first mortgage, affords no reason why equity should permit the party so advancing the money to be subrogated to the rights of the holder of the first mortgage."

A. B. Rapp insists that Krieger, the bank president, was Deaver's agent, and that Deaver is chargeable with notice that A. B. Rapp was paying off the bank note. We do not agree that Krieger was doing more than accommodating Deaver in having the papers prepared or

in having the mortgage filed at Deaver's direction. We do not find that any knowledge Krieger may have had is imputable to Deaver. Assuming, however, that Krieger was Deaver's agent, we still do not believe that A. B. Rapp is entitled to the relief sought.

Under the facts in this case, Krieger, even as Deaver's agent, had no obligation to A. B. Rapp to inform him of the Deaver mortgage. At no time did A. B. Rapp ever visit with or communicate with Krieger about the transaction. We further find that A. B. Rapp has not in the slightest degree proved any conspiracy or fraud on the part of the bank and Deaver. Any misrepresentation or fraud in this record is solely that of the son, Emerald Rapp.

In passing, we might observe that there was some testimony, disputed however, from which the trial court could have found that A. B. Rapp knew of an indebtedness on the part of his son to Deaver before the advancement of the $12,500 on September 27, 1958.

This action on appeal is triable de novo. We see no reason to disturb the conclusions of the trial court. This certainly is a case within the ambit of the principle inherent in all subrogation cases and well expressed in Criswell v. McKnight, 120 Neb. 317, 232 N. W. 586, 84 A. L. R. 1361: "* * * the rights of one seeking subrogation must have greater equity than the rights of those opposing it."

A. B. Rapp's chief complaint is the failure of Deaver to file his mortgage until October 1, 1958. While it is not a controlling factor, the evidence is conclusive that the Deaver mortgage was not purposely withheld from record for any improper or fraudulent purpose. The mortgage was payable on demand. Emerald Rapp testified that the mortgage was to be for only a short time; and that he expected to pay Deaver back in 30 days. Deaver testified that Emerald only wanted the money for a week or two. The trial court excluded Deaver's testimony as to demands for payment on A. B. Rapp's

objection. Emerald Rapp's deposition, however, gives the following information: "I mean I talked to Charlie several different times afterwards about it, because I was commencing to wondering myself; the loan wasn't coming through and I knew I had just got it from Charlie for a short time, because he was just helping along to do that. I told him that I thought—I kept checking it all the time; I thought the loan would be coming through. Q. Did he call you on the telephone the first time about payment would you say or not? A. Well, I don't know. He might have called me the first time; I wouldn't say for sure; but I went and talked to him different times about the deal—called him and found out whether he was home. * * * Q. You had a conversation with him shortly prior to October 1, 1958, is that right, at his home? A. Yes, the last time I was there. Q. Do you recall particularly what that conversation was? A. Well, I do know that the last time I talked to him it looked like it was going to be some time before I could pay him and I said things wasn't shaping up the way I thought at that time, and it looked like it would be some time—I couldn't tell him exactly —but as soon as I could I would get the money, I would pay him."

Deaver testified that his last conversation with Emerald about payment was during the late afternoon of September 30, 1958; and that this was the first time that Emerald told him he did not know when he could pay the obligation. He then went to the bank to obtain the mortgage for recording, but it was too late to do so, and Krieger volunteered to have it filed for him the next morning.

We note what A. B. Rapp has to say about oral mortgages, equitable mortgages, and agreements for loans, and do not disagree with the cases cited. However, Deaver had no knowledge of the transactions between A. B. Rapp and his son Emerald Rapp, and the cases cited

are not applicable on the fact situation herein. The other cases cited are also distinguishable on the facts and are not controlling herein.

A. B. Rapp argues: "If Deaver's mortgage was absolutely void on account of not being recorded until after A. B. Rapp obtained his interest in the mortgaged property in controversy in good faith by his equitable or legal mortgage, then the fact that Deaver got his mortgage on ahead of A. B. Rapp's mortgage is wholly immaterial, and does not give to Deaver any superior rights."

The facts are, A. B. Rapp advanced $4,000 of the loan the day before Deaver made his advance, and did so without any thought of security. He advanced $12,500 4 days before his mortgage was executed, and, incidentally, 3 days before his attorney checked the record. He gave Emerald the other $13,500 at the time of the execution of the mortgage, which was at least after the Deaver mortgage was on file.

A. B. Rapp was well aware that his son was in financial difficulties. He was well aware that his son was kiting checks to carry on his business operations. The $4,000 he advanced was to take up such outstanding checks. A. B. Rapp testified that when he told Emerald Rapp in August that he had put in for a loan at the Federal Land Bank to help him: "Well, then Emerald—he said, 'you shouldn't a had done it.' 'Well', I says, 'Emerald, you are still my boy', and I said, 'I am going to help you through hell', I said." While this may not be material, together with the other testimony in the record it does suggest that A. B. Rapp could not have helped but be aware of his son's operations.

While we do not agree with some of Deaver's conclusions, we do believe his analysis of the cases cited by A. B. Rapp on interpretation of the recording statute is sufficient to distinguish this case on the facts.

We conclude that the trial court was correct in the

conclusions drawn from the record, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

GRACE E. KNAPP, APPELLANT, V. CITY OF OMAHA, A CITY OF THE METROPOLITAN CLASS, ET AL., APPELLEES.
108 N. W. 2d 419

Filed April 7, 1961. No. 34943.

1. **Municipal Corporations: Pleading.** A petition for damages alleged to have been caused by the negligent construction of a curb by a city of the metropolitan class is subject to demurrer if it fails to allege that the notice required by section 14-801, R. R. S. 1943, was filed within the time required.
2. **Municipal Corporations.** The purpose of the notice required by section 14-801, R. R. S. 1943, is to permit the city to make an investigation of the alleged occurrence while it is still fresh.

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

O'Sullivan & O'Sullivan and *Donald S. Bergquist, Jr.*, for appellant.

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and *Steven J. Lustgarten,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action for damages brought by the appellant against the City of Omaha, Nebraska, its mayor, and councilmen. The appellant will be referred to as the plaintiff and the appellees as the defendants.

The petition alleged that the defendant city was a municipal corporation of the metropolitan class; that on July 15, 1957, the plaintiff slipped, fell, and was in-

jured after stepping upon a curb at the northwest corner of the intersection of Sixteenth and Dodge Streets in Omaha; that "the plaintiff was injured without any carelessness or negligence whatsoever on her part, and wholly by reason of the carelessness and negligence of the defendants"; that the top of the curb "was on a slope or angle of about 30°" slanting toward the street; that the curb was about 8 inches wide; that the north edge of the curb was even with the sidewalk; that the south portion of the curb was at the street level; that the north edge of the curb was "approximately eight inches higher" than the south edge; that the curb "was improperly and negligently constructed" of very smooth, blackish, marble-like material "which was as smooth as glass"; that "a pedestrian could not secure a safe footing" on the curb; that the curb was "dangerously and defectively constructed"; that the plaintiff was injured and suffered damages as a result of the fall; that "after said accident and on the —— day of July, 1957," the plaintiff filed a proper statutory notification which was denied by the defendant city; and that the defendants "had actual knowledge of the said defective and faulty conditions of said curb and the material used in same" prior to the injury to the plaintiff.

The defendants filed a general demurrer to the petition which was sustained. The plaintiff elected to stand on her petition and the action was dismissed. A motion for new trial was filed and overruled. The plaintiff then perfected this appeal.

The defendants suggest nine reasons why the demurrer was properly sustained. It will be necessary to consider only one of them.

Section 14-801, R. R. S. 1943, provides in part as follows: "No metropolitan city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places, within such city unless actual notice in writing, describing fully the accident and the nature and extent of the injury complained of

and describing the defects causing the injury and stating the time when and with particularity the place where the accident occurred, shall be proved to have been filed with the city clerk within ten days after the occurrence of such accident or injury."

When the plaintiff is given the benefit of all of the facts pleaded in the petition, together with the proper and reasonable inferences that may be drawn therefrom, the most that can be said is that the plaintiff has alleged that after the accident and sometime in July of 1957 she filed the notice required by section 14-801, R. R. S. 1943. The plaintiff alleged she was injured on July 15, 1957. The plaintiff has failed to allege that a notice was filed "within ten days after the occurrence of such accident or injury."

In McCollum v. City of South Omaha, 84 Neb. 413, 121 N. W. 438, the court held that a demurrer was properly sustained where the petition failed to allege the filing of the notice required by a similar statute. See, also, Harms v. City of Beatrice, 142 Neb. 219, 5 N. W. 2d 287, 142 A. L. R. 239; Chaney v. Village of Riverton, 104 Neb. 189, 177 N. W. 845, 10 A. L. R. 244; Harris v. City of Genoa, 111 Neb. 91, 195 N. W. 953; Schmidt v. City of Fremont, 70 Neb. 577, 97 N. W. 830; City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321.

In Bethscheider v. City of Hebron, 137 Neb. 909, 291 N. W. 684, the court held that a general demurrer was properly sustained where the petition failed to allege that the notice required by a similar statute had been given. In that case the court pointed out that the purpose of the notice was to permit the municipal authorities to make an investigation while the occurrence was still fresh, to allow the claim if it was deemed just, or protect and defend the public interest if it was deemed otherwise. The court then said: "Having come to this conclusion, the argument that the city having by its own act created the defect should be held to have

knowledge of its existence and the requirement of notice avoided is not persuasive. To extend the rule of the Updike and similar cases to include the notice statute here involved would be to extend the rule beyond the reason therefor so clearly pointed out in those cases. The plaintiff's cause of action falls within the scope of cases to which the statute is applicable, and since we hold that the purpose of the statute is to give notice of the accident and injury, as distinguished from mere notice of the defect, it follows that the notice must be given in accordance with the requirements of the statute as a condition precedent to an action on such a claim and that this must be done regardless of whose negligent act created the defective condition."

The allegations that the curb was improperly and negligently constructed and that the defendants had actual knowledge of the defective and faulty condition of the curb did not excuse the failure to allege that a notice had been filed within the time required by the statute.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE ASSESSMENT OF CERTAIN LIVESTOCK AND OTHER PERSONAL PROPERTY OWNED BY ANDREW GOEBEL AND VIOLA GOEBEL, HUSBAND AND WIFE.

ANDREW GOEBEL ET AL., APPELLEES, V. THE COUNTY OF HOLT, NEBRASKA, ET AL., APPELLANTS.

108 N. W. 2d 406

Filed April 14, 1961. No. 34934.

1. **Taxation.** Section 77-1216, R. R. S. 1943, makes it the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision will not be disturbed unless an abuse of discretion is shown.
2. ———. The term "farm" as used in Chapter 77, R. R. S. 1943,

means a tract of land used for cultivation or production of crops of any nature, or the raising of any type of animal embraced within the term "livestock."

3. ———. Where the owner of cattle resides in one taxing district and his cattle are kept on a farm in another taxing district, which farm is entirely disconnected from the home of the owner, such cattle are properly taxed in the taxing district where kept.

4. Courts. "Discretion," when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. It means that the court in its ruling must be guided and governed by applicable law. It means the application of statutes and legal principles to all the facts of a case.

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

William W. Griffin, for appellants.

Julius D. Cronin and *Edward E. Hannon*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

SPENCER, J.

This case involves a determination of the proper place of listing livestock and machinery for taxation as between two taxing districts in Holt County. Andrew Goebel and Viola Goebel, appellees, hereinafter referred to as taxpayers, reside in the village of Stuart, where they own a home and operate a grocery store, butcher shop, and cold storage plant. They likewise own about 3 acres 3 blocks from the home, equipped with corrals, shed, and 3 granaries. This tract of 3 acres is adapted and used for the keeping and feeding of livestock. It is normally used for a short term feeding operation in connection with the business. All of this property is situated within the boundaries of school district No. 44.

Taxpayers rent 480 acres of hay and pasture land 4 miles from the village of Stuart. This land is equipped with fences, corrals, feeders, a shed, and a loading

chute which taxpayers use for cattle operations. There are no other buildings, and no one resides on the premises. All this land is located within the boundaries of school district No. 136.

On January 1, 1960, taxpayers owned 69 head of cattle, several horses, 2 trucks, a line of hay machinery, and 30 tons of hay, all a part of their stock and haying operation. Fourteen heifers were temporarily in town on that date, but were later moved to the farm. Except for these heifers, some hay, and some of the machinery, all of the property was located in school district No. 136. Taxpayers listed all of the livestock, the machinery, and the feed for assessment in school district No. 136. The county assessor changed this so as to list all of the property in school district No. 44. Taxpayers filed a protest with the county board, and, after a hearing, the board ordered the property assessed in school district No. 44. Taxpayers filed a petition in error in the district court. After a hearing, the district court overruled the order of the board and ordered the property assessed in school district No. 136 as originally listed.

The evidence indicates that the cattle are normally kept on the land in school district No. 136 and are cared for by the taxpayers and their son, who drive back and forth from the home in Stuart. It was taxpayers' custom, about February 1, when the cows started calving and the roads became difficult, to bring the cattle to Stuart for a short time. Taxpayers testified that most of the cattle raised were sold. They also purchased cattle from time to time at various sales. On occasions, some cattle, both raised and purchased, were fattened for a short period of time in school district No. 44, and were butchered and sold through taxpayers' store and locker plant. However, there is no evidence in the record that any of the 69 head on hand January 1, 1960, were intended for use in the store or locker business. The

machinery was all used exclusively to put up hay and to care for the cattle.

Section 77-1202, R. R. S. 1943, states the general rule that personal property shall be listed and assessed where the owner resides, except that property having a local situs shall be listed and assessed at that situs.

Section 77-1204, R. R. S. 1943, provides as follows: "When the owner of livestock or other personal property connected with a farm does not reside thereon, the same shall be listed and assessed in the county, township or precinct where the farm is situated. If the farm is situated in several townships or precincts, it shall be listed and assessed in the township or precinct in which the principal place of business on such farm shall be."

Section 77-1205, R. S. Supp., 1959, provides as follows: "Livestock in charge of an agister, caretaker, or nonresident owner, on January 1 at 12:01 a.m. of the year for which the property is required to be listed, and not connected with the farm, shall be assessed where so kept; and any livestock which shall be brought into any county of this state for grazing purposes between January 1 at 12:01 a.m. and July 1 of any year shall be assessed by the county assessor or county clerk, where he is ex officio county assessor in such county, and in the proper taxing district unless the owner of said livestock produces a certificate from the county clerk, or other proper officer, showing that such property has been assessed elsewhere." These two statutes establish specific statutory exceptions to the general rule that personal property shall be listed and assessed where the owner resides.

Section 77-1216, R. R. S. 1943, provides as follows: "Questions that may arise as to the proper place to list personal property shall be determined as follows:

"(1) If between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board; and

"(2) If between different counties, the place for listing and assessing shall be determined by the State Board of Equalization and Assessment.

"When fixed in either case, it shall be as binding as if fixed by specific statutory provision."

In interpreting this statute, we have held as follows: "This section makes it the duty of the county board to determine where within the county personal property shall be assessed, when questions arise, as in this case, and its decision will not be disturbed unless an abuse of discretion is shown." Diemer & Guilfoil v. Grant County, 76 Neb. 78, 107 N. W. 216.

The question involved herein, therefore, is whether or not the county board abused its discretion in directing the listing and assessment of all said livestock and machinery in school district No. 44. Taxpayers contend it it is an abuse of discretion because the county board did not follow the law with respect to the listing and assessment of the property.

The fact that taxpayers are engaged in another business in school district No. 44 has no bearing on the issue in this case. If the livestock is connected with that business, clearly it is not connected with the farm. The residence of taxpayers is determinative of the place where the livestock will be taxed only if that livestock does not come under section 77-1204, R. R. S. 1943, or section 77-1205, R. S. Supp., 1959.

Section 77-1204, R. R. S. 1943, will be controlling: (1) If the property in school district No. 136 constitutes a farm within the meaning of the statute; (2) if the livestock is connected with that farm; and (3) if the owner does not reside thereon.

While originally the term "farm" may have been used to refer only to land held under cultivation, the term now has a much broader meaning. As said in 35 C. J. S., Farm, p. 948: "* * * in the present day, both in England and the United States, a farm in its ordinary acceptation means any * * * tract of land, or a

number of small tracts, devoted wholly or partially to agricultural purposes or pasturage of cattle."

Clearly, Chapter 77, R. R. S. 1943, uses the term to mean a tract of land used for cultivation or production of crops of any nature, or the raising of any type of animal embraced within the term "livestock." With the development particularly of the western states, a large part of whose wealth consists of cattle, the word "farm" has acquired a somewhat broader meaning, and in its generic sense it has application to a stock farm as well as to one where grain is raised. Porter v. Yakima County, 77 Wash. 299, 137 P. 466.

There can be no question taxpayers were operating a farm in school district No. 136. Is the livestock connected with the farm? That certainly was the purpose of its operation, to raise and feed cattle. It should be evident that the livestock was connected with the farm.

As to the third point above, it is conceded that taxpayers do not live in school district No. 136, but are residents of school district No. 44. We said in Delatour v. Smith, 116 Neb. 695, 218 N. W. 731: " 'Where the owner of cattle resides in one county and his cattle are kept on a farm in another county, which farm is entirely disconnected from the home of the owner, such cattle are properly taxed in the county where kept.' " What is said about a county would be equally true as to the other assessing or taxing districts, including school districts.

As we view the facts in this case, it clearly falls within the provisions of section 77-1204, R. R. S. 1943. To reach the conclusion it did, the county board must have found that the farm in school district No. 136 was so connected with the business in school district No. 44 as to constitute only one unit. Appellants contend that is the situation, and insist that under the last sentence of section 77-1204, R. R. S. 1943, the finding of the county board must be sustained.

Taxpayers' operation in school district No. 44 was separate and distinct from those in school district No. 136 even if the 3-acre tract within the town of Stuart be considered a farm, which we do not decide. It is not in any way connected with the 480 acres in school district No. 136, to be considered as one farming operation. The two tracts were used for entirely separate and different operations. However, for convenience, taxpayers did during approximately 2 months of the year and after the taxing date, when it was necessary to protect the cattle, move them to the 3-acre tract. In any event, we do not believe this is the type of operation contemplated by the last sentence of section 77-1204, R. R. S. 1943.

Appellants suggest that this case is unusual and confusing; that different minds might come to different conclusions; and that the county board should be allowed some latitude in the exercise of its discretion. In answer, we quote the following from Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772: "The word 'discretion' is one of variable meanings depending on its use. In Tingley v. Dobly, supra (13 Neb. 371, 14 N. W. 146), we quoted with approval this definition by Lord Mansfield: 'Discretion when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular.' As used in the connection here presented it means that the court in its ruling must be guided and governed by applicable law. It means the application of statutes and legal principles to all of the facts of a case."

We find the following language in Delatour v. Smith, *supra,* to be appropriate herein: "The trend of authorities in cattle feeding states indicates that bands of sheep or herds of cattle being prepared for market are a distinct entity from operations on the home ranch and may be taxed for the benefit of the county they are being fed in on the taxing date. * * * 'In fact, an in-

spection of the whole law shows the clear intention on the part of the legislature to give the people of the taxing subdivision in which personal property is situated and used for the profit of the owner the right and privilege of collecting taxes upon it, so that it may bear its proper share of the expenses of government at that place.' Nye-Schneider-Fowler Co. v. Boone County, 99 Neb. 383."

We hold that the facts in this case do not support appellants' contention. Consequently, the trial court was correct in holding that the county board abused its discretion. The judgment of the trial court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE ASSESSMENT OF CERTAIN LIVESTOCK AND OTHER PERSONAL PROPERTY OWNED BY RAMM BROTHERS, A PARTNERSHIP.

ROBERT A. RAMM ET AL., APPELLANTS, V. THE COUNTY OF HOLT, NEBRASKA, ET AL., APPELLEES.

108 N. W. 2d 808

Filed April 14, 1961. No. 34935.

1. **Taxation. The term "farm" as used in Chapter 77, R. R. S. 1943, means a tract of land used for cultivation or production of crops of any nature, or the raising of any animal embraced within the term "livestock."**
2. **———. Section 77-1216, R. R. S. 1943, makes it the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision will not be disturbed unless an abuse of discretion is shown.**
3. **———. We cannot say as a matter of law that a county board abused its discretion when it held contiguous tracts of land in two different school districts constituted one farm rather than two where taxpayers had different parts of a cattle operation in each of the districts.**

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

Julius D. Cronin and *Edward E. Hannon,* for appellants.

William W. Griffin, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

SPENCER, J.

This case involves a determination of the proper place of listing livestock and machinery as between two taxing districts in Holt County.

Appellants, Eugene Ramm and Robert A. Ramm, are brothers and partners engaged in the business of breeding, raising, and feeding cattle. They will hereinafter be referred to as taxpayers. They run a yearling operation in school district No. 44, where their residences and farm buildings are located, and a cow operation in school district No. 136. They have been so engaged for the past 10 years.

Taxpayers normally keep about 500 head of yearling cattle in school district No. 44, where they reside and have pens and feed yards, and where they own 3 sections of pasture land. This pasture land is not sufficient for the yearling operation and it is necessary to obtain hay from other sources, including the land in school district No. 136. All of the livestock, machinery, feed, and other personal property in school district No. 44 was listed for taxation in that district and is not in question herein.

The cow operation is conducted by taxpayers on land they own approximately 3 miles west of their residences, and consists of a section of hay land and 2,000 acres of pasture land. When the calves produced in the cow herd on this land are weaned, they are trucked to school district No. 44 and become a part of the yearling operation. The cow operation, however, is always kept separate and apart from the yearling operation. The improvements in school district No. 136 are sufficient to care for the cattle kept there at all times.

There is, however, no residence on this property. The taxpayers and their hired help go back and forth daily from school district No. 44 to care for the cows. The land in the two school districts is joined, but the two operations are separated by a fence and a river. At certain times of the year it would be possible for the cattle to cross the river from one school district to the other, but the fences prevent their doing so. Although the land in the two school districts is contiguous, the entire cow operation is located in school district No. 136.

On January 1, 1960, taxpayers had 739 cattle in their cow herd. They also had 200 tons of prairie hay and certain machinery. This property was all listed for taxation in school district No. 136 where it was located. This had been the practice followed in previous years. The county assessor changed the place of assessment for all of this property for 1960 from school district No. 136 to school district No. 44. Taxpayers complained to the county board. After a hearing, the county board, by resolution, held that the livestock in school district No. 136 should be listed and assessed in school district No. 44. The taxpayers, by petition in error, appealed to the district court. The district court denied their petition and they have perfected their appeal to this court.

Sections of statute discussed in the briefs are as follows. Section 77-1202, R. R. S. 1943, provides: "Personal property, except such as is required by law to be listed and assessed otherwise, shall be listed and assessed in the county, precinct, township, city, village and school district where the owner resides, except that property having local situs, like grain elevators, lumber yards or any established business, shall be listed and assessed at the place of such situs."

Section 77-1204, R. R. S. 1943, provides: "When the owner of livestock or other personal property connected with a farm does not reside thereon, the same shall be listed and assessed in the county, township or precinct where the farm is situated. If the farm is situated in

several townships or precincts, it shall be listed and assessed in the township or precinct in which the principal place of business on such farm shall be."

Section 77-1205, R. S. Supp., 1959, so far as material herein, provides: "Livestock in charge of an agister, caretaker, or nonresident owner, on January 1 at 12:01 a.m. of the year for which the property is required to be listed, and not connected with the farm, shall be assessed where so kept; * * *."

In Goebel v. County of Holt, *ante*, p. 81, 108 N. W. 2d 406, we held: "The term 'farm' as used in Chapter 77, R. R. S. 1943, means a tract of land used for cultivation or production of crops of any nature, or the raising of any type of animal embraced within the term 'livestock.'"

We hold that the livestock involved herein is connected with a farm. Consequently, it is apparent that section 77-1205, R. S. Supp., 1959, is not applicable to the facts in this case because that section applies only to livestock which is not connected with a farm on which it is kept or found on January 1. Therefore, if there is any legal justification for assessment of the livestock in school district No. 136, it must be found under section 77-1204, R. R. S. 1943.

Before we discuss that point, it is appropriate to call attention to section 77-1216, R. R. S. 1943, which provides as follows: "Questions that may arise as to the proper place to list personal property shall be determined as follows:

"(1) If between several places in the same county, the place for listing and assessing shall be determined and fixed by the county board; and

"(2) If between different counties, the place for listing and assessing shall be determined by the State Board of Equalization and Assessment.

"When fixed in either case, it shall be as binding as if fixed by specific statutory provision."

In Goebel v. County of Holt, *supra*, we said: "Section

77-1216, R. R. S. 1943, makes it the duty of the county board to determine where within the county personal property shall be assessed when questions arise, and its decision will not be disturbed unless an abuse of discretion is shown."

We are concerned, therefore, with whether or not there has been an abuse of discretion herein. It is evident that the county assessor, the county board, and the district court determined that taxpayers' operation constitutes but a single stock farm or ranch, and that the personal property connected with it should be assessed at the principal place of business, which they determined to be the residences in school district No. 44.

It is the position of taxpayers that they have in fact separate operations on two separate farms. They point out that there are no facilities to care for the cow herd in school district No. 44. They argue that the land in school district No. 136 where the cow herd is cared for on a permanent basis, as a matter of law, constitutes a farm separate and distinct from the farm on which the taxpayers reside and on which they have additional cattle.

Taxpayers cite Delatour v. Smith, 116 Neb. 695, 218 N. W. 731, to support their position. In that case the taxpayer moved 573 cattle from his farm in Garden County into Arthur County to feed on some hay he purchased. They were there on the taxing date and this court held they were properly assessed in Arthur County under the statute which is now section 77-1205, R. S. Supp., 1959. We do not see its applicability to the facts herein.

Taxpayers also cite Diemer & Guilfoil v. Grant County, 76 Neb. 78, 107 N. W. 216, where taxpayer operated a home ranch in Collins precinct and a ranch in Hyannis precinct 15 miles away. Cattle were moved back and forth between the ranches. The county board held the cattle on the Hyannis ranch should be taxed in Hyannis precinct rather than the home precinct. That decision

was affirmed in this court. We said: "This section (now section 77-1216, R. R. S. 1943) makes it the duty of the county board to determine where within the county personal property shall be assessed, when questions arise, as in this case, and its decision will not be disturbed unless an abuse of discretion is shown."

The land in school district No. 44 on which the yearlings are kept is all pasture except for the pens and facilities adjoining the residences where the taxpayers reside. The hay used for feeding the yearlings is raised in school district No. 136. There are no residences of any nature on the land in school district No. 136, and the taxpayers and their hired help live in school district No. 44 and only go to the land to carry out the ranching operations. The calves raised by the cows in school district No. 136 are transferred to school district No. 44 as soon as they are weaned. This appears to be part of an integrated plan of operation followed for several years. Also, the land on which both operations are carried out is one single tract, all joined together with common boundaries, and not separated by any intervening land. However, fences do prevent the two herds from ever intermingling.

In this state of the record, can we say as a matter of law that the county board has clearly abused its discretion in holding that all of the facilities owned and operated by taxpayers in both school districts constitute a single enterprise of raising livestock, or in fact constitutes but one farm or ranch? Under the record in this case, the principal place of business on the farm must be held to be the residence of taxpayers.

Taxpayers claim they have been discriminated against because other taxpayers in Holt County with similar operations have been assessed differently. Passing the question as to whether this issue is properly before us, suffice it to say that there are differences in the fact situations which could justify the county board in upholding those assessments if they were before the board.

For one of the differences, the parties named by the taxpayers did not reside on their farms or ranches, but resided in the towns of Atkinson, O'Neill, and Stuart.

We cannot hold as a matter of law that the county board has abused its discretion. The judgment of the trial court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JAMES D. CONWAY, APPELLEE, V. COUNTY OF ADAMS, NEBRASKA, APPELLANT.
108 N. W. 2d 637

Filed April 21, 1961. No. 34819.

SUPPLEMENTAL OPINION

APPEAL from the district court for Adams County: NORRIS CHADDERDON, JUDGE. On motion for rehearing. See 171 Neb. 677, 107 N. W. 2d 418, for original opinion. *Original opinion adhered to. Motion for rehearing denied.*

Clarence A. H. Meyer, Attorney General, *Homer G. Hamilton,* and *Donald L. Brock,* for appellant.

Cline, Williams, Wright & Johnson, Richard N. Thompson, Conway & Irons, and *John N. Marvel,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

In order to clarify what was said in the original opinion in this case it is deemed advisable to elucidate the following statement contained in the opinion: "In instances where the instrument creating the trust declares the character of the trust estate, that is, if it is declared to be personal property, and does not conflict with law, the declared intent has binding force and effect."

The particular point which requires clarification is

that the opinion concludes that the declaration of the trust indenture that the trust estate is personal property violates no law and is therefore binding on the parties to this action, but fails to make clear the assumption that the declaration violates no law.

The substantial theory of the plaintiff is that the tax is void and violative of law because it was assessed against this property as personal property whereas under law it is an interest in real estate.

It is of course true that parties to a contract cannot stipulate the nature of property for the purposes of taxation. The applicable rule is that whether property shall be taxed as real or personal property must be determined from the provisions of the statutes and the general distinguishing characteristics of real and personal property. See 84 C. J. S., Taxation, § 66, p. 169.

If it was not an interest in real estate but was personal property it was properly assessed and taxed. Real property is described as follows by section 77-103, R. R. S. 1943: "The terms 'real property,' 'real estate' and 'lands' shall include city and village lots and all other lands, and all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, oil and gas wells, and privileges pertaining thereto."

Personal property is described as follows by section 77-104, R. R. S. 1943: "The term 'personal property' includes all property other than real property and franchises."

With reference to minerals which have been detached from realty the following appears in 58 C. J. S., Mines and Minerals, § 133, p. 212: "Where the minerals are severed and removed from their position or bed by mining, they become personal property, and are sold or pass like other personal chattels."

In Fawn Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N. W. 75, in commenting upon the subject of the severance of minerals from land this court said: "The removal of minerals, whether held in solution upon the

land or resting in the soil and subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property, but it remains real estate until detached." This pronouncement was made in the light of the same statutory definitions of real and personal property as exist today.

In the instance involved here the property taxed is even farther removed from the real estate than mere severance. The property involved is only a right to participate in the avails or proceeds of sale of property which has been severed.

With the additional observations herein contained made a part of the original opinion the conclusion reached by that opinion is adhered to, and the motion for rehearing is denied.

ORIGINAL OPINION ADHERED TO.
MOTION FOR REHEARING DENIED.

SIMMONS, C. J., participating on briefs.

WALTER V. JONES, DOING BUSINESS AS JONES CONSTRUCTION COMPANY, APPELLEE AND CROSS-APPELLANT, V. HOWARD ELLIOTT, HAROLD ELLIOTT, AND DELBERT URLING, DOING BUSINESS AS ELLIOTT BROTHERS AND URLING GRAIN COMPANY, A PARTNERSHIP, APPELLANTS AND CROSS-APPELLEES.
108 N. W. 2d 742

Filed April 21, 1961. No. 34853.

1. **Contracts.** There is substantial performance of a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract.
2. **Contracts: Damages.** Where defects in a building constructed under a building contract are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the

expense of making the work conform to contractual requirements.

3. ———: ———. Where a contractor's violations of a building contract result in defects which cannot be remedied without reconstruction of or material injury to a substantial portion of a building, the measure of the owner's damages is the difference between its value when constructed and what its value would have been if built according to the contract.

4. Contracts: Usury. Where a contract provides for the construction of a building and contains a cash-payment plan and a time-payment plan, and the contractees are actually informed of and had the opportunity to choose between the two plans and accepted the time-payment plan, even though the time-payment plan price is in excess of the cash-payment plan price, or may exceed the lawful rate of interest, such a transaction may be made without tainting it with usury.

APPEAL from the district court for Hitchcock County: VICTOR WESTERMARK, JUDGE. *Affirmed as modified.*

Charles M. Bosley and *Robert L. Jeffrey,* for appellants.

George B. Hastings and *Frederick E. Wanek,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought in the district court for Hitchcock County by Walter V. Jones, doing business as Jones Construction Company, plaintiff, against Howard Elliott, Harold Elliott, and Delbert Urling, doing business as Elliott Brothers and Urling Grain Company, a copartnership, to foreclose a chattel mortgage and a mechanic's lien. The trial court found generally in favor of the plaintiff and against the defendants. The trial court further found that the plaintiff and defendants entered into a written agreement May 26, 1958, wherein the plaintiff agreed to remodel a Quonset building belonging to the defendants so that it could be used as a grain elevator, to erect two buildings for storage of grain, and to furnish the necessary equipment. The defendants agreed to pay $95,000 upon completion of the struc-

tures and buildings. The contract also provided that the defendants could elect a time-payment plan whereby the price would be $96,800, to be paid in certain installments in cash, of which $7,500 would be due upon completion of the buildings and structures, and the balance of $63,800 would be evidenced by four equal promissory notes each in the sum of $15,950, secured by a chattel mortgage on property belonging to the defendants. The trial court further found that after the execution of the agreement, the plaintiff commenced the reconstruction of the Quonset building and the construction of the storage building; that the defendants elected to take the time-payment plan; that on July 1, 1958, the defendants executed and delivered to the plaintiff the four promissory notes secured by a chattel mortgage; that said mortgage was a valid and enforceable lien upon the defendants' property described in the plaintiff's petition; and that the mechanic's lien filed by the plaintiff was not filed within the time provided for by law and was null and void.

The trial court further found that the defendants paid the plaintiff all cash installments provided for in the contract except the last installment of $7,500 which was due upon completion and acceptance of the building and structures; and that the plaintiff furnished extras in the sum of $948.12. The trial court further found that the plaintiff failed to comply with the plans and specifications of the contract in certain respects and, for failure to so do, allowed the defendants damages in the following amounts: Headhouse, $3,434.76; cement driveway, $995; aeration system, $311.45; rewiring for aeration system, $72.50; overhead auger, $320.05; and compression flanges, $377.21. The trial court further found that the defendants lost profits in the amount of $1,753.04. The trial court further found that said amounts should be allowed as a setoff from the $7,500 and $948.12 found to be due plaintiff; that by reason thereof, the plaintiff was entitled to the difference between

$8,448.12 and $7,264.01, or $1,184.11, with interest at 6 percent per annum from February 1, 1959, to date, in the sum of $89.78, or an aggregate of $1,273.89. The trial court further found that the notes signed by the defendants and delivered to the plaintiff were valid obligations of the defendants, and were past due; that the amount due the plaintiff on said notes was $72,049.68 with interest at 7 percent per annum from date until paid; and that the plaintiff was entitled to a decree of foreclosure of the chattel mortgage and sale of property described in the decree for payment of $72,049.68 with interest at 7 percent.

On May 5, 1960, the trial court rendered judgment in the amount of $72,049.68 with interest at 7 percent from date of rendition of judgment on the notes, as above stated, and also rendered judgment in the amount of $1,273.89 with interest at 6 percent from the date of the rendition of the judgment, as above stated. We conclude that when the trial court allowed interest at 6 percent on the $1,184.11 from February 1, 1959, to the date of rendition of the judgment, it was in error. The trial court apparently invoked section 45-104, R. R. S. 1943, which has no application in this case where there were damages allowed to be offset against a cash payment due upon the alleged completion of a building contract. The trial court should have rendered judgment in the amount of $1,184.11 with interest at 6 percent per annum from the date of the rendition of the judgment.

The defendants filed a motion for new trial which was overruled. From the overruling of the defendants' motion for new trial, the defendants appealed.

The defendants have set forth 24 assignments of error, most of which relate to the failure of the trial court in allowing sufficient damages to the defendants for breach of contract in certain respects by the plaintiff. The defendants also predicate error on the ground that the plaintiff failed to follow the plans and specifications of the contract relating to the footings and foundations

of the buildings, by virtue of which the defendants claim they sustained damages and for which the trial court allowed no damages; that the notes in question were not valid obligations, were usurious, and were void; and that the chattel mortgage given as security for the same was void, and consequently the plaintiff was not entitled to a foreclosure of the chattel mortgage. The defendants also claim that the trial court erred in finding that the defendants elected to pay the amount of the contract pursuant to the time-payment plan.

On December 16, 1959, when the trial commenced, the defendants were granted the right to amend their answer to the effect that the plaintiff failed to comply with the contract to properly construct the footings and foundations of the buildings.

The case is for trial de novo in this court.

The contract provides that the contractor should erect two Columbian rigid-frame grain-storage buildings, each 50 feet wide by 260 feet long with 14-foot high sidewalls, and roof ventilators placed on 20-foot centers. The contract provided for other construction and the furnishing of facilities, some of which are set forth in the trial court's findings and others that are not so set forth but have been considered as to whether or not they fail to comply with the plans and specifications, and what damages, if any, defendants would be entitled to recover.

The defendants were the owners of a leasehold interest in a tract of land owned by the Chicago, Burlington & Quincy Railroad Company, upon which two buildings were to be constructed for the storage of grain, and a Quonset building, which was standing on the premises, was to be remodeled so it could be used as a grain elevator.

Upon an examination of the record relating to the damages that the trial court has allowed for the items heretofore specified, the record sustains the amount of damages as awarded by the trial court to the defendants. The trial court denied the defendants damages on cer-

tain other items. We conclude that the trial court did not err in so doing because of the lack of proof on the part of the defendants respecting such damages. Also, the trial court did not err in refusing to allow the plaintiff certain amounts for extras claimed to have been furnished by the plaintiff, for the same reason.

We next consider how the footings and foundations were put in by the plaintiff. It might be said that they did not strictly comply with the contract, the plans, and the specifications relating thereto.

The contract provides as follows: "The Contractor shall furnish and pour concrete foundations, footings and floors and shall reinforce same in accordance with the specifications of the Columbian Steel Tank Company for the above buildings."

The specifications provide that the foundation shall be placed on firm, undisturbed soil; shall be designed for 3,000 pound soil bearing; must be adjusted to suit conditions; and shall be increased in depth to suit local soil and frost conditions.

The language of the contract and specifications dealing with the foundations and footings is vague as to the precise meaning with reference to the same. There is nothing in the specifications or the contract that definitely requires the foundations and footings to be built in depth to the frostline.

The evidence discloses that after the ground was leveled and packed, 2 x 6's were used for forms clear around the outer area of the building, and trenches 16 inches by 16 inches were dug, the inside edge having an 8-inch beveled edge extending from a point approximately 8 inches below the top of the foundation, making an overall surface of the foundation 24 inches in width and 16 inches in depth. At each 10-foot interval pillars were installed, approximately 24 inches square and 16 inches in depth. All foundations were reinforced with 1-inch steel bars hung approximately midway in depth from the top of the footing to the bottom, and extending

for the full length of all footings. The footings were also strengthened by steel bars approximately 10 feet long, set in transverse position at each pillar and extending into the floor which was superimposed on the footings. A 4-inch floor was poured as soon as the foundations were set, and was also reinforced with 10-gauge 6-inch mesh. It was one continuous operation. This is known as floating-type foundation or floating-slab foundation. Anchor bolts were set in the cement at the pillars to which the buildings were tied. The only reinforcing bar called for in the Columbian specifications is the 6-inch 10-gauge mesh in the floor, and the No. 5 reinforcing bars from the anchor bolts back into the floors.

The plaintiff testified that the soil upon which the buildings were built could hold approximately 5,000 pounds per square foot. The plaintiff also testified that his design of construction required more concrete than the Columbian specifications called for; that the flat storage, according to his design, gave far more tensile strength to the support of the building than did the Columbian design; and that he had been engaged in this type of business for 27 years.

The superintendent on the job testified that the footings and foundations for flat storage foundations such as in this case are usually of the depth of 16 inches; and that the so-called floating foundation is used by contractors in this type of building 60 or 70 percent of the time, the reason being if there should be a settlement in the fill, the floor and footings are tied together as a unit and this distributes the weight evenly upon the fill.

The chief engineer for the Columbian Steel Tank Company testified that he assumed that the ground upon which the buildings were to be constructed would have a 3,000 pounds per square foot soil bearing quality; that if the contractor inserted 1-inch steel bars for the purpose of reinforcement this would materially strengthen the foundation; that the floating-slab foundations are

used in climates similar to that of Nebraska; that from an examination of the buildings he observed no indication of any failures other than a few hairline cracks; that the footings and foundations were in good shape; and that there were no fractures. He saw no buckling of the frame members. He further testified that the test for the support of a foundation and footings of a building that rests on it is, if the building is loaded to capacity and stands up, it is a good indication that the building contains the strength to carry out the purpose for which it is built; and that where a building has been constructed for a year and a half and has been loaded with wheat, there is a reasonable probability that the building will stand and be used for the purpose for which it is built. On cross-examination this witness testified that he made a computation of the cement as to how much less cement there would be in the foundations under the buildings as constructed, compared with the amount of cement required by the Columbian plans, and found that there was very little difference in the amount.

An expert witness, an architect, testified for the defendants that he made 12 excavations around the foundations with a shovel, and determined that the depth of the slab varied from a minimum of 9 inches below the concrete floor to a depth of 14 inches below the floor; that his examination also disclosed a strong odor of decayed vegetation, indicating that the plaintiff had not scraped the surface of the site before making the fill; that he found rubbish consisting of broken tiles and broken cement in a part of the fill; and that one of the steel reinforcing rods protruded 4 inches below the bottom of the slab which could, by a process of rust expansion, destroy the stability of the cement. He discovered erosion of earth away from the slab on the south side of the south Columbian building. He testified that a floating slab is a nonstructural slab supported on grade or fill, not connected to any footing or foundation structure; that solid, undisturbed earth is

that which has not historically been uncovered previously, or, existing natural earth structure; that he presumed the soil upon which the building was erected would hold approximately 2,000 pounds per square foot and not 5,000 pounds as testified to by the plaintiff; that the Columbian plans require the soil to have a weight-bearing quality of 3,000 pounds, which is a conservative requirement, and that the buildings be erected on a firm, undisturbed soil; and that the plaintiff did not meet the requirements as provided by the contract. On cross-examination this witness testified that the buildings were solid at the moment; and that he was taking a calculated risk when he went under the pier to a depth of 2 feet and took out the supporting soil, however the building stood up. On redirect examination this witness testified that according to a comparison of the cement required to be used with reference to these footings and foundations, the plaintiff used only 41½ percent of the amount of cement called for by the plans and specifications in the contract. The ratio of 1,738 cubic feet supplied, compared to the required 4,185 cubic feet, gave this percentage. This difference in cement used and what the defendants claim should have been used constitutes part of the defendants' claim for damages sustained.

Another witness for the defendants made a computation of the cement and found that the plaintiff did not use the amount of cement that would be required for the footings and foundations to hold the buildings, and fixed the cost of the amount that he failed to use and which would be necessary to use at $6,585.82. This witness did not recommend any work being done on the buildings because it would be a waste of time and material. Also, he did not recommend underpinning the buildings. He was asked: "You have seen those foundations standing up solid and firm today as when that building was finished, have you not?" He answered: "I guess they are."

A witness engaged in the building of feed mills and grain elevators testified for the defendants that he inspected the buildings and the foundations, and made a computation with respect to the underpinning of the two buildings which he thought was necessary, taking into consideration the digging out of the ground under the present foundations, setting the forms, pouring and placing the cement back in, backfilling, and cleaning up. He testified that in this type of construction he would build a foundation just below the frostline, whereas the plaintiff's foundation was 12 to 14, and sometimes 16 inches in depth; and that the total figure for the underpinning and work incident thereto would amount to $9,355. On cross-examination this witness testified that he did not see a single defect in the footings or foundations of either of the two buildings which would justify the expenditure of any kind at that time; and that he never did a similar operation such as he proposed with reference to the footings and foundations of these buildings, and it would be purely experimental on his part.

A representative of the Butler Manufacturing Company, and a competitor of the plaintiff in the business of selling and erecting rigid-frame steel buildings, testified in substance that he found by inspection of the buildings that they were constructed in a manner particularly accepted by the industry; that the foundations were a duplication of the Butler Manufacturing Company design which had been designed through a matter of time as the safest design to maintain the kind of pressure the building would have to stand; and that he found nothing that was detrimental to the soundness of the buildings or the foundations, and concluded that it was a good workmanship job. He further testified that he did not use a transit, but sighted the buildings and they were straight. The foundations were straight, they followed a girt line. He found no cracks in the concrete foundations and no cracks in the floor which, in

his opinion, was exceptional. He testified that the design used in the construction of these buildings had been used by 95 percent of the industry and was generally accepted by the industry.

The record further does not disclose that the defendants, or any of them, made any complaint relative to the foundations and footings of these buildings from August 20, 1958, until December 1959. The record also shows that the defendants, or one of them, was on the premises at all times that construction was in progress and until the buildings were completed.

The first question to determine is whether or not the plaintiff substantially performed the contract.

While it is difficult to state what the term "substantial performance" or "substantial compliance" as applied to building and construction contracts means, it seems that there is substantial performance of such a contract where all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed are performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. See 9 Am. Jur., Building and Construction Contracts, § 42, p. 31.

Many cases in this jurisdiction have stated the rule with reference to substantial performance of a contract and the measure of damages relative thereto as follows: If a construction contract is substantially performed, the damage which the owner suffers because of defective workmanship or unsuitable materials used is measured by the reasonable cost of remedying the defects. See, Cartwright & Wilson Constr. Co. v. Smith, 155 Neb. 431, 52 N. W. 2d 274; Stillinger & Napier v. Central States Grain Co., Inc., 164 Neb. 458, 82 N. W. 2d 637.

The following rules relating to the measure of damages to be applied for breach of building contracts are also applicable in the instant case.

In Graham v. Anderson, 121 Neb. 733, 238 N. W. 362, it is said: "There is a generally accepted rule applicable to building contracts that, where defects in materials, construction or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements. See 23 A. L. R. 1436; 65 A. L. R. 1298. This rule has been recognized in Library Board v. Ohlsen, 110 Neb. 146. * * *

"There is, however, another generally accepted rule to the effect that, where a contractor's violations of a building contract result in defects which cannot be remedied without reconstruction of, or material injury to, a substantial portion of the building, the measure of the owner's damages is the difference between its value when constructed and what its value would have been if built according to contract. Cases so holding are collected in 23 A. L. R. 1438. This is in harmony with the view expressed in Lincoln Stone & Supply Co. v. Ludwig, 94 Neb. 722. There is no conflict between the two lines of decisions. Each rule is enforceable under any state of facts to which it applies." With reference to the latter rule see, also, Walsh v. Cornwell, 272 Mass. 555, 172 N. E. 855; Taulbee v. Moore, 106 Ky. 749, 51 S. W. 564; Pelatowski v. Black, 213 Mass. 428, 100 N. E. 831; Gutov v. Clark, 190 Mich. 381, 157 N. W. 49; Otis Elevator Co. v. Flanders Realty Co., 244 Pa. 186, 90 A. 624; Karlinski v. P. R. & H. Lumber & Constr. Co., 68 N. D. 522, 281 N. W. 898.

In the instant case, relating to the alleged damage to the footings and foundations, the rule that should be adopted as the measure of damages would be the difference between the value of the buildings when constructed and what their value would have been if built according to the contract and the plans and specifications relating thereto. The plaintiff gave as his opinion as

to the difference in value between the buildings as constructed by him and the buildings if constructed according to the plans and specifications of the Columbian Steel Tank Company, that the buildings as now constructed had a greater value than had they been constructed according to the plans and specifications of the Columbian Steel Tank Company.

It appears from the evidence that any underpinning of the present foundations could cause disastrous results. The defendants have had the use of these buildings since August 20, 1958. Each of the buildings had a capacity for the storage of grain of 167,000 bushels. It is apparent from the evidence that the buildings are fulfilling the functions for which they were built. The defendants in their brief state: "It seems clear that the parties have achieved their object insofar as the grain storage buildings were built (although belatedly) and useable." We conclude, as did the trial court, that the plaintiff substantially performed the contract.

The trial court awarded the defendants $1,753.04 damages for loss of profits due to the failure of the plaintiff to have the south Columbian building ready for the storage of wheat by July 1, 1958.

Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. See Restatement, Contracts, § 331, p. 515, § 333, p. 525.

The evidence supports the trial court's award of damages for loss of profits suffered by the defendants.

The trial court, at the request of the parties, inspected the premises, the footings, and the foundations of the buildings. "The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the

trial court did view the premises; provided, that the record contains competent evidence to support the findings." Columbian Steel Tank Co. v. Vosika, 145 Neb. 541, 17 N. W. 2d 488. See, also, Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387.

The contract provided for a cash price which the plaintiff could accept in payment on the completion of the work. The defendants were granted an option, also, to make payment on a time-plan basis. The cash price was $95,000. The time-payment plan price was $96,800. The evidence shows that the defendants read the contract, were acquainted with its terms, understood it, and signed it. The defendants, however, contend that they at no time accepted the time-payment plan; and that the notes were signed solely for the convenience of the plaintiff because he wanted it that way as it would be beneficial to his business. The fact remains, the defendants did execute the notes and the chattel mortgage as security therefor, in conformity with the contract providing for the time-payment plan. The defendant Howard Elliott never notified the plaintiff they were going to pay him according to the time-payment plan. The defendant Urling testified with reference to the $25,500 payments made, that when the first payment was due they were unable to find a checkbook, consequently they paid this amount by an $18,000 check, and subsequently by a $7,500 check.

The case of Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57, related to an automobile dealer, and the same rule as therein set forth would apply in the instant case. The court said that an automobile dealer may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan. However, in order to have the foregoing principle apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash

sale price. See, also, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; Nelson v. General Credit Corp., 166 Neb. 770, 90 N. W. 2d 799.

We conclude that the evidence shows the defendants accepted the time-payment plan, were acquainted with and knew of all the details with reference to accepting such plan, and elected to do so. We find the defendants' contention to the effect that the notes and chattel mortgage securing the same were null and void is without merit.

The plaintiff cross-appealed, contending that the trial court erred in assessing the damages for the defendants in the amounts allowed. We find no merit to the plaintiff's cross-appeal and it is hereby dismissed.

Other matters are raised which we deem unnecessary to discuss.

We conclude that the judgment of the trial court should be modified in the manner heretofore stated and in all other respects its judgment should be affirmed, each party to pay his own costs in the district court and in this court.

AFFIRMED AS MODIFIED.

SIMMONS, C. J., participating on briefs.

WILLIAM OTTE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
108 N. W. 2d 737

Filed April 21, 1961. No. 34921.

1. **Criminal Law.** **Unless the offense charged would require a preliminary hearing if filed in the county court, no preliminary hearing is necessary if a complaint is filed in the district court as an original action.**
2. **Intoxicating Liquors.** **Tests to be considered valid under the provisions of section 39-727.01, R. S. Supp., 1959, must be performed according to methods approved by the Department of Health and by an individual possessing a valid permit to make the analysis.**

3. ———. A registered nurse will be authorized to withdraw blood for a test as provided in section 39-727.04, R. S. Supp., 1959, only if she is acting under the direction of a physician.
4. ———. For the implied consent of a person to be effective, as provided in section 39-727.03, R. S. Supp., 1959, the person must have been arrested or taken into custody before the test is given.
5. ———. A statute providing that a presumption of intoxication arises under a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction.

ERROR to the district court for Morrill County: RICHARD VAN STEENBERG, JUDGE. *Reversed and remanded with directions.*

Atkins & Ferguson and *Clark G. Nichols,* for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

SPENCER, J.

The defendant was convicted by a jury in the district court for Morrill County of operating a motor vehicle while under the influence of alcoholic liquor. He prosecutes error to this court. Defendant lists several assignments of error. We will discuss only the following assignments: "1. The Court erred in overruling the Plea in Abatement filed by Plaintiff-in-error * * *.

"2. The Court erred in giving Instruction No. 9 on its own Motion.

"3. The Court erred in permitting Dr. W. O. Brown to testify as to an analysis of the alcoholic content of the blood of the Defendant over the objection of the Defendant when the State had failed to lay proper foundation by showing that the specimen of blood was taken from the Defendant in compliance with Section 39-727.03 and 39-727.04, R. S. Supp. 1943."

The defendant, about 9 p.m., December 24, 1959, was involved in a one-car accident at an intersection between Bayard and Bridgeport, Nebraska. He was taken to a doctor's office in Bayard. A highway patrolman saw him at the doctor's office but did not talk to him, place him under arrest, or take him into custody. This patrolman did ask the doctor to take a blood test, but none was taken because neither the doctor nor the patrolman had a bottle available for a specimen. The defendant was taken to a hospital at Scottsbluff. Ten minutes after his admission, and while he was unconscious, a registered nurse at the hospital withdrew blood from the defendant. There is no testimony in the record as to who requested her to do so or that she was acting under the direction of a physician. The doctor was not present. The blood was placed by her in two bottles in a locked box in an icebox in the laboratory of a pathologist connected with the hospital. The pathologist made an analysis of the blood the morning of December 26. He testified that the result of his blood alcohol determination was 0.165 percent. No evidence appears in the record that the pathologist was the holder of a permit issued by the Department of Health authorizing him to examine blood specimens for the purpose of section 39-727.01, R. S. Supp., 1959, or that the method used by him was one approved by the Department of Health.

The complaint in this action was filed in the district court on January 11, 1960. The defendant filed a plea in abatement setting forth that no preliminary hearing had been held as required by law. This plea was overruled. The offense charged was a misdemeanor. If the complaint had been filed in the county court, the defendant would not have been entitled to a preliminary hearing. Is he entitled to one in the district court?

There can be no question but that a district court in the exercise of its original, as distinguished from appellate, jurisdiction is empowered to try and determine

misdemeanors. Nelson v. State, 115 Neb. 26, 211 N. W. 175.

The defendant contends that section 29-1607, R. R. S. 1943, clearly contemplates that prosecutions brought in the district court must be brought upon information regardless of whether the crime charged is a felony or a misdemeanor. We hold this contention to be without merit.

The provisions of law relating to the filing of an information for the prosecution of crime were provided as a substitute for prosecution on indictment. Article I, section 10, Constitution of Nebraska, provides as follows: "No person shall be held to answer for a criminal offense, *except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary,* in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; Provided, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system." (Italics supplied.) It is evident from the exceptions italicized that prosecutions for misdemeanors were exempt from the requirement of being brought only under indictment or information if the Legislature should provide such procedure.

Section 29-203, R. R. S. 1943, provides as follows: "The judges of the district courts in their respective districts, and the magistrates mentioned in section 29-201 in their respective counties, shall jointly and severally be conservators of the peace within their respective jurisdictions, and shall have full power to enforce or cause to be enforced all laws that now exist or that shall hereafter be made for the prevention and punishment of offenses, or for the preservation and observance of the peace. Judges of the district courts shall have

the same powers to require securities for the keeping of the peace and good behavior, and bail for appearance in courts to answer complaints to keep the peace, and for crimes and offenses committed in their respective districts as any of the magistrates aforesaid have in their respective counties."

Section 29-601, R. R. S. 1943, provides as follows: "Magistrates shall have jurisdiction concurrent with the district court and coextensive with their respective counties in all criminal cases where the punishment cannot exceed three months imprisonment or a fine of one hundred dollars, or both, except as otherwise provided by law."

While not particularly pertinent, section 29-613, R. R. S. 1943, does cover the situation where it is necessary to file a new complaint in district court. It provides: "The district court shall hear and determine any cause brought by appeal from a magistrate upon the original complaint, unless such complaint shall be found insufficient or defective, in which event the court, at any stage of the proceedings, shall order a new complaint to be filed therein, and the case shall proceed thereon the same in all respects as if the original complaint had not been set aside."

It appears to be the import of our statutes that district judges have all of the original jurisdiction of magistrates. With this in mind, we hold that section 29-1607, R. R. S. 1943, requiring a preliminary hearing before the filing of an information, was intended to apply only where the grade of the offense makes it necessary to file an information. This was the interpretation we placed on this section in Jahnke v. State, 68 Neb. 154, 94 N. W. 158, when we said: "What the statute evidently contemplates is that when a person is charged with the commission of a felony, before he can be proceeded against by information he must be brought before an examining magistrate on such charge, * * *." The instrument filed in this case was not an information but

was a complaint. It lacks certain requirements of an information, viz, endorsement of names of witnesses. In any event, we now say that unless the offense charged would require a preliminary hearing if filed in the county court, no preliminary hearing is necessary if a complaint is filed in the district court as an original action.

With reference to the other assignments of error, section 39-727.02, R. R. S. 1943, provides as follows: "Tests to be considered valid under the provisions of section 39-727.01 shall have been performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for this purpose. The department is hereby authorized to approve satisfactory technics or methods and to ascertain the qualifications and competence of individuals to perform such tests and to issue permits which shall be subject to termination or revocation at the discretion of the department." The words *"Tests to be considered valid * * * shall"* would indicate that it was the intention of the Legislature to condition the right to use the tests on meeting the two requirements of this section: First, an analysis by an individual who had been issued a permit to make such analysis; and second, an analysis according to a method approved by the Department of Health. There is no evidence in this record that the pathologist met either of these tests.

If there can be any doubt on this point, there can be none when we also consider the provisions of section 39-727.06, R. S. Supp., 1959, which provides: "Any test made under the provisions of sections 39-727.03 to 39-727.12, *if made in conformity with the requirements of section 39-727.02,* shall be valid for the purposes of section 39-727.01, and shall be competent evidence in any criminal prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor."

(Italics supplied.) Timely objection was made as to foundation.

Section 39-727.04, R. S. Supp., 1959, provides in part: "The person so arrested or taken into custody may choose whether the test so required shall be a chemical test of his blood or urine. Only a physician, registered nurse, or registered laboratory technologist, under the direction of a physician, acting at the request of a law enforcement officer may withdraw blood for the purpose of determining the alcoholic content therein; Provided, this limitation shall not apply to the taking of a urine specimen. The person tested shall be permitted to have a physician or registered nurse, under the direction of a physician, of his own choosing administer a chemical test in addition to and following the test administered at the direction of the law enforcement officer." In the second sentence, the words "or registered laboratory technologist" appear between the words "registered nurse" and "under the direction of a physician," but in the third sentence this is not the case. In the third sentence, there can be no possibility of any other construction than the one that the registered nurse must be acting under the direction of a physician. It should be evident that it could not have been the intention of the Legislature that in one case the nurse would be required to be acting under the direction of a physician and in the other she would not. Construing the section in its entirety, we hold that in order to permit the blood sample to be used for the purposes of the act, the registered nurse at the time the blood sample is taken must be acting under the direction of a physician.

In this case, the withdrawal of blood was made by a registered nurse. There is no evidence that she was acting under the direction of a physician. Nor is there any evidence in this record to indicate that any law enforcement officer directed that a test be made. Timely objection was made of no proper and sufficient founda-

tion when the blood test was first produced.

Section 39-727.03, R. S. Supp., 1959, provides as follows: "Any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his blood or urine for the purpose of determining the amount of alcoholic content in his body fluid. The test shall be administered at the direction of a law enforcement officer *whenever the person has been arrested for any offense involving operating a motor vehicle under the influence* of alcoholic liquor in violation of a statute or a city or village ordinance when the arresting officer has reasonable grounds to believe that *before his arrest the person was driving* while under the influence of alcoholic liquor." (Italics supplied.) Without a detailed analysis of this section, read in connection with section 39-727.04, R. S. Supp., 1959, it is apparent that it requires an arrest or the taking into custody on a driving offense before the test is administered. We therefore hold that for the implied consent of a person to be effective, as provided in section 39-727.03, R. S. Supp., 1959, the person must have been arrested or taken into custody before the test is given. The defendant was not arrested or taken into custody for several days after the test was made.

We held in Vore v. State, 158 Neb. 222, 63 N. W. 2d 141: "A statute providing that a presumption of intoxication arises upon a determination that the amount of alcohol in the subject's body fluid at the time in question is 0.15 percent or more, by weight, as shown by chemical analysis, is in derogation of the common law and subject to strict construction."

The trial court erred in admitting the evidence as to blood test over the objection of the defendant. As the evidence was not admissible, the giving of instruction No. 9, covering the presumptions as to intoxication based upon the percentage of alcohol by weight in the body

fluid, as established by section 39-727.01, R. S. Supp., 1959, was prejudicial error.

However, in this case, when the testimony on the blood test is excluded, there is not a scintilla of evidence which would have permitted a jury to have returned a verdict of guilty. The defendant moved for a directed verdict after both parties rested. The motion should have been sustained. The judgment of the district court is reversed and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

FIRST CONTINENTAL NATIONAL BANK & TRUST COMPANY, TRUSTEE, PLAINTIFF, V. ARTHUR M. DAVIS, AS ASSESSOR OF LANCASTER COUNTY, NEBRASKA, ET AL., DEFENDANTS.
108 N. W. 2d 638

Filed April 21, 1961. No. 34929.

1. **Constitutional Law: Taxation.** By the terms of Article VIII, section 1, of the Constitution of Nebraska, it is provided that taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises.
2. ———: ———. By the terms of Article VIII, section 1, of the Constitution of Nebraska, taxes uniform as to class may be levied by valuation upon all other property.
3. ———: ———. By the terms of Article VIII, section 2, of the Constitution of Nebraska, the Legislature is empowered to exempt by law property from taxation which is owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user.
4. ———: ———. There is no provision of the Constitution of Nebraska other than Article VIII, section 2, exempting property from taxation, or which permits exemption by the Legislature.
5. ———: ———. By the terms of Article VIII, section 2, of the Constitution of Nebraska, no property shall be exempt from taxation except as provided in the Constitution.

6. ———: ———. By the terms of section 77-701, R. R. S. 1943, the property involved herein is intangible property on which, under the terms of Article VIII, section 2, of the Constitution, the tax must be in uniformity with that levied on the class to which it belongs.
7. ———: ———. The Legislature has power to classify intangible property for the purpose of taxation, but it may not divide a class and enact different rates of taxation for different segments of the class.
8. ———: ———. The validity and constitutionality of a classification for the purposes of taxation may not be sustained unless it rests upon real differences of situation and circumstances from those applicable to other persons and property.
9. ———: ———. Property may not be exempted from taxation by the Legislature unless power so to do is found in the Constitution.

Original action. *Demurrer sustained.*

Mason, Knudsen, Dickeson & Berkheimer and *Jerrold L. Strasheim,* for plaintiff.

Clarence A. H. Meyer, Attorney General, *Homer G. Hamilton,* and *Elmer M. Scheele,* for defendants.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

This is an original action filed in the Supreme Court by First Continental National Bank & Trust Company, Trustee, as plaintiff, against Arthur M. Davis, assessor of Lancaster County, Nebraska, C. E. Berg, treasurer of said county, Forrest Johnson, Tax Commissioner of the State of Nebraska, and Clarence S. Beck, Attorney General of said State of Nebraska, defendants.

By the petition it is alleged that the plaintiff is the trustee by succession of a trust executed on October 30, 1958, with The Continental National Bank of Lincoln as the original trustee which trust was denominated General Tobacco and Candy Company Profit-Sharing Trust. The description and declared purpose of the trust as contained in the petition is the following: "At all the

times subsequent to October 30, 1958, hereinafter mentioned, The Trust has had as its purpose the funding of a profit-sharing plan for the benefit of employees of General Tobacco and Candy Company and as such it has been exempt from income tax under the laws of the United States." Neither the trust indenture nor a further description of its contents is before the court by pleading or otherwise.

It is further pleaded that during 1958 the trust received no income from intangible property; that in 1959 the trust was the owner of intangible Class A property of the value of $9,820; that on April 20, 1959, the trustee listed with the defendant assessor the intangible property of the trust showing no income therefrom for 1958; and that the assessor computed and assessed a tax on this property for 1958 at the rate of 2½ mills on each dollar which amounted to $24.55, as provided by section 77-702, R. R. S. 1943.

It is further pleaded that this assessment was made by the assessor contrary to law for the reason that by the terms of section 77-730, R. R. S. 1943, the trustee had nothing subject to tax in 1958. By the terms of section 77-730, R. R. S. 1943, only gross income received from intangible property was taxable and that at 2 percent. There was no such gross income.

The prayer of the petition is for a declaratory judgment that the laws of Nebraska do not permit this trust to be taxed in accordance with the provisions of section 77-702, R. R. S. 1943, but on the contrary that the provisions of section 77-730, R. R. S. 1943, shall apply.

To the petition the defendants filed a general demurrer on the ground that the facts stated were not sufficient to constitute a cause of action. The only question before the court is that of whether or not the petition states a cause of action.

It is made apparent by their briefs that the defendants' attack on the petition is based upon the premise that section 77-730, R. R. S. 1943, is violative of the Con-

stitution of the State of Nebraska and of the Fourteenth Amendment to the Constitution of the United States. The section of the statute is the following: "The trustee of every trust which has as its purpose the funding of a pension, profit-sharing, or other employee benefit plan, exempt as such from income tax under the laws of the United States and which (1) is established in the State of Nebraska, (2) is established by an employer residing in or having its principal place of business in the State of Nebraska, or (3) has intangible property otherwise subject to taxation under Chapter 77, shall pay, in lieu of any other intangible property tax, a tax equal to two per cent of the gross income which such trust has received during the preceding calendar year from intangible property otherwise taxable under Chapter 77. Such tax shall be due and delinquent and shall be paid by the trustee or other custodian of the assets the same as other intangible property taxes. In the event the trustee or custodian shall fail to pay the tax imposed by the provisions of this section, it shall be collected from the employer."

The attack is presented on three basic theories. One theory advanced by the defendants is that the statute is violative of the Fourteenth Amendment to the United States Constitution. The point is that by the statute it is attempted to tax intangibles beyond the jurisdiction of this state. This contention appears to be without merit. This is true since the statute by its terms provides for taxation only on intangible property taxable under Chapter 77, which of course has reference to property in the State of Nebraska.

Another theory is that contrary to the Constitution of Nebraska this statutory provision authorizes the taxation of pensions, profit-sharing funds, or other employee benefit funds held in trust at a different rate and in a different manner than other property of the same class. The third theory is that the provision exempts property

from taxation which may not under the Constitution be exempted.

It therefore becomes necessary to examine the pertinent provisions of the Constitution and related statutory provisions. The first to which attention is directed is Article VIII, section 1, of the Constitution. It contains the following: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, * * *. Taxes uniform as to class may be levied by valuation upon all other property."

Article VIII, section 2, contains the following: "The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. * * * No property shall be exempt from taxation except as provided in the Constitution." There is no constitutional provision other than this one which directly exempts real or personal tangible or intangible property from taxation or permits exemption by the Legislature.

From an examination of the description of the subject matter of the action contained in the petition, the language of the statute hereinbefore quoted, and the powers and inhibitions contained in the two constitutional provisions which have been referred to, it is clear that this court is dealing with property which may not be legislatively exempted from taxation. It is also true that the subject matter is in the legal sense intangible and not tangible property. What shall be said herein is to be regarded as so limited.

Section 77-701, R. R. S. 1943, is as follows: "Intangible property, other than notes secured by mortgages on real estate situated in this state and other than bonds of the United States, of this state, or of governmental subdivisions of this state, shall be separately classified, listed, and taxed as follows:

"(1) Class 'A' shall consist of money, United States legal tender notes and other securities of the United States payable on demand, book accounts, savings accounts, bank deposits, bills of exchange, checks, and drafts.

"(2) Class 'B' shall include all other kinds of intangible property which is not included in Class 'A'."

Section 77-702, R. R. S. 1943, is as follows: "All intangible property in Class 'A' shall be taxed where it is assessed at the rate of two and one half mills on the dollar of the actual value thereof."

Section 77-703, R. R. S. 1943, is as follows: "All intangible property in Class 'B' shall be taxed where it is assessed at the rate of four mills on the dollar of the actual value thereof, to be assessed and collected where the owner resides."

The petition makes it clear that the subject matter involved in 1958 was intangible property, Class A, and if taxable under these provisions of the statute it was taxable at the rate of 2½ mills on the dollar of the actual value. It is conceivable that in the future the trust might have intangible property, Class B, which if taxable under these provisions would be taxable at the rate of 4 mills on the dollar of the actual value.

It was in 1957 that section 77-730, R. R. S. 1943, was enacted. The purpose was, according to the title of the act (Laws 1957, c. 324, p. 1146) and the body of the provision, to provide for the taxation of a trust of intangible property in a manner other and different from the manner prescribed by sections 77-701, 77-702, and 77-703, R. R. S. 1943.

The defendants contend that this violates the uniformity requirement of Article VIII, section 1, of the Constitution of Nebraska. If it be said that this amounts to a new rate within one or the other of the classifications declared by section 77-701, R. R. S. 1943, without a recognizable and proper classification as the basis therefor, this without doubt would be true. This court

effectually so declared in Omaha Nat. Bank v. Heintze, 159 Neb. 520, 67 N. W. 2d 753.

No case has been found wherein it has been said that there may be separation of parts from intangible Classes A and B or either of them as described in section 77-701, R. R. S. 1943, and a separate rate of taxation provided for the separated parts thus rendering the rates fixed by sections 77-702 and 77-703, R. R. S. 1943, inapplicable. This court did say in United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N. W. 2d 408, a case which involved the right of classification of property for the purpose of taxation: "The Legislature may properly legislate in regard to a class of persons, but it may not divide a class of persons and enact different rules for the government of each segment of the class."

It was also said: "The Legislature may make a reasonable classification of persons, corporations, and property for the purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render appropriate its enactment." See, also, Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738. These statements were not made in a case wherein the issues were the same as here, but rights and powers under Article VIII, section 1, of the Constitution of Nebraska, were under consideration.

In Continental Ins. Co. v. Smrha, 131 Neb. 791, 270 N. W. 122, it was said: "The record conclusively shows that the classification attempted on the basis of benefits received and objects to be accomplished does not rest upon any real differences in situation and circumstances from others within the class. In the absence of some real and substantial distinction which bears a reasonable, just and proper relation to the objects sought to be accomplished, a tax levied upon a part of those within the same class cannot be sustained. The classification

and the object to be accomplished must be germane."

It is clear that the intent of the Legislature by enacting section 77-730, R. R. S. 1943, was to create a new classification or classifications of intangible property and to establish a new rate of tax thereon. From what has been pointed out it was not prohibited from so doing. It is concluded that the Legislature could so do without specific reference in the new legislation to previous statutory designations and rates of tax.

The validity and constitutionality of the classification may not be sustained however unless it includes all other like situations and circumstances and all of the persons and property of the same class. In other words, if there were those in a like situation to whom the classification did not apply it could not be regarded as valid and constitutional.

From the face of the statute itself it becomes apparent that it is void and unconstitutional for the reason that it fails to operate uniformly upon all of the persons and property of the same class.

It is declared by the provision that the classification embraces trusts, (1) which are exempt from income tax under the laws of the United States, and (2) which have for their purpose the funding of pensions, profit-sharing plans, or employee benefit plans. As is observable no intangibles which may be devoted to any of these purposes may come within this statutory classification unless they are in the hands of a trustee. Every other intangible fund created for these purposes whether by voluntary and unilateral action of an employer, or by contractual arrangement, would be without the class and the fund would be taxable as intangible Class A or Class B.

Other examples of failure to include within the classification funds or property for purposes like those set forth in this statute could be mentioned but it is not deemed necessary to do so.

There is another reason why this must be treated as

a lack of uniformity as to class. That reason is that there is no measure whereby it could be ascertained whether or not the tax on income from the intangible property of the trust would be equal actually or approximately to the tax on other intangibles of the same class or character subject to tax and taxed under the rates fixed by statute. Obviously, the intangibles within this class but not included in this statutory classification would be subject to a different rate of tax.

In dealing with such a situation this court said: "It may happen that 70 per cent. of the rate of taxation upon tangible property will be precisely 5 mills upon the dollar, in which event no harm would be done, but the probability of such an event is ephemeral, and is purely a matter of chance. If the application of the 70 per cent. rate should exceed 5 mills upon the dollar of valuation, or be less than 5 mills, in either event the rule of uniformity would be violated." State ex rel. Spillman v. Ord State Bank, 117 Neb. 189, 220 N. W. 265.

It is not the purpose to say herein that this could or could not under any circumstances be legally set up by the Legislature as a class and that in no event could it be treated and taxed as the Legislature has attempted to do. This is a matter which is not presented by this record and accordingly it is not passed upon. The only purpose is to say that taking into consideration what the statute contains and the definition and description of the purposes to be accomplished under it the classification as made violates the uniformity requirements of the Constitution.

The third theory presented by the defendants is that this statute by its terms exempts property from taxation contrary to the Constitution.

It becomes clear from the terms of the statute and the constitutional provisions already cited herein, and from what has been said with reference to classification, that the subject matter to be dealt with is not subject to exemption from taxation. In the brief of the plaintiff

is a suggestion that it may be constitutionally exempt but it does not, as it is thought, seriously so contend.

The wording of the statute points out without question that the intangible property of a trust created pursuant to the terms of this statute is free from any direct burden of taxation. It follows of course that it is exempted from taxation unless a tax burden is indirectly imposed. The theory of the plaintiff appears to be that an indirect burden is imposed by the provision that "in lieu of any other intangible property tax, a tax equal to two per cent of the gross income which such trust has received during the preceding calendar year from intangible property otherwise taxable under Chapter 77" shall be paid, and that thereby the constitutional requirement that this property shall be taxed is satisfied.

By clear and specific statement a trust set up in accordance with this statutory provision is exempt from taxation if the trust "has intangible property otherwise subject to taxation under Chapter 77." It is further clear that any and all intangible property coming to the trust from any source and in any manner except as gross income is exempt from taxation.

The meaning of this quoted language is not free from doubt, but as used in context it is assumed that it means intangible property which would be subject to taxation except for elimination therefrom by the terms of the provision under examination. Nothing is taxed except the gross income from this intangible property for the current year, which gross income is taxable at the rate of 2 percent.

There was an apparent attempt to impose an indirect burden on this trust. None however was imposed on the trust but only on something which could be taxed only if it existed. In fact this record discloses that in 1958 there was a trust in the amount of $9,820 but there was nothing to tax in lieu of a tax on this trust since there was no income.

In the face of all this it must be said that this provi-

sion of the statute creates an exemption contrary to the Constitution of the State of Nebraska.

It follows that the intangible property in this trust was taxable as Class A property and subject to the rate of tax fixed by statute therefor.

The conclusion reached is that the demurrer should be sustained.

DEMURRER SUSTAINED.

SIMMONS, C. J., participating on briefs.

UNITED SERVICES AUTOMOBILE ASSOCIATION, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. LYLE Q. HILLS, APPELLEE AND CROSS-APPELLANT.
109 N. W. 2d 174

Filed April 28, 1961. No. 34860.

1. **Interpleader.** The right of a stakeholder to interplead and have the interests of adverse parties in the fund determined is an equitable proceeding.
2. **Insurance.** Where an insured, having partial insurance coverage, sustains a loss in excess of the amount of such coverage, he may properly proceed against the wrongdoer for the total loss sustained.
3. **Insurance: Subrogation.** If in such proceeding he collects for the damages for which he was compensated by his insurance carrier, such insurance carrier is entitled to assert its right to an equitable subrogation thereto.
4. ———: ———. Where the holder of the subrogation right in such a case asserts his right to equitable subrogation in the avails of litigation or settlement created by the efforts of insured and his attorney, and the insurance company fails to make or offer to make, itself a party to the action against the wrongdoer, or in any manner to assist in the prosecution of the claim or contribute towards the expense thereof, although having full knowledge of its pendency and object, the insured is entitled to retain a proportionate share of the expenses, including attorney's fees, incurred in the recovery from which the insurance company will benefit to the extent of its subrogation claim.
5. **Attorney and Client: Subrogation.** Such recovery of expenses and attorney's fees in such case is not based on the relation of

attorney and client, but on the equitable theory that one who incurs expenses for the recovery of money for the benefit of a holder of a right of equitable subrogation should be permitted to reimburse himself for the share of the expense that was for the benefit of the holder of the subrogation right.

6. **Attorney and Client.** The recovery of expenses including attorney's fees in such a case is not a claim in which an attorney's fee can be allowed as a part of the costs within the purview of section 25-1801, R. R. S. 1943.

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

Eisenstatt & Lay and *John J. Higgins, Jr.*, for appellant.

Thomas D. Carey and *Lyle Q. Hills*, for appellee.

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

CARTER, J.

This is an action for a declaratory judgment brought by the United Services Automobile Association against Lyle Q. Hills and Allstate Insurance Company. The trial court found for the defendant Hills and against United Services Automobile Association. The latter has appealed.

For convenience we shall refer to the plaintiff as United, to the defendant Lyle Q. Hills as Hills, and to Allstate Insurance Company as Allstate. The controlling facts are not in dispute, although there are variations in the evidence that do not appear material to the decision of the case.

Albert E. Dawson was the owner of an automobile which United had insured against loss caused by collision by a $50 deductible policy. On April 1, 1957, a loss occurred while the automobile was being operated by the wife of Dawson. United employed the Crocker Claims Service to adjust the claim. One Welch, an employee of Crocker, adjusted the claim and paid for Dawson on behalf of United the sum of $454.93, the

same being the amount of the damage less $50. In the proof of loss executed by Dawson the latter agreed with United that in case of recovery for the damage from a third person United would be subrogated, that Dawson would permit suit in his name by United, and that he would cooperate and give all reasonable assistance in the enforcement of its right of subrogation. There was no assignment of any part of Dawson's claim to United.

After the accident Dawson and his wife retained Hills, an attorney, to represent them in an action against one Yanovich, the driver, and one Miller, the owner of the other car involved in the accident. Hills investigated the facts preparatory to legal action. He interviewed Welch as to the results of his investigation, informed him of his intention to sue, inquired if United desired him to handle its subrogation claim, and informed Welch of his fee arrangement with Dawson. Welch advised Hills that he would inquire of United as to its wishes as he was without authority to act in the matter. Hills heard nothing further from Welch or United and commenced the action against Miller in June or July 1957. On December 5, 1957, Welch advised Hills by letter, at the instance of United, to delete the subrogation claim of United from his cause of action. Hills advised that the cause of action was Dawson's and could not be split, and proceeded with negotiations for settlement then pending. See Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N. W. 2d 807; Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660; Hayward v. State Farm Mut. Automobile Ins. Co., 212 Minn. 500, 4 N. W. 2d 316, 140 A. L. R. 1236.

Allstate had issued a policy of insurance on Miller's automobile, insuring against public liability. After the action was commenced a settlement was negotiated between Allstate and Dawsons in the amount of $3,500. It is undisputed in this record that United had advised Allstate and Hills as attorney for the Dawsons of its right of subrogation and Allstate had informed United

that if and when a settlement was made with the Dawsons it would protect the subrogation rights of United.

When the $3,500 was ready for payment, Hills requested Allstate's attorney to issue two drafts, one for $454.93 payable to United and Hills and one for $3,045.07 payable to the Dawsons and Hills. This was done by agreement, as a matter of convenience, to permit the Dawsons to get their money promptly. Allstate, having notice of the amount of United's subrogation claim, protected it as agreed, by including United as a copayee with Hills on a draft for the amount of United's claim. Hills claims 33⅓ percent of the draft for $454.93 as an attorney's fee pursuant to fee arrangement with the Dawsons. The only issue before the court is the interest of Hills, if any, in the draft for $454.93.

We point out that ordinarily an insurance carrier such as Allstate would have adequately protected itself against the claims of others to the fund by issuing one draft for the full amount of the settlement and making all persons known to have an interest in the fund copayees therein. In the instant case the fund, by mutual agreement, was paid by two drafts by which the rights of all claimants were protected. The rights of the parties remain the same as if the whole amount were in one draft with all claimants listed as payees therein. When the present issue arose between United and Hills, this case was commenced by United against Hills and Allstate to have the rights of the parties determined. Allstate alleged that it had no interest in the litigation, asserted that it was in the position of a stakeholder, paid the $454.93 into court, and was dismissed from the case, in accordance with a stipulation of the parties.

A party may resort to a declaratory judgment proceeding whether it be an action in law or equity. In such a proceeding, where a question of fact is involved, such issue may be tried and determined in the same manner as issues of fact in other civil actions. § 25-21,157, R. R. S. 1943.

The present action is one of interpleader. Allstate as a defendant was authorized to interplead under the provisions of section 25-325, R. R. S. 1943. Farming Corp. v. Bridgeport Bank, 113 Neb. 323, 202 N. W. 911. It was dismissed from the litigation by stipulation of the parties. No irregularities are asserted or are available by virtue of the stipulation. The right to interplead and have the interests of the adverse parties determined in a fund held by a stakeholder is an equitable proceeding and will be so treated on this appeal. Provident Savings & Loan Assn. v. Booth, 138 Neb. 424, 293 N. W. 293.

It is the contention of United that Hills, standing in the shoes of the Dawsons to the extent of his claim, has no employment relation with United and cannot therefore recover from United. It cannot be questioned that Hills was not employed by United either expressly or impliedly. Ordinarily the right of a lawyer to compensation for his services depends upon a contract of employment, express or implied. But there are exceptions to this general rule. One exception is stated in a well-known text as follows: "An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund." 7 C. J. S., Attorney and Client, § 193 b (2), p. 1098. And it is stated in the same section "and the mere fact that some of the persons interested have employed counsel and opposed the suit which has benefited them, will not prevent their interests from being subjected to the payment of reasonable compensation to counsel who has succeeded in recovering or preserving the fund which is brought into the custody of the court." See, also, Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N. W. 836; Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489; Summerville v. North Platte Valley Weather Control Dist., 171 Neb. 695, 107 N. W. 2d 425. While the foregoing cases

do not sustain the claim of Hills, they do announce the underlying principle that does sustain it.

The applicable rule is that where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees. In the early case of Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382, 10 Am. R. 746, the rule was stated as follows: "Where the assured, as in case of partial insurance, sustains a loss, in excess of the reimbursement or compensation by the underwriter, he has an undoubted right to have it satisfied by action against the wrong-doer. But if, by such action, there comes into his hands, any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the latter, based on his right in equity to subrogation. But the assured will not, in the forum of conscience, be required to account for more than the surplus, which may remain in his hands, after satisfying his own excess of loss in full, and his reasonable expenses incurred in its recovery; unless the underwriter shall, on notice and opportunity given, have contributed to, and made common cause with him, in the prosecution." See, also, Svea Assurance Co. v. Packham, 92 Md. 464, 48 A. 359, 52 L. R. A. 95; Washtenaw Mut. Fire Ins. Co. v. Budd, 208 Mich, 483, 175 N. W. 231; Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 296, 116 P. 819, 41 L. R. A. N. S. 719; Camden Fire Ins. Co. v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.), 175 S. W. 816; Annotation, 36 A. L. R. 1267.

In the last case above cited, the insurer, after having through its agents agreed to pay a loss caused by a fire covered by an insurance policy, reserving the right to be subrogated to the rights of the insured against third persons causing the loss, thereafter refused to pay the insurance. The insured commenced suit on the

policy, and later he instituted suit against the railroad causing the loss, recovering judgment in both cases. It was held that, inasmuch as the insurance company failed to make or offered to make, itself a party to the suit against the railroad company, or in any manner to assist in the prosecution, or contribute towards the expense thereof, although having full knowledge of its pendency and object, the insured would not be required to account for more than the surplus remaining in his hands after satisfying his loss in full and his reasonable expenses incurred in the recovery. The rule clearly applies to the instant case.

United contends, however, that the foregoing rule does not apply where the insured is informed that its subrogation claim is not to be included in the litigation and it indicates an intention to pursue the enforcement of its right of subrogation in some other manner. It seems clear to us, however, that whatever intentions United may have had prior to the commencement of the present action, they were abandoned when it elected to pursue its general equitable right of subrogation against the avails of the settlement established by the efforts of the Dawsons and Hills. In other words, when United abandoned its previous hostile position and elected to seek the collection of its claim from the avails of the litigation and settlement secured solely by the efforts of the Dawsons and Hills, it brought itself squarely within the cited authorities. Under such situation, justice and equity require that United pay its proportionate share of the expenses, including attorney's fees, incurred by the Dawsons and Hills in establishing the fund from which United seeks to benefit.

It is contended by Hills that he is entitled to the allowance of an attorney's fee against United in the district court and in this court under the provisions of section 25-1801, R. R. S. 1943. The trial court denied an attorney's fee in that court and Hills has cross-appealed, asserting that the trial court erred in so doing. We point

out that the claim of Hills for 33⅓ percent of the $454.93 paid into court was a claim against the fund for expenses and not a claim against United for an attorney's fee. It is not a claim against a person, partnership, association, or corporation within the purview of the statute. The trial court properly denied the allowance of an attorney's fee as a part of the costs. There is no merit in the cross-appeal. This court likewise denies an attorney's fee for services rendered in this court.

No question of pleading or parties is raised by this appeal. Under our system of code pleading, a pleading is required to contain a statement of the facts in ordinary and concise language. §§ 25-804 and 25-811, R. R. S. 1943. It is the facts well pleaded that determine the nature of the action and the relief to be granted. The rule has been stated by this court as follows: "It is a long-established rule that a court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject-matter." Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298. The pleaded facts and evidence sustain the prayer of Hills' cross-petition. The district court so found. The judgment rendered is correct and it is affirmed.

AFFIRMED.

WENKE, J., not participating.

SIMMONS, C. J., dissenting.

Like the chameleon changes its color, so the court's opinion shifts from position to position and finally concludes with an affirmance of the trial court's judgment.

It cannot conceal, however, the ultimate fact that it here compels the payment of a contingent fee to a lawyer by an insurance company who never employed him and specifically directed him not to represent it in a court action.

I have been of the opinion that an appellate court should pay attention to the pleadings in a cause, the

positions of the parties, the issues presented, and the evidence received bearing on those issues.

I shall here refer to the plaintiff as United; to Allstate Insurance Company as Allstate; to Lyle Q. Hills as Hills; to Major Dawson as Dawson; to Mrs. Dawson as such; and on occasion to the Dawsons as such.

An outline of the court's opinion follows this reasoning:

It first declares this to be an action for a declaratory judgment. I agree.

The court then states certain facts which I am unable to find either in the pleadings or the evidence. I will refer to some of these in this dissent in later paragraphs.

The court then seems to approve Hills' contention that Dawson was required to sue for United's subrogated claim but says only that that was Hills' contention. I discuss the splitting of causes of action later herein.

The court states that the only issue before the court was the interest, if any, of Hills in the draft for $454.93. The court finally proceeds to rest Hills' right of recovery upon the stated right of *Dawson to recover expenses* in spite of the total absence of any evidence that Hills or Dawson had any expense and that the Dawsons are not parties to this litigation.

The court then holds that this "action is one of interpleader" although no one interpleaded and the parties stipulated that only United (the plaintiff) and Hills (the defendant) are interested in the fund. Allstate was and is a party in this action. Dawson did not interplead nor was he interpleaded and is in nowise a party to this proceeding.

The court then, without any evidence before it of the parties' pleadings or issues in the action against the tortfeasor, proceeds to hold that in that action there was the preservation and recovery of a common fund.

That action so far as this record shows was a two-cause action at law. One by Mrs. Dawson to recover for personal injuries and the second cause one by as-

signment to recover property damage. So far as the pleadings and evidence go it was an ordinary, garden variety of an action at law for damages. Obviously the Dawsons were interested in that "common fund." Hills, as an attorney, may have been and obviously was interested in getting an attorney's fee out of the "common fund." However, that "common fund," if it is such, belonged to the Dawsons and United, not to Hills. The Dawsons are not parties to this proceeding and by stipulation of the parties, not including the Dawsons, the Dawsons have no interest in the fund involved in this action.

The court then holds that United, by accepting the avails of the litigation against the tort-feasor, is subject to a proportionate share of the expenses, including attorney's fees. However that is a right of the Dawsons, not of Hills. The Dawsons are not parties to this action and are not here making any claim for the recovery of expenses. In fact there is no evidence that the Dawsons incurred any expense, nor is there evidence that Hills incurred any expense in connection with the recovery of this fund. The fact that the Dawsons, under that theory, are necessary parties and are entitled under the rule announced to recover a "proportionate share of the expenses thereof, including attorney's fees" does not seem to give the court concern. The court does not rest its decision on that point however. It concludes with a finding that the pleaded facts and the evidence sustain the prayer of Hills' cross-petition. I recite the prayer of Hills' cross-petition which the court says should be sustained: "Wherefore, defendant, Lyle Q. Hills, prays that the petition of the plaintiff be dismissed; that he be given a judgment for $151.64 against the plaintiff on his cross-petition, together with his costs herein expended and a reasonable attorney fee."

I include the concluding allegations of that cross-petition: "That due demand was made more then (sic) 90 days prior hereto upon the plaintiff herein for $151.64

for services rendered and no part has been paid." The court then approves the recovery "for services rendered" to United by Hills but denies him an attorney's fee on his recovery as not "within the purview" of section 25-1801, R. R. S. 1943. By the statute the first basis for the granting of such a fee is "for services rendered." I submit that if Hills is entitled to recover "for services rendered" he is entitled to an attorney's fee by the direct language of the act. But without explanation that is denied as "without merit." I submit that the entire claim of Hills should be denied as "without merit."

It appears that sometime prior to April 1, 1957, plaintiff issued a "physical property damage" insurance policy to Dawson for a Pontiac automobile. This was a "$50.00 Deductible" policy. The record does not contain the terms of the policy.

On April 1, 1957, Mrs. Dawson was involved in an accident resulting in serious personal injuries and damage to the insured car.

Allstate was the insurance carrier for the owner of the other car involved.

United employed an adjuster in Omaha and apparently reached the conclusion that it was liable to Dawson for $454.93. It paid that amount to an agency which repaired the automobile. Apparently Dawson signed a subrogation agreement with United but it does not appear in the evidence. United then advised Allstate of the payment and demanded the sum paid. Allstate replied, asking for estimates of damage and insured's version of the accident. Allstate promised that if and when it settled the personal injury claim of Mrs. Dawson it would protect United.

In May 1957 Mrs. Dawson consulted Hills and apparently employed him to represent her against the tortfeasor for whom Allstate was the insurance carrier.

In May or June 1957 Hills talked to the adjuster, advised him of the additional damage to the Dawson car, and asked what investigation the adjuster had made.

There was also some talk in July 1957 about the necessity of suit, Hills asked if United desired him to represent it, and Hills advised the adjuster what his fee would be if he collected United's claim without litigation and if he represented United in litigation. The adjuster agreed to take it up with United.

In June or July 1957 suit was filed by Mrs. Dawson on her cause of action based on her personal injuries and later on a second cause of action, it being the assigned property damage claim. The pleadings in that action are not here, nor does the record contain a statement of the amounts claimed on each cause of action.

In July 1957 Hills was asked by the adjuster if he had included the full amount of property damage in the suit. He replied that he had, because he could not "split a cause of action." Hills was advised that he had no authority to represent United. On December 5, 1957, Hills was requested by letter to delete United's subrogation right from the cause of action. Hills replied orally, refusing to do so for the above reason. This apparently was concurrently done with an offer by Allstate to settle for $1,200. Hills recommended the settlement but his client refused to accept it. It is the first indication that United knew that Hills had filed suit for the full amount of the property damage.

The matter then proceeded to settlement in June 1958. Allstate issued its draft to the Dawsons and Hills for $3,045.07, which included the $50 "deductible" assigned to Mrs. Dawson by Mr. Dawson. That payment is not involved in this litigation.

Allstate, also, in keeping with its promise to United, issued a draft payable to United in the sum of $454.93. At Hills' request his name was inserted in the draft as copayee. Hills received the draft, mailed it to United, and requested that United endorse it and return it to him. Hills then proposed to deduct a fee of one-third of the amount and send his check for the balance to United. United refused, and this litigation followed.

It was later stipulated that Allstate should pay the fund involved to the clerk of the court and upon doing so should be dismissed as a party defendant. There is no record of the money being paid into court or an unconditional order of dismissal entered. Allstate continues as an ignored party in this litigation.

What are the issues as presented to the trial court?

United alleged that it brought the action for a declaratory judgment to determine an actual controversy between the parties.

United alleged the issuance of its policy covering physical property damage and the employment of Hills by Dawson to represent "his interests for the personal injuries sustained by him." United alleged the damage to a 1955 Pontiac station wagon and that it had paid $454.93 toward the repair of the automobile; and that it was subrogated to the interests of its insured.

United alleged that it had notified both Allstate and Hills that it did not want its subrogation claim represented by Hills. It then alleged that notwithstanding such notice, Hills negotiated a settlement with Allstate and had his name inserted in the draft as a payee along with United for the $454.93. United further alleged that Hills demanded United sign the draft and return it to him so that he could collect the full amount, deduct one-third thereof as a fee, and pay the balance to United.

United then prayed for a judgment that Hills was not entitled to any part of the sum of $454.93.

Hills by answer admitted that the action was one for a declaratory judgment and admitted the corporate capacity of United and Allstate, and that he was a "practicing attorney." He then denied generally except as to matters admitted in his cross-petition. He there admitted the issuance of United's policy and the collision, and alleged that he was employed by Dawson to represent him in his claim for damages to his automobile. He then alleged that he started settlement negotiations

in June of 1957 and filed suit on September 12, 1957; that thereafter settlement was made by Allstate for the tort-feasor; and that the draft was issued in the amount of $454.93 payable to himself and United. He then alleged that he had demanded payment of $151.64 by United "for services rendered."

Hills prayed for a dismissal of the petition for a declaratory judgment; and that he have judgment for $151.64 against United on his cross-petition, together with his costs and an attorney's fee under the statute. § 25-1801, R. R. S. 1943.

Hills during the progress of this case made a request for admissions which included a request that United admit that Hills had made demand for the fee of $151.64 "for services rendered."

Thus Hills framed the issues as an action at law. What was Hills' position at the trial? He testified when asked if he was ever hired by United: "There is no question but what they attempted to take the fruits of my efforts; and after they knew I was going ahead, they said nothing until I was ready to start the case in 1957." He also testified: "I also insisted that they make it for the full amount of the deal so there could be no criticism that I compromised their name (claim) without their authority, in view of the letter I got about deleting that portion of the claim."

What is Hills' position here? He states in his brief: "We respectfully submit that all the facts and circumstances show that in this case the plaintiff appellant desired the fruits of the work of the attorney and the work was not done gratuitously and that in equity and good conscience it should be required to pay the attorney fee which was the minimum attorney fee allowed for this service in this jurisdiction. * * * Justice and equity could not hold that this insurer is in a preferred classification so that its claims can be collected without payment of attorney fees * * *."

Hills claims no contract, express or implied. He pleads only that United took the fruits of his services.

Hills then brings himself squarely within the case of In re Estate of Kierstead, 121 Neb. 423, 237 N. W. 299. We there dealt with the claim of lawyers for the value of services inuring to the benefit of parties who refused employment to the claiming lawyers.

We there held: " 'No one can legally claim compensation for voluntary services to another, however beneficial they may be, especially where rendered without his knowledge or consent, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom the attorney may have been employed.' (This language was quoted by us from 6 C. J. 730. See, also, 7 C. J. S., Attorney and Client, § 175, p. 1041.) * * *

"The evidence fairly discloses that the interveners herein exerted diligence in their efforts to secure a termination of the controversy and that it inured to the substantial benefit of all the heirs. But we are unable to find that the interveners obtained an implied or express contract of employment with the defendants. It clearly appears that the interveners were notified that the defendants had employed another as their attorney and that there was no justification for the interveners to assume that they represented the defendants.

"In view of the evidence and the law applicable thereto, we conclude that, where the interveners were expressly employed by other of the heirs to represent their interests, and a settlement was subsequently reached which inured to the substantial benefit of all interested parties, the defendants are not liable for the payment of attorneys' fees, in the absence of an express or implied contract of employment with the interveners."

The court holds: "It cannot be questioned that Hills was not employed by United either expressly or impliedly." With that finding I agree. It is my position that under that finding our holding in In re Estate of

Kierstead, *supra,* becomes directly controlling and requires a denial of recovery to Hills. But the court awards Hills the fee he seeks in an action "for services rendered."

In 5 Am. Jur., Attorneys at Law, § 155, p. 352, the rule is stated as follows: "The mere fact that the services which an attorney renders his client are beneficial to a third person, * * * does not entitle the attorney to recover compensation from the person or persons thus benefited."

There are other findings, statements, and stated rules of law with which I disagree or think are inapplicable. I shall take these up as they appear in the opinion.

In the third full paragraph of the opinion the court refers to a proof of loss executed by Dawson and sets out its terms. I do not find where such a proof of loss was ever offered in evidence. It was not before the trial court as evidence and is not here. There is in the transcript a proof of loss signed by Dawson. It appears there as a part of a showing made by United in his effort to secure a summary judgment. It was never offered in evidence at the trial of this cause and would not have been competent had it been offered, for the simple reason that it relates to a 1955 Mercury, and the damage here involved and settled for refers throughout to a 1955 Pontiac.

The court then holds that: "There was no assignment of any part of Dawson's claim to United." There is no basis in this record for that statement; as to it the record is silent.

Discussing the relationship of Hills to the Dawsons in this matter, the court states that Hills interviewed Welch, the adjuster for United, "informed him of his intention to sue," and "inquired if United desired him to handle its subrogation claim, and informed Welch of his fee arrangement with Dawson." This record is entirely devoid of any evidence as to the fee arrangement made between Hills and the Dawsons. Hills was

advised that Welch had no "authority to act in the matter" as the court holds.

The court then holds that United advised Allstate "and Hills as attorney for the Dawsons" of its right of subrogation. There is evidence in the record that Allstate was so advised and agreed to protect United. I find no evidence that the Dawsons were so advised.

The court then states that Allstate asserted that "it was in the position of a stakeholder, paid the $454.93 into court, and was dismissed from the case, in accordance with a stipulation of the parties." The record is that Allstate answered, admitted four of the five paragraphs of United's petition, alleged that the controversy was between United and Hills, and denied each and every other allegation in United's petition.

Allstate appeared by its attorney at the trial of this cause on December 3, 1959, stated that it was not the real party in interest, and asked to be excused. The court excused the attorney. Later on May 5, 1960, a stipulation was filed by United, Allstate, and Hills that Allstate "should be dismissed * * * upon depositing with the Clerk * * * the sum of $454.93 * * *." After judgment pursuant to the stipulation the trial court ordered Allstate dismissed upon payment to the clerk of the sum of $454.93. There is no showing that the money was ever paid into court nor that the order of dismissal became effective. On this record Allstate remains a party to this action. Just who holds the draft does not appear.

The above finding of the court seems to be resorted to in order to lay a foundation for holding this to be an action in equity. Allstate was named defendant, it joined issue with United on material allegations, it did not pay the money into court, and remains in possession of the fund involved, so far as this record shows.

The court then, having by that process converted an action "for services rendered" into an equitable action of interpleader, proceeds to hold that this is a representa-

tive action to recover a common fund and hence avoid the rule of In re Estate of Kierstead, *supra.*

The claim of this sum of $454.93 being the result of a representative action appears for the first time in this opinion of the court. The sum in dispute is the result of a settlement of a property damage cause of action. That is an action at law. Hills does not assert now and never has asserted that he had any authority to represent United. He did not bring the damage action against the tort-feasor for United but for the Dawsons. Nowhere in the pleadings is any contention that this or the preceding law action was a representative action. In fact in the stipulation of May 5, 1960, all three parties stipulate that the dispute is between Hills and United "and between them only." The sole issue presented here and in the court below is this: Was Hills entitled to a judgment against United for attorney's fees for services rendered payable out of the sum which Allstate agreed to pay United? He makes no other claim. The court to sustain this representative action theory then cites three cases which it says "do not sustain the claim of Hills" but "do announce the underlying principle that does sustain it."

I find difficulty in going in two directions at the same time.

The record here shows that Mrs. Dawson sued the tort-feasor on two causes of action. One was her own action for personal injuries. The second cause was on the assigned claim of Dawson for property damage.

I confess difficulty in finding that an action at law for property damage suddenly becomes a representative class action in equity merely because a part of the damage claim by subrogation may belong to the insurer of the injured party. I need not explore that question here because this much is certain: No part of the cause of action belonged to Hills. Hills' only conceivable interest in it was under an attorney's contract with Dawson. That contract, if any, does not

appear in this record. Hills claims no part of the fund as such. He merely has put himself in position to compel United to pay him a contingent fee.

Before going further in the discussion of the opinion, I desire to return to the basis of Hills' contention that he was justified in including United's claim in the Dawsons' action and later in refusing to delete it when he had direct instructions to do so. It was that the cause of action "could not be split." The court does not say that it sustains that position, but in fact does so. It cites Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N. W. 2d 807; Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660; and Hayward v. State Farm Mut. Automobile Ins. Co., 212 Minn. 500, 4 N. W. 2d 316, 140 A. L. R. 1236.

What is the holding of these cases? In the Shiman case the question was: Who was the real party in interest? Shiman there had its own cause of action. An insurance company had loaned it the amount of its liability to Shiman. During the course of the opinion we quoted from 29 Am. Jur., Insurance, § 1358, p. 1016. That quote is now found in 29A Am. Jur., Insurance, § 1746, p. 821. It is followed by this sentence which we did not quote in Shiman and which the court does not now quote: "This rule has been said to rest upon the theory that the insured sustains toward the insurer the relation of trustee, and also upon the right of the wrongdoer not to have the cause of action against him split up so that he is compelled to defend two actions for the same wrong."

The quote from the Shiman case is stated in Dixon v. Coffey, *supra,* as the probable source of the trial court's error in a preliminary ruling. It is not approved there.

In Hayward v. State Farm Mut. Automobile Ins. Co., *supra,* attorney's fees were not involved. There the subrogee insurance company apparently approved the inclusion of their claim in the suit by the injured party.

The subrogee asked the injured party to represent it in the action. No question of attorney's fees was involved. The issue related to the right of the subrogor to deduct expert medical witness fees from the recovery for property damage. The decision rests on a holding that the tort-feasor could not be "subjected to two actions on one cause." The court held that had that split cause been sued on and "recovery had been had on either element of the cause, the other element would have been barred by the judgment."

However, the splitting of a cause of action by an injured party is not barred by the rule. If a split cause is brought and goes to judgment, the remaining "element" of the cause is then barred if suit is brought on a part of a cause. So here if the Dawsons had sued for the $50 damage not paid by United they would have had a perfect right to recover that $50 and Allstate and its insured could have pleaded that suit as barred by the judgment if they later were sued thereon.

As I read the Hayward v. State Farm Mut. Automobile Ins. Co. case, it is an authority directly contrary to the position taken by Hills in contending that he was required to sue for the entire property damage. Obviously he was not. Our cases do not so hold.

United had been subrogated to the rights of Dawson against the tort-feasor. Allstate was the insurance carrier for the tort-feasor. United advised Allstate of its payment to Dawson and asked for payment. Allstate promised to pay United on a condition later met. At that point Dawson had split his cause of action against the tort-feasor and accepted United's payment of its contractual obligation to him. United became the creditor of Allstate. Allstate was not required to assent to the splitting of the cause of action between United and Dawson. It did so. So we have a situation where a debtor consents to the splitting of a cause of action and agrees to pay part thereof to one creditor and part thereof to another creditor.

The rules are stated as follows: "The object of the rule against splitting causes of action is to prevent multiplicity of actions, a course favored by the law, and to avoid the costs and expenses incident to vexatious litigation on the same cause of action, and is for the benefit of defendant. * * * As a defense it is not an estoppel, but a bar. * * * *The rule does not prevent plaintiff from suing for a part of a single cause of action;* it applies only where the claims or demands are divided and made the basis of several actions; and if he does sue for a part, it merely precludes him from thereafter maintaining another action for the other portion. * * * *Since the rule prohibiting the splitting of causes of actions is for the benefit of defendant, he alone is entitled to object if the rule is not enforced;* he may waive or renounce its benefits by either expressly or impliedly consenting to the institution of separate actions on a single demand or cause of action, and such a waiver will be presumed unless timely and proper objection is made." 1 C. J. S., Actions, § 102, pp. 1308, 1309, 1310, 1312. (Emphasis supplied.)

"* * * one who has a claim against another may take a part in the satisfaction of the whole, *or maintain an action for a part only, of the claim,* * * *. But after having brought suit for a part of a claim, the plaintiff is barred from bringing another suit for another part. The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand, *without the consent of the person against whom the cause or demand exists,* to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. *If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action* for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only em-

braces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule is founded upon the plainest and most substantial justice,—namely, that litigation should have an end and that no person should be unnecessarily harrassed with a multiplicity of suits." (Emphasis supplied.) 1 Am. Jur., Actions, § 96, p. 480.

"The rule against splitting applies to bar the second action * * *." 1 Am. Jur., Actions, § 98, p. 483.

"The rule that a cause of action may not be split into two or more causes of action is a rule for the benefit of the party defendant; he may agree to a splitting of the cause of action, and in such case the courts will respect the agreement, or he may waive his right to insist upon the rule forbidding the splitting of a single cause of action." 1 Am. Jur., Actions, § 101, p. 484.

There is no multiplicity of suits involved in the first action on a split cause. That comes on the second and subsequent actions.

The debtor is the one who has the right, if he wishes, to raise that question when sued the second or subsequent time on a cause of action. The creditor cannot raise it for the debtor as Hills undertook to do here. As pointed out, the debtor in this instance has specifically agreed to pay the part of the cause to which United is entitled by subrogation. The question of Allstate's liability is not involved here. I suggest, also, a reading of 1 Am. Jur., Actions, § 102, p. 485.

Hills concedes that he was not employed by United; that he was advised that United did not desire his representation; and that United asked him to omit its subrogated part of the cause from the suit. The rules regarding the splitting of causes of action neither required the Dawsons to sue for the full amount of their loss, nor do they justify the payment of an attorney's fee for service to a person who did not employ him.

Having apparently accepted Hills' "split cause of action" theory that he was compelled to represent United

even though not so employed, the court then would avoid the rule of In re Estate of Kierstead, *supra,* by an exception to the rule, and holds as follows: "* * * where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees."

I shall not extend this dissent by a discussion of the cases cited there. They relate to the right of an insurer who has paid part or all of a loss to recover from the insured who has recovered from the tort-feasor. The question at issue in these cases was not (as here) the right of an attorney for the insured to collect a fee from the insurer. Rather it was the right of the insured, to whom the payment had been made, to deduct payments made by him to his attorney as expense.

Every case cited by the court on this proposition involves actions by an insurer who has paid its contract liability to an insured and who later sues the insured to recover money paid to the insured. They are insurer-versus-insured actions. There is no dispute presently among us about that rule. This is not an insurer-versus-insured action. Most of the cases are cited in 29A Am. Jur., Insurance, §§ 1736, 1737, 1738, 1739, and 1740, p. 812, and following. See, also, 46 C. J. S., Insurance, § 1209, p. 155. Dawson is not here making any claim to the money involved in this action. Hills claims it for himself and not for Dawson. In fact, I repeat, the Dawsons are not even parties to this declaratory judgment proceeding. No one knows what the position of the Dawsons might be were they parties. Interestingly enough two of the cases cited by the court to sustain its position at this point are cited in the dissenting opinion in Hayward v. State Farm Mut. Automobile Ins. Co., *supra,* which is a case relied on by the court earlier in the opinion.

If this action is to be determined on the theory pres-

ently being discussed, I point out that section 25-21,159, R. R. S. 1943, requires that all persons shall be made parties in a declaratory judgment action who have or claim any interest which would be affected by the declaration. Under our decisions in Redick v. Peony Park, 151 Neb. 442, 37 N. W. 2d 801, and Stahl v. Allchin, 155 Neb. 412, 52 N. W. 2d 251, this action should be dismissed if the rule of law just above discussed is to be considered as controlling.

Early in the opinion the court says: "Hills claims 33⅓ percent of the draft for $454.93 *as an attorney's fee* pursuant to fee arrangement with the Dawsons." (Emphasis supplied.) Hills did so make his claim for an attorney's fee. I challenge the court to point out where by pleading or proof there is any evidence of the "fee arrangement" made by Hills with the Dawsons. I have searched the record and it is not there.

The court then holds that United seeks to recover against the "avails of the settlement established by the efforts of the Dawsons and Hills." It goes further and says that the avails of the settlement were "secured *solely* by the efforts of the Dawsons and Hills." (Emphasis supplied.)

The record is (by Hills' testimony) that Hills went to the adjuster for United and sought and secured the information and investigation facts that the adjuster had assembled. He then testified as to his own investigation. It is manifest from his investigation that he was seeking evidence to assist recovery in the personal injury claim of Mrs. Dawson. At that time there had been paid for Dawson all but $50 of his property damage. There is no evidence that the Dawsons expended any effort in securing the settlement here, except to resist Hills' efforts to persuade them to accept a settlement for $1,200.

Having started off with the position stated in the sixth paragraph of its opinion that Hills claimed one-third of the fund here involved as an "attorney's fee pursuant to fee arrangement with the Dawsons" the

court concludes by awarding it to Hills as reasonable "expenses." Manifestly under the authorities cited by the court if any one was entitled to recover "expenses" it was the Dawsons. Here again I appeal to the record. There is not a wee bit of a scintilla of evidence that Hills or Dawson spent one copper cent of 1957 value in order to secure a settlement of the claim for property damage. The issue was at all times the amount that Allstate would be required to pay for the tort-feasor to settle the claim of Mrs. Dawson. Likewise there is no evidence that the Dawsons ever paid Hills or incurred a liability to Hills for attorney's fees in any part of this matter.

Why, then, this shift from the earlier position that Hills sought an attorney's fee to a judgment for Hills for "expenses." To bring the case within the last discussed rule is obviously one reason. However in doing so the court gets itself into another dilemma. Section 25-1801, R. R. S. 1943, provides for the recovery of an attorney's fee under certain instances "for services rendered." Hills sought in his cross-petition to recover an attorney's fee "for services rendered." Hills rendered no services for United. He here seeks to recover from United "for services rendered" to the Dawsons. The court orders United to pay it as a part of the Dawsons' expenses. If Hills is entitled to recover the one-third attorney's fee, then he is entitled to recover another fee under the statute above cited.

The court says the pleaded facts and evidence sustain the prayer of Hills' cross-petition. It then proceeds to deny a part of that prayer.

One further matter requires comment. Hills offered no evidence of a contractual relationship either with the Dawsons or United. He offered no evidence as to the reasonable value, if any, of his services. He sought to recover and is permitted to recover a fee in accord with the fee schedule of the Omaha Bar Association. The

trial court by its decision took judicial notice that such a fee schedule is reasonable. This court affirms.

It is not for me to discuss the impact of this decision on the insurance business of this state. That it will be disturbing and controversy-producing is to state it mildly. It likewise will be a source of confusion to the trial courts and lawyers in causes of this character. Those considerations and not the amount in controversy justify this dissent.

I am authorized to say that Boslaugh, J., concurs in this dissent.

FRANCES B. LANGFORD, ADMINISTRATRIX OF THE ESTATE OF HERBERT E. LANGFORD, DECEASED, APPELLEE, V. RITZ TAXICAB COMPANY, A PARTNERSHIP, APPELLANT, IMPLEADED WITH HARRY HOLMES, APPELLEE.
109 N. W. 2d 120

Filed April 28, 1961. No. 34894.

1. **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 and which find support in the evidence.
2. **Intoxicating Liquors: Negligence.** Evidence of the drinking of alcoholic liquor by a guest in an automobile is not of itself evidence of negligence.
3. **Automobiles: Negligence.** Ordinarily the negligence of the driver of an automobile is not imputed to his guest.
4. ———: ———. 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.
5. ———: ———. Where a plaintiff is free from negligence or contributory negligence and two or more parties are guilty of negligence in the operation of automobiles causing or proximately contributing to an accident resulting in injury to the plaintiff, and one being the host of the plaintiff and free from liability because of the guest statute and the other or others not, the one or ones not being the host may be held liable for the entire damage.
6. **Negligence: Trial.** When contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is

improper to submit to the jury issues involving contributory negligence and comparative negligence.

7. **Trial: Appeal and Error.** Where a party has sustained the burden of a trial and has succeeded in securing the verdict of a jury on controverted issues of fact, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
8. **Death: Appeal and Error.** Where in an action for wrongful death the evidence is sufficient to sustain the verdict of the jury under the limited liability provisions of sections 30-809 and 30-810, R. R. S. 1943, this court will not, in the absence of prejudicial error, interfere with the verdict and judgment, unless it is shown to be clearly wrong.

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

William A. Day, Sr., Gross, Welch, Vinardi, Kauffman & Schatz, and *Davis & Pittman,* for appellant.

Joseph P. Inserra, for appellee Langford.

Mecham, Stoehr, Rickerson & Sodoro, for appellee Holmes.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

This is an action for wrongful death brought by plaintiff as the administratrix of the estate of Herbert E. Langford, deceased, for the death of the deceased resulting from a collision of an automobile owned and operated by Harry Holmes, in which the deceased was a guest, and a taxicab owned by the Ritz Taxicab Company and operated by Robert L. Stanford. The jury returned a verdict against the Ritz Taxicab Company for $31,889.10. Judgment was entered thereon and the Ritz Taxicab Company has appealed.

The defendant Harry Holmes will be referred to as Holmes, and Ritz Taxicab Company, a partnership, and the partners composing it will be referred to as defendant.

The accident occurred at the intersection of Twenty-fifth and Lake Streets in the city of Omaha. Lake Street is an east and west street, 40 feet wide, and protected by stop signs. Twenty-fifth Street is a north and south street, 30 feet wide, without stop signs and, consequently, a nonprotected thoroughfare. The accident occurred on December 19, 1958, at about 9 o'clock p.m. The streets were dry and street lights were burning.

The evidence of the plaintiff shows that Holmes and the deceased had met in a bar about 30 minutes before the accident. Holmes admitted that he drank two beers and a "shot" of whiskey. He testified that the deceased drank nothing in this bar. They left the bar within 5 minutes after deceased arrived. Holmes drove the car and deceased rode in the right front seat. They observed a Mrs. Pitts walking on Twenty-second Street, who was recognized as an acquaintance by the deceased. They offered her a ride to her destination and she accepted. At the time of the accident she was riding in the front seat between the two men.

Holmes testified that he was driving west on Lake Street at a speed of 25 miles an hour as he approached the intersection of Twenty-fifth and Lake Streets. He testified that the Ritz cab came from the north on Twenty-fifth Street, failed to stop at the stop sign, and collided with his car in the intersection. His evidence is corroborated by Mrs. Pitts and one Sanders, who was approaching the intersection on Twenty-fifth Street from the south. Mrs. Pitts also testified that neither Holmes nor the deceased were intoxicated, although she smelled the odor of beer on Holmes. Holmes testified that he was not intoxicated.

Holmes testified further that his car was too close to avoid the accident when the cab ran the stop sign into Lake Street, that he pulled his car left to avoid the accident, and the right front of his car hit the left front of the Ritz cab. He lost control of his car, which

veered south and hit the south curb of Lake Street, then turned north and struck a parked truck on the north side of Lake Street, 255 feet distant from the point of impact, at which point he was thrown from his car. The driverless car again veered to the south for a distance of 120 feet, went over the south curb into a depression, and hit a store building. The measurements were supplied by police officers, to which there is no dispute. Holmes said that his right front tire blew out and his motor quit, making his power steering useless. He testified also that his car accelerator stuck and would not operate. He stated he was dazed for 5 minutes or so following his fall from his car. The trial court directed a verdict in favor of Holmes at the close of plaintiff's evidence on the ground that there was no evidence of gross negligence on his part. No complaint is made to the trial court's action in so doing.

The evidence of the cab driver was that he picked up a passenger at or near Twenty-fourth and Lake Streets, that he proceeded west on Lake Street, that he gave an arm signal for a left turn onto Twenty-fifth Street, and that he was hit by plaintiff's automobile which came up behind him at a high rate of speed before he could complete his turn. His evidence is corroborated by the passenger in his cab and a witness who was waiting for a bus at Twenty-fourth and Lake Streets. There is evidence by two policemen that Holmes was, in their opinion, under the influence fo intoxicating liquor. There is also evidence that a blood test was given Holmes to determine the amount of alcohol in his blood, which was negative.

The evidence is in direct conflict as to the controlling facts and clearly raises a question for the jury. No contention is made that the case was not one for the jury's determination.

The Ritz Taxicab Company contends that the trial court erred in certain rulings on the evidence, that certain instructions were prejudicially erroneous, and erred

in holding the evidence was sufficient to sustain the verdict and judgment. We shall review the foregoing in the order above stated.

It is contended that the trial court erred in sustaining the objection to a question directed to Holmes on cross-examination as to whether the deceased made any objection to the manner of Holmes' driving prior to the accident. Holmes answered "No." The objection was then sustained. An offer of proof was made that Holmes would testify, if permitted, that the deceased made no complaint. Holmes later testified without objection that the deceased immediately before the accident called out "Hold it." The offer of proof shows that no complaint was made to Holmes by the deceased. There is nothing in the record to indicate any duty on the part of the deceased to protest. Under such circumstances evidence that no protest was made is not material to the issues and the ruling of the trial court did not prejudice the rights of the defendant.

Complaint is made that the trial court erred in refusing the testimony of a police officer wherein he stated that he smelled the odor of liquor on the deceased. It must be borne in mind that the deceased was a guest in the Holmes car. The odor of liquor on a guest, standing alone, is not evidence of contributory negligence. No prejudicial error resulted from the trial court's ruling. Similar complaints are made as to rulings of a similar nature to the evidence of a member of the rescue squad. We likewise find no reversible error in the trial court's rulings on these assignments of error.

It is contended that the trial court erred in ruling that the evidence of Holmes' intoxication was admissible only on the issue of Holmes' negligence. It is clear that the negligence of an automobile driver, standing alone, cannot ordinarily be imputed to his guest. The ruling of the trial court was correct under the state of the evidence.

Complaint is made that the trial court erred in ex-

cluding evidence as to the speed of the Holmes car when it turned the corner of Twenty-fourth and Lake Streets prior to the collision, a point 1 block distant from the scene of the accident. The evidence was clearly too remote and was properly excluded.

Error is asserted in that the trial court excluded the evidence of a police officer and the cab driver to the effect that Holmes did not state at the police station following the accident that the cab entered Lake Street from Twenty-fifth Street after running the stop sign. The question was: "Did you ever hear anybody, any witness, claim that the Ritz Cab Company or the Ritz cab was driving north and south?" The question was objected to as irrelevant, incompetent, calling for hearsay, not proper examination. The objection was sustained. The offer of proof was: "Offer to prove by this witness that the defendant who has been dismissed out of this case, Harry Holmes, never made any claim at any time prior to this time that the taxicab was going north and south or that it ran the stop sign and that if the question was permitted to be answered, that the officer would so testify." Whether the witness had heard "anybody, any witness" claim that the cab was traveling north and south was not material and hearsay. It is not claimed that Holmes made any statement in conflict with his evidence on the trial, or that he was questioned as to how the accident occurred. Under the circumstances shown, Holmes was under no duty to speak and, ordinarily, mere silence in such a situation does not affect the credibility of a witness. The ruling of the trial court was not prejudicially erroneous.

The defendant asserts that instructions Nos. 7, 8, 9, 11, and 17 were prejudicially erroneous. Before discussing the instructions complained of we point out that this suit was brought against the Ritz Taxicab Company and Holmes. The deceased was admittedly the guest of Holmes. The liability of Holmes as the host was for gross negligence only. Gross negligence by

Holmes not being established, a verdict was directed in his favor. The case then proceeded on the allegations of negligence on the part of the Ritz Taxicab Company. The latter asserted that the negligence of Holmes was the sole proximate cause of the accident which, if established, would require a verdict for the Ritz Taxicab Company. On the other hand, the Ritz Taxicab Company was liable if its negligence was the proximate cause of the accident, or a proximately contributing cause to the accident even if Holmes was negligent as alleged by the Ritz Taxicab Company. Segebart v. Gregory, 156 Neb. 261, 55 N. W. 2d 678. The trial court instructed on the foregoing theory.

The defendant contends that the instructions complained of were prejudicially erroneous in that they did not adequately instruct the jury on defendant's theory of the case. The theory of defendant's case was clearly and accurately set forth in instruction No. 3. Defendant's contention has no merit.

By instruction No. 7 the court instructed the jury that, in determining if plaintiff has sustained the burden of proof imposed on her, she is entitled to the benefit of all the evidence produced at the trial including any evidence produced by the other party. The instruction then stated: "In other words, the burden of proof which a party has may be supported by evidence produced by the opposing party as well as by his or her own evidence." The complaint is that the plaintiff was given the benefit of the rule and the defendant was not. The objection is without merit. The quoted portion of the instruction applied the rule to any party having the burden of proof on any issue. In the absence of a request for a more comprehensive instruction the instruction was adequate. We find no error prejudicial to the defendant in instruction No. 7.

By instruction No. 8 the trial court instructed the jury in part as follows: "In this connection, you are admonished that the truth of the charge of negligence by

the defendant Ritz Taxicab Company against Harry Holmes as being the proximate cause of the accident is for your determination in arriving at your verdict and if you find, by a preponderance of the evidence, that negligence on his part in one or more of the particulars stated and identified by the letters A to E, inclusive, in Instruction No. 3 was the sole, proximate cause of the accident, your verdict must be for the defendant Ritz Taxicab Company." It is contended that the use of the words "by a preponderance of the evidence" placed the burden of proof on the Ritz Taxicab Company to establish that the negligence of Holmes was the sole proximate cause of the accident, contrary to our holdings in Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557, and other cited cases. The instruction does not put the burden of proof on this proposition on defendant, but, to the contrary, advises the jury that if it finds by a preponderance of the evidence that the negligence of Holmes was the sole proximate cause of the accident, it should find for the Ritz Taxicab Company. The instruction is a correct statement of the law and the cases cited have no application.

Defendant asserts that instruction No. 9 is erroneous in that it does not limit the negligence therein mentioned to acts of negligence pleaded. Other instructions make this point abundantly clear and the jury could not have been misled thereby. Under the rule that instructions should be considered as a whole, we find that instruction No. 9 in no way was prejudicial to the rights of the defendant. The same contention is advanced as to instruction No. 11, and it is without merit for the same reason.

The complaint against instruction No. 17 is that, although it correctly defines the term "under the influence of alcoholic liquor," it did not advise the jury that the use of intoxicating liquor close in time to the accident is a circumstance proper to be considered in determining the question of negligence. The purport of this

instruction is to define the term "under the influence of alcoholic liquor" as it is used in the statute. § 39-727, R. R. S. 1943. There is no indication in it that any use of alcoholic liquor could not be considered, as the defendant contends. There is no error in the instruction. If defendant desired a more specific instruction on the subject it should have requested it. Not having done so, it is not subject to the attack made upon it by the defendant.

After an examination of all the instructions given by the court we conclude that they fairly submitted the issues that have support in the evidence and, consequently, prejudicial error cannot be successfully asserted against them.

Defendant complains of the failure of the trial court to instruct on contributory negligence and the comparative negligence doctrine. There was no evidence of contributory negligence on the part of the deceased, and the trial court properly so told the jury. In the absence of evidence of such contributory negligence the trial court properly excluded those issues from the consideration of the jury. Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372.

It is asserted that the verdict is not supported by the evidence. The deceased was 46 years of age at the time of his death. He had a life expectancy of 24.43 years at that time. The widow was 39 years of age at the time of trial and had a life expectancy in excess of that of deceased. The deceased left two children surviving, Herbert, age 4, and Virginia, age 5. The deceased was earning gross pay of $93 per week, and take-home pay of $75 to $80 per week. The deceased was injured on December 19, 1958, and died on January 3, 1959, as the result of the injuries sustained in the accident here involved. Funeral expenses were $786. Hospital expenses were $623.10. Medical bills amounted to $735. The evidence of the widow is that the earnings of the deceased were used to maintain the family and the

home. The widow receives social security in the amount of $142.60 per month, which she expects to continue to receive until the children are 16 years of age. She also was paid $255 as a burial benefit. The evidence also shows that the widow was gainfully employed and has been for 14 years. Her pay is $62.50 every 2 weeks, which has been contributed to the support of the family.

The jury returned a verdict for $1,358.10 on the first cause of action, it being the amount of the hospital and medical bills that were not disputed by the evidence. The verdict on the second cause of action was in the amount of $30,000, which is supported by evidence within the purview of sections 30-809 and 30-810, R. R. S. 1943, the wrongful death statutes. The verdict on the third cause of action was for $531, the same being the amount of the funeral expenses of $786, less the burial benefit paid the widow in the amount of $255.

The verdict and judgment are sustained by sufficient evidence. We find no prejudicial error in the record. The judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

FRED L. AYE, APPELLEE AND CROSS-APPELLANT, V. ROBERT J. GARTNER, DOING BUSINESS AS UNIVERSAL EXTENSION SERVICE, APPELLANT AND CROSS-APPELLEE.
108 N. W. 2d 798

Filed April 28, 1961. No. 34902.

1. **Pleading: Trial.** A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.
2. **Evidence.** An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of a present claim and other evidence of the party making the admission.

3. ———. An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel.
4. **Evidence: Trial.** Where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is 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 facts to decide the issue upon all the evidence.

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

Cunningham & Cunningham, for appellant.

Robert V. Hoagland and *Kelly & Kelly,* for appellee.

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

BROWER, J.

Plaintiff below and appellee brought this suit in equity for an accounting against defendant and appellant alleging an oral contract with the defendant providing, first, for the payment of accrued commissions as a sales representative and, second, for 10 percent commission as sales manager on the net profits of the defendant's business during a portion of the period of employment. The prayer was for production of defendant's books, an accounting, and judgment for $6,500. The plaintiff admits he was paid in full up to the time of the termination of his employment on May 7, 1956, both as to the commissions as salesman and the 10 percent net as sales manager. He claims, however, commissions on certain time sales which had not been paid in full and where the balance was to be paid in installments and were collected by defendant after termination of his employment. Plaintiff also claims the 10 percent commission on the net profits of the business of the defendant was to be paid after this termination.

An auditor employed by the plaintiff found that the

accrued commissions on the particular sales of the plaintiff that came in after such termination were $2,406.16, and that the net profits of business for 6 months after said termination was $27,211.60, making said 10 percent net during said period $2,721.16.

Defendant filed an answer admitting the employment under a contract providing for payments practically as set out by the plaintiff except he alleged such payments were made only during the period of employment. He also set out a cross-petition alleging certain damages to his business arising out of alleged disclosure of confidential matters by plaintiff to competitors of the defendant and certain misrepresentations made by plaintiff to purchasers.

The trial court found for the plaintiff as to the deferred commissions as a salesman called "accruals" and against him as to the net profits of the business coming in after May 1956; dismissed the defendant's cross-petition and entered judgment for plaintiff in the sum of $2,406.16; and also allowed the plaintiff as costs the expense of auditing the defendant's books by his auditor in the sum of $485.

Defendant appealed, making numerous assignments of error. Those of which it will be necessary to consider here are as follows: First, that the judgment is contrary to the evidence and that the plaintiff did not prove by a preponderance of the evidence an agreement by which he was entitled to the payment of accrual commissions after the termination of his employment; second, that the plaintiff had admitted under oath that no accrual payments were ever paid by the defendant after termination of such employment or were to be paid to the plaintiff, and that he was bound by such admission as a matter of law as a judicial admission, and that the court below erred in not so ruling; and third, that the court erred in taxing as costs the expense of the plaintiff's auditor in auditing defendant's books.

Plaintiff in his cross-appeal makes claim for the 10

percent of the net profits of the defendant's business on contracts written while he was sales manager.

Defendant operates the Universal Extension Service offering for sale home study and correspondence courses. In October of 1954, plaintiff expressed a desire to go to work for the defendant and after a discussion on or about October 15, 1954, plaintiff was employed by oral agreement as a salesman to sell home study courses on a commission basis. Originally plaintiff was to receive $60 for each cash contract sold and up to $50 commission on each time payment contract. A cash sale of a civil service course on which the plaintiff worked a good portion of his employment was $170 to the purchaser and the time price was $194.50. Plaintiff was to receive a bonus of $100 on every 25 enrollments. On time sales the student paid $25 down and the salesman got $15 of it and the company $10, and thereafter the salesman got 50 percent of the subsequent payments until he received his full commission. It is the salesman's portion of these subsequent payments of installment sales that are referred to throughout this suit as "accruals." The plaintiff continued his employment steadily from November 1954, to March 1, 1955. In March 1955, he stopped working for the defendant at Grand Island but under just what circumstances is in dispute. Defendant claims it was agreed that the plaintiff would leave Grand Island and would temporarily stop selling courses for the defendant and as a salesman would secure information and promotion ideas from other schools, and that defendant agreed to pay him accruals on all contract payments made until plaintiff's return to Grand Island. Plaintiff asserts that he left the employment of the defendant, and went to work for another home study course institution at Louisville, Kentucky, and that he was sought out by the defendant to return to defendant's employ.

At any rate plaintiff shortly returned to work and it was agreed that the plaintiff receive also 10 percent of

the net profits of the business as a sales manager in addition to his commissions as a salesman.

Plaintiff worked under this second agreement until May 1, 1956. According to defendant plaintiff was then discharged because of certain false representations he had made to purchasers and breach of his confidence to other like businesses. Plaintiff on one occasion says he handed in his "leads" or list of prospects and left, saying he would have to get going. Then again he states his employment had not yet terminated and that he was still an employee and was on inactive status, but was still sales manager. And at another time he said that he just quit. He immediately went to work at Lincoln for John T. Rose and never again worked for defendant.

This being a case in equity it must be tried de novo. The real questions are concerning the agreement of the parties and particularly, (1) was the plaintiff to be paid as sales manager the 10 percent net profit on the entire business of the defendant after leaving his employment, and (2) was he to receive the balance of his commission on the contracts actually written by him as a salesman that were collected after his employment stopped, referred to as "accruals"?

The first question in regard to the 10 percent net we believe is disposed of by the pleading itself. The only reference in the amended petition to this 10 percent and the manner and the period over which it was to be paid is in paragraph III which reads as follows: "Plaintiff further alleges, that on or about May 1, 1955, he again, at the defendant's request was employed by the defendant upon the terms hereinabove set forth in paragraph 1 of this petition, but that in addition thereto, the plaintiff was further employed as, and appointed sales manager for all of the defendant's activities in connection with his school and as additional compensation, therefor, the plaintiff was to be paid the sum of 10 percent of the entire net profits of the business school *while he was so employed.* Said additional compensation as sales

manager was to be paid on a monthly basis. Said condition of employment existed until May 1, 1956, that said agreement was oral." (Emphasis ours.)

This pleading was the one under which this case was tried. It clearly states the plaintiff was to receive such compensation "while he was so employed." This clearly comes within the rule of judicial admissions as defined by the holdings of this court. Bonacci v. Cerra, 134 Neb. 476, 279 N. W. 173; Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831. These cases and many other decisions of this court lay down the rules. As stated in Johns v. Carr, *supra:* "A party may at any time invoke the language of the pleading of his adversary on which the case is tried, on a particular issue, as rendering certain facts indisputable.

"An admission made in a pleading on which the trial is had is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it and is therefore a limitation of the issues."

The trial court below found that the plaintiff had admitted he was only entitled to the 10 percent net overall commission until he stopped working. It disallowed this after he stopped work and we think the pleading required it to do so. This likewise disposes of plaintiff's cross-appeal.

We come now to the claim for the so-called "accruals," being the unpaid portion of the plaintiff's commission as a salesman received after the termination of employment. In a deposition taken April 6, 1960, the day before trial and admitted in evidence at the trial on motion of plaintiff without objection, the testimony of the plaintiff seems quite clear that he understood the defendant had not agreed to pay any such accruals after the termination of the employment. His testimony is as follows: "Mr. Hoagland: When you said we settled all up, by that, it did not include the accruals?

A. No. Mr. Cunningham: I will object to that. A. No, he didn't. Mr. Hoagland: I was just trying to clarify the question. But that did not represent any accruals? A. He paid me only up to the day that I had left and there was no advance on accruals that I still had, no. Mr. Cunningham: You knew no accruals had been paid? A. He made the brag several times. I know of three men who came after that that left Mr. Gartner. He said try and get them, but he did make a complete settlement with one man at the time he left. Mr. Cunningham: Who was that man? A. Mr. John T. Rose. He made a flat settlement for all—for the accruals off of Mr. Rose—for what he had wrote. Mr. Cunningham: But you had no agreement like that? A. No, *none whatsoever,* but it's customary in the home study industry to pay a man for accruals for a term of six months after termination. (Emphasis supplied.) Mr. Cunningham: But when you took your employment there you knew there would be— A. He told me, but in the back of my mind I very much doubted his statement. Mr. Cunningham: That's all. Mr. Hoagland: In other words, part of your oral agreement when you went to work for Mr. Gartner, you were to be entitled to your accruals? Mr. Cunningham: Just a minute. You're injecting something—you're testifying— Mr. Hoagland: Go ahead. Mr. Cunningham: We'll object to that as a conclusion; what was said. A. *It was my understanding he stated to me he never paid any accruals, never, but after my friend, Mr. Rose, had told me he got his, there was no reason in my mind I should not get mine.* (Emphasis supplied.) Mr. Cunningham: How long would you say it was that Mr. Rose got his? A. Approximately 60 days after Mr. Rose left Mr. Gartner. Mr. Cunningham: How long had you been there at that time? A. With Mr. Gartner? this last interim? Mr. Cunningham: How long had you been there when you found out Rose got his accruals? A. Oh, I'd say a couple—three months afterwards, somewhere in there.

Mr. Cunningham: Is this Mr. Rose sitting over here to my left? A. That's correct. Mr. Cunningham: That's all. Mr. Hoagland: In other words, Mr. Aye, from the period of time you were working for Mr. Gartner and you were selling these advance courses to which you were entitled to a certain percentage that you have testified to, and in addition to that it was part of your agreement that you were entitled to the accruals on these various contracts? A. That's right. Mr. Cunningham: That was your understanding? A. That's right, my understanding."

Defendant urges because of this testimony and particularly the portion we have placed in italics that these statements were likewise judicial admissions and that the plaintiff is bound by them and they cannot be controverted. With this view of the law we cannot agree.

The effect of such adverse testimony is quite fully discussed in Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65. In that case this court distinguished, first, between admissions appearing in the pleading and admissions in the evidence and, second, differentiated as to the effect of admissions in the evidence, holding that if a party, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the occasion, the evidence is discredited as a matter of law and should be disregarded. But the court distinguished this from the situation where damaging statements are made by a party in his oral testimony in one and the same proceeding. Speaking of oral admissions of a party made in the same proceeding, the court said: "Extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted, and

thereafter are to be given such weight as the trier of the facts deems them entitled."

The matter is further discussed in Vermaas v. Heckel, 170 Neb. 321, 102 N. W. 2d 647, wherein this court, discussing the evidence required to overcome the effect of a party's self-injurious statement, cites the majority rule in the note in 169 A. L. R. under the annotation of "Binding effect of party's own unfavorable testimony" under IV b, at page 805, to the effect that the party's own testimony is available for that purpose as well as that of other witnesses. We think, as the court held in Vermaas v. Heckel, *supra,* that the statements of plaintiff are only an item of evidence in the mass of evidence adduced during trial, admissible in contradiction and impeachment of the plaintiff's claim and his other evidence concerning that claim.

In this case no one but the plaintiff and defendant testified as to the hiring contract with respect to the payment of these "accruals." The defendant testified he never paid the "accruals" after the termination of the employment and had fully explained that fact to plaintiff before his employment.

These extrajudicial admissions in plaintiff's testimony are nevertheless considered by us in the trial of this case de novo. We think they go a long way towards controverting plaintiff's subsequent testimony that it was agreed between himself and the defendant that he be paid his accruals as salesman even after he left the defendant's employ. Further plaintiff admits that when he left defendant's employ defendant had made advancements or loans to him; and that he received payment by defendant's checks for his commision as a salesman and also for his 10 percent overall net commission as sales manager. He admits he then endorsed these checks and delivered them to defendant to take up this debt leaving a small amount of $25 or $35 owing him which defendant paid to him; and that they thereupon parted even on that date. Plaintiff testified

he was hard up while working for defendant. It seems unusual indeed that a salesman who was hard up should pay his indebtedness in full if he really considered the defendant would shortly be owing him a considerable amount on "accruals." The plaintiff also testifies that he never asked the defendant for any payment or accounting for almost 3 years after he quit the defendant's employ; and that the first inquiry was directed to defendant by letter from plaintiff's attorney about that time. The original petition was filed in February 1959, nearly 3 years thereafter. In that petition, which was admitted in evidence, nothing was said about plaintiff expecting or claiming payments of either accruals or 10 percent net profits of the business after his employment terminated. It appeared to be a suit for an accounting and payments due during his employment. It alleges plaintiff quit work May 1, 1956, among other reasons, because defendant had not paid him or accounted. This petition was verified by plaintiff and he testified he had informed his attorney of his claim and had read the petition before signing it. There were many other contradictions in the plaintiff's testimony. Plaintiff's evidence as to whether or not he left, quit, or was still an employee and sales manager of the defendant hitherto mentioned, is self-contradictory.

At the time of taking the deposition on April 6, 1960, plaintiff testified that he was to receive the 10 percent net overall commissions for a period of 6 months after he left the defendant's employ. The next day at the trial he stated he was to have it until the time payment contracts had been completely paid out.

In view of the many contradictions and inconsistencies in the plaintiff's testimony; the extrajudicial admission which practically agreed with the defendant's theory of the case; the unusual payment of his indebtedness to defendant out of his last checks in view of the present contention that he was to be paid "his accruals" out of money to be received by the defendant after quitting

his employment; his failure to make claim on the defendant for almost 3 years; and his bringing suit without pleading in his original petition that he was to receive payments after stopping work, we are forced to the conclusion that the plaintiff did not meet the burden of proof and that the finding of the trial court and entering of judgment in his favor should be reversed. In view of this finding it is unnecessary to consider the question of the allowance of the fees of the plaintiff's accountant as costs.

The defendant has not seriously raised a question as to his cross-petition. Neither do we think the evidence shows any damage of consequence.

The judgment of the trial court is reversed and the cause remanded with directions to dismiss the plaintiff's petition and the defendant's cross-petition at the plaintiff's cost.

REVERSED AND REMANDED WITH DIRECTIONS.

LEO BEEBE ET AL., APPELLANTS, V. ALEX REICHERT, APPELLEE.

108 N. W. 2d 804

Filed April 28, 1961. No. 34904.

Equity: Appeal and Error. Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the 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.

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

Wright & Simmons and *Robert M. Harris*, for appellants.

Lyman & Winner, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

BOSLAUGH, J.

This is an action for injunctive relief and damages. The appellants, who will be referred to as the plaintiffs, own a quarter section of land in Scotts Bluff County, Nebraska. The appellee, who will be referred to as the defendant, owns an 80-acre tract of land lying to the east of the plaintiffs' land and adjacent thereto.

The petition alleged that the west bank of an irrigation lateral running north and south was the boundary line between the plaintiffs' land and the defendant's land; that the west bank of the lateral had been recognized and acquiesced in as the boundary line for more than 10 years; that the plaintiffs, and their grantors, had been in adverse possession of the land lying west of the west bank of the lateral for more than 10 years; and that the defendant was constructing a dike and other structures on the plaintiffs' land. The prayer was that the defendant be enjoined from making any use of the land lying west of the west bank of the lateral; that the defendant be required to restore and maintain the west bank of the lateral in its original condition; and that the plaintiffs recover damages.

The answer amounted to a denial of the allegations of the petition concerning the boundary line and alleged that the boundary line was located 30 feet west of the west bank of the irrigation lateral. The reply was a denial of the allegations of the answer.

Upon trial to the court, the court found that there was a failure of proof and dismissed the action. A motion for new trial was filed and overruled. The plaintiffs then appealed.

The plaintiffs' assignments of error are, in substance, that the court erred in dismissing the action, in permitting the defendant to amend his answer after the plaintiffs had rested, and in admitting certain exhibits. Our

determination concerning the first assignment makes it unnecessary to consider the others.

This being an appeal in an action in equity, it is triable de novo in this court, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. Peters v. Woodman Accident & Life Co., 170 Neb. 861, 104 N. W. 2d 490.

An irrigation lateral running north and south has existed for many years near the boundary line between the plaintiffs' land and the defendant's land. A licensed surveyor testified that the lateral was approximately 13.1 feet east of the boundary line at a point 1,550 feet south of the north line and approximately 25.5 feet east of the boundary line at the north end of the property. An exhibit prepared by this witness showed that the lateral was approximately 3.5 feet east of the boundary line at the south end of the property.

The dike constructed by the defendant is on the west bank of the lateral and runs south from the north line of the property approximately 1,550 feet. The dike is approximately 10 to 12 feet wide at its widest place. The dike was constructed by pushing the east bank of the lateral over onto the west bank. The ownership of the property on which the dike is located is the controlling issue in the case.

The evidence shows that about 1928 a fence was constructed west of the lateral. Sometime around 1951 the fence was removed. The construction of the dike commenced in March of 1959. It is apparent that unless the plaintiffs obtained title to the property in dispute prior to the removal of the fence in 1951, they cannot succeed in this action. This is true because the statutory period is 10 years. § 25-202, R. R. S. 1943.

The plaintiffs' theory of the case is that the fence was located on the west bank of the lateral; that the plaintiffs and their grantors claimed ownership of the land west of the fence for more than the statutory period without interruption in their possession or control; and that the plaintiffs have acquired title to the land west of the fence under the rule discussed in Olson v. Fedde, 171 Neb. 704, 107 N. W. 2d 663, and the cases cited in that opinion.

The plaintiff Leo Beebe testified that the west bank of the lateral was 3 feet wide; that the fence had been constructed on the west bank of the lateral; that while the fence was there he farmed within 18 inches of the fence; that he farms within approximately 3 feet of the lateral; that in the past 2 years he has pastured his land and erected a woven wire fence; and that in 1958 the fence was 12 feet west of the west bank of the lateral, all along the line.

Henry Sauer, a former tenant on the defendant's land, testified that the fence was within 18 inches of the lateral and that when he "pulled" the ditch the tractor would be in the plaintiffs' hayfield.

Harold Spurrier, who owns the land on the east of the defendant, testified that the west bank of the lateral was around 36 inches wide, and that the fence was 18 inches from the lateral.

E. F. Koenig, who owns the property directly south of the defendant, testified that the fence was as close to the lateral as you could get along there and work the ditch.

The defendant testified that he purchased his land in 1954; that at that time there was a "valley" from 12 to 33 feet west of the lateral; that there was a dike covered with weeds between the valley and the lateral; that the west bank of the lateral or dike was from 12 to 16 feet wide; that the plaintiffs' crops were from 12 to 16 feet west of the lateral; and that in cleaning the

ditch, a tractor was operated on the west bank of the lateral without going upon the plaintiffs' crops.

The defendant's land was formerly owned by Jacob Shaffer, the father of John Shaffer. John Shaffer testified by deposition that he had lived on the land and had helped construct the fence in about 1928; that the fence was a good 12 feet west of the center of the lateral; that the fence was about 2 feet east of the east side of the culvert between the plaintiffs' land and the highway on the north side of the property; and that the west bank of the lateral was approximately 12 feet wide.

William E. Keefover, a surveyor, testified that in 1956 the west bank of the lateral was 12 feet wide at the north end and from 6 to 8 feet wide at the south end, and that it was covered with weeds.

Marvin Holscher, a lawyer formerly associated with the defendant's counsel, testified that in 1956 at the north end of the property there were heavy weeds 18 feet west of the lateral.

Harry Reichert, the defendant's brother, testified that he burned the weeds west of the lateral in 1954; that the weed patch was from 15 to 18 feet wide at the north end and from 12 to 15 feet wide near the middle; that there were stubs from the fenceposts in the ground and fenceposts with barbed wire attached to them laying on the ground; that one stub about 300 feet south of the north line was 15 feet west of the lateral; and that in cleaning the ditch he drove the tractor in the weeds on the west bank of the lateral.

From the foregoing summary of the principal evidence bearing upon the location of the fence between 1928 and 1951, and the bank upon which it was built, it is apparent that the evidence relating thereto is in irreconcilable conflict. The trial court who observed the witnesses and their manner of testifying accepted the version of the facts most favorable to the defendant. His finding that there was a failure of proof is sustained

by the record. The conclusion which we have reached makes it unnecessary to consider the aerial photographs offered by the defendant and the testimony concerning them. It is also unnecessary to consider the assignment of error relating to the defendant's amendment of his answer.

The decree of the trial court is correct and is affirmed.

AFFIRMED.

PAUL E. RHODES, APPELLANT, V. NORVAL HOUSTON, SHERIFF OF MORRILL COUNTY, NEBRASKA, AND NORVAL HOUSTON, APPELLEE.

108 N. W. 2d 807

Filed April 28, 1961. No. 35039.

1. **Appeal and Error.** The rulings of a district court cannot be reviewed in the Supreme Court upon appeal before a judgment or final order has been entered in the action in the district court.
2. ———. An appeal to the Supreme Court cannot be taken from an order or judgment of a district court in a habeas corpus proceeding where the order or judgment does not conclude or terminate the proceeding.

APPEAL from the district court for Morrill County: EDMUND NUSS, JUDGE. *Motion to dismiss appeal sustained.*

Paul E. Rhodes, pro se.

Clarence A. H. Meyer, Attorney General, *Rush C. Clarke,* and *James L. Macken,* for appellee.

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

BOSLAUGH, J.

This matter is before the court upon the motion of appellee to dismiss the appeal. The appeal is from the "judgment" of the district court for Morrill County of February 25, 1961, "together with denial of Motions of

Relator of April 26, 1960 and other rulings of court adverse to relator."

This is a proceeding upon a petition for a writ of habeas corpus originally filed in the county court of Morrill County, Nebraska. The county court discharged the relator. The respondent, the sheriff of Morrill County, Nebraska, then appealed to the district court where the action is now pending.

The "judgment" of February 25, 1961, referred to by the relator who is the appellant here, is an order overruling several motions filed by the relator. One of the motions filed April 26, 1960, was a motion to strike the return or certain parts thereof. A motion filed July 20, 1960, requested that the relator be discharged from custody for the reason that the return failed to set forth the authority for the imprisonment of the relator as required by section 29-2817, R. R. S. 1943. A motion filed February 15, 1961, alleged that the relator was imprisoned in the penitentiary under a sentence for contempt of court which was alleged to be illegal and void and requested that the warden be required to show cause for the imprisonment of the relator and that, upon hearing, the relator be released from imprisonment. This last motion is an attempt to inject an issue into this case that was not before the county court and, properly, cannot be before the district court on appeal.

The appellate jurisdiction of the Supreme Court with respect to matters appealed from the district court is limited to a review of judgments and final orders. Art. V, § 2, Constitution of Nebraska; § 25-1911, R. R. S. 1943. "The test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment. Any judgment which ends the particular action or proceeding is final for the purposes of appeal, if an appeal is permissible." Tail v. Olson, 144 Neb. 820, 14 N. W. 2d 840.

The relator had been charged with arson and the petition filed in the county court sought a review of the sufficiency of the evidence adduced at a preliminary hearing held in the district court. The statute contemplates that in such a habeas corpus proceeding the relator be discharged, committed, or let to bail. § 29-2806, R. R. S. 1943. The record shows that the relator at this time has not been discharged, committed, or admitted to bail by the district court. Thus, there has been no judgment or final order in the district court and the attempted appeal is from interlocutory rulings. This court has no jurisdiction to review these rulings at this time and, therefore, the appeal must be dismissed.

Since this court is without jurisdiction, the other matters raised by the appellee and the appellant cannot be considered at this time.

MOTION TO DISMISS APPEAL SUSTAINED.

PREFERRED RISK MUTUAL INSURANCE COMPANY, APPELLANT, V. CONTINENTAL INSURANCE COMPANY, APPELLEE.
109 N. W. 2d 126

Filed May 5, 1961. No. 34919.

1. **Insurance.** A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein.
2. ———. The language of a policy of insurance should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean.
3. ———. In giving effect to these rules, it is equally important that the contract made by the parties shall be enforced, and that a new contract will not be interpolated by construction.
4. ———. A policy of insurance will be given effect according to the ordinary sense of the terms used, and if they are clear they will be applied according to their plain and ordinary meaning.

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

Wear, Boland, Mullin & Walsh, McCormack & McCormack, A. Lee Bloomingdale, and *Paul J. Gerdes,* for appellant.

Crossman, Barton & Norris, for appellee.

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

SIMMONS, C. J.

This is an action brought by Preferred Risk Mutual Insurance Company against the Continental Insurance Company.

On March 1, 1957, plaintiff had issued a policy of insurance to one Linn P. Sullenberger covering bodily injury, property damage, and other risks, and specifically related to a 1953 Buick.

On or about April 19, 1957, Sullenberger bought a 1953 Chevrolet for the use of his grandson, then a minor and a student in Arizona. The grandson had the possession of the Chevrolet at all times involved herein. Sullenberger bought and paid for a policy of insurance on the Chevrolet from the defendant which it had denominated a "Family Automobile Policy." We refer to its terms later herein.

On June 5, 1957, Mr. Sullenberger was involved in a two-car head-on automobile collision in Nebraska. He was then driving the Buick car. The drivers of both automobiles were killed and there was extensive property damage. Plaintiff investigated the accident, and concluded that it was obligated to pay a substantial sum in damages to the estate of the deceased driver of the other car for losses caused by the death, for property damage, and other items. Plaintiff, contending that the defendant's policy covered the Sullenberger Buick, demanded contribution. Defendant refused to pay. This action followed.

The trial court dismissed the cause with prejudice. Plaintiff appealed.

The first question presented here is whether or not defendant has any liability to plaintiff under its contract with Sullenberger. If that question is decided in favor of defendant then the other questions become unimportant here.

We decide that defendant is not liable and affirm the judgment of the trial court.

The policy issued here by defendant is denominated a "Family Automobile Policy." Plaintiff appears to think that there is some liability that flows from the name of the policy. We see no particular magic in the name. It may well be that it is a policy intended to cover the liabilities involved in the application of the family purpose doctrine. The name of the policy neither imposes added liability nor subtracts liability from the covenants of the policy.

Plaintiff appeals to the rule that where the language in a policy of insurance is susceptible of more than one construction, that most favorable to the insured will be adopted. That is a rule applicable to all contracts and not alone to insurance policies. It is designed to protect the party who did not prepare the contract. Here, however, the plaintiff is not a party to this contract and we see no reason in this case to extend the scope of the rule.

In Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874, we held: "A policy of insurance should be considered as any other contract to give effect to the intention of the parties at the time it was made as expressed therein. The language of it should be considered not in accordance with what insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean. * * * In giving effect to this rule, it is equally important that the contract made by the parties shall be enforced, and that a new contract will not be interpolated by construction. * * * A policy of insurance will be given effect according to the ordinary sense of

the terms used, and if they are clear they will be applied according to their plain and ordinary meaning."

Here the defendant's policy shows coverage for six classifications of liability and shows the premium charged for each under the column headline "Car No. 1." A column for "Car No. 2" follows with no figures inserted therein. It becomes patent that defendant charged a premium for liability assumed only on "Car No. 1."

This is followed by a recital that: "The total number of private passenger and utility automobiles owned on the effective date of this policy by the named insured does not exceed one, unless otherwise stated herein." There is evidence that the agent knew that Sullenberger had a Buick car at that time. That ownership was not stated in the policy. The policy contains a provision that: "Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed except by endorsement issued to form a part of this policy signed by a duly authorized representative of the company."

It follows that the knowledge of the agent that Mr. Sullenberger owned the Buick car does not affect the liability of the defendant.

The above statement that only one automobile was owned by the insured is followed by a description of the "owned automobile." Under the caption of "Car No. 1" the Chevrolet is described. There is a heading for "Car No. 2" in which no description is inserted.

It seems clear at this point that defendant's liability attaches only to those coverages involving the Chevrolet.

Plaintiff then resorts to provisions under the "liability" provisions of the policy which are: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay" because of bodily

injuries and property damage "arising out of the ownership, maintenance or use of the owned automobile or non-owned automobile, * * *."

The term "owned automobile" is defined in the policy as meaning "a private passenger or utility automobile or trailer owned by the named insured, and includes a temporary substitute automobile." A " 'temporary substitute automobile' means any automobile or trailer while temporarily used as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."

There is no "temporary substitute automobile" involved here. The clause becomes important only because it shows that the temporary substitute is insured only when the insured car is withdrawn from service as provided in the policy. The defendant assumed liability only for one automobile.

Substituting the definition of "owned automobile" for those words in the insuring clause, we have a contract of the insurer to be legally obligated to pay certain damages arising out of the ownership, maintenance, or use of the private passenger or utility automobile or trailer owned by the named insured. That owned automobile so far as this policy is concerned is the Chevrolet.

Plaintiff next appeals to that "condition" of the policy, which provides: "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, * * *."

The answer to that contention is that only one automobile was insured under the policy here involved.

The judgment of the trial court is affirmed.

AFFIRMED.

ANNA M. SCHOLZ, APPELLEE, V. JOHN P. SCHOLZ, APPELLANT.
109 N. W. 2d 156

Filed May 5, 1961. No. 34926.

1. **Divorce.** It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
2. ———. In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.
3. ———. Any unjustifiable conduct by either the husband or the wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty as defined in section 42-302, R. R. S. 1943.
4. ———. A divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects but relieving both parties from all obligations and rights to cohabitation while making the necessary adjustments of their property to assure support during the continuance of the relationship.
5. ———. It was not intended that the parties in a limited divorce would have all of the benefits of an absolute divorce except the legal dissolution of the marriage.
6. ———. While the court has the power to adjust all the respective property interests of the parties in a limited divorce, it will not be done any further than necessary to effect a proper separation under the facts of the particular case.

APPEAL from the district court for Douglas County: LAWRENCE C. KRELL, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Boyle & Hetzner, for appellant.

Webb, Kelley, Green & Byam, for appellee.

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

SPENCER, J.

This is an action by Anna M. Scholz, plaintiff-appellee, hereinafter called the plaintiff, for a divorce from bed and board. Defendant-appellant, John P. Scholz, here-

inafter called defendant, cross-petitioned for an absolute divorce. The trial court dismissed the cross-petition and granted the plaintiff a divorce from bed and board.

Defendant makes two assignments of error: That the trial court erred in granting a limited divorce under the law and the evidence; and that the plaintiff was awarded an excessive and disproportionate amount of the property of the parties.

The parties were married in 1934. Five children were born to the marriage, only two of whom are minors, a boy who was 10 at the time of the filing of the petition, and a girl 9. Defendant is operating the Brown Derby Tavern at Twenty-fourth and F Streets in the city of Omaha. The business, started in October 1933, a few months before the marriage of the parties, was built by the joint efforts of both the plaintiff and the defendant. However, since 1945, plaintiff's connection with the business has been limited to the keeping of the books at the home of the parties. The parties owned a business building across the street, the sale of which was directed in the decree, and which has been sold since the decree to pay the indebtedness on the tavern. There are three furnished apartments above the tavern, one of which is occupied by the defendant. The others are rented for $60 each per month. In addition, the parties own a cabin and 25 lots at Kings Lake, valued at between four and five thousand dollars, and a home at 2535 North Sixtieth Avenue in Omaha, occupied by the plaintiff, purchased at a cost of $23,500, on which there is a present mortgage of approximately $13,000. The payments on the mortgage are $180 per month. The tavern building is valued at $27,500, and the value of the business is set at $25,000 by the testimony of plaintiff because of an offer of that amount in 1959. The value placed by the defendant's witnesses was a top of $15,000, plus an inventory of approximately $3,000.

There is evidence that the defendant had been seen in the company of another woman under suspicious cir-

cumstances. There is evidence which might create a suspicion that the plaintiff had developed an unnatural attachment to another woman who had lived in the home of the parties between 1943 and 1959, the latter part of the period over the objection of the defendant. It will serve no useful purpose to detail the evidence of either side herein. What has been said will indicate that neither of the parties is entirely without fault and that while it would not justify improper conduct on the part of the defendant, it could be suspicioned that the plaintiff's lack of affection drove the defendant to other associations. It should be stated that the evidence was not as one-sided as the trial court's decree might indicate.

In Workman v. Workman, 164 Neb. 642, 83 N. W. 2d 368, we said: "It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances."

Pursuant to the provisions of section 25-1925, R. R. S. 1943, this court is required in equity cases to try findings of fact complained of de novo and to reach independent conclusions without reference to the findings made by the trial court.

However, as we said in Shomaker v. Shomaker, 166 Neb. 164, 88 N. W. 2d 221: " 'In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliabiilty of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.' "

In both Shomaker v. Shomaker, *supra,* and Workman v. Workman, *supra,* we said that any unjustifiable conduct by either the husband or the wife which destroys the legitimate ends and objects of matrimony constitutes extreme cruelty as defined in section 42-302, R. R. S. 1943.

The trial court awarded the plaintiff a divorce from bed and board; awarded custody of the children subject

to rights of reasonable visitation; and dismissed the defendant's cross-petition. The home of the parties was awarded absolutely to the plaintiff, subject to the mortgage, except that any delinquencies should be paid by plaintiff. She was also awarded all of the furniture, household fixtures, and appliances in the home; the 25 lots and the improvements at Kings Lake; and the building housing the tavern. The defendant was also required to maintain certain insurance policies; pay certain unpaid bills; and was ordered to pay $2,000 to plaintiff's counsel, which we assume was in addition to a temporary allowance of $250. The defendant was awarded the tavern business, and was given a 10-year "*non-assignible*" lease of the ground floor and basement of the building occupied by the tavern and given by the decree to the plaintiff. For this lease defendant was required to pay a monthly rental to the plaintiff of $100, and was required to pay all utilities used in the tavern and certain maintenance costs. The parties were assigned their respective automobiles.

The uncontradicted evidence indicates that the net income from the tavern operation for the 4 years preceding the trial was: For 1956, $5,075.92; for 1957, $6,845.66; for 1958, $6,375.84; and for 1959, $2,565.58. This action was filed in June 1959. The award in this case is unreasonably arbitrary and excessive to the point of oppression when we consider plaintiff was given all the property except the actual business. The following from defendant's brief serves to illustrate the point: "As a matter of simple arithmetic the decree breaks down as follows:

"Defendant to pay plaintiff rent	$1,200.00
"Defendant to pay plaintiff child support	1,800.00
"Defendant to pay insurance	719.04
"Estimated tax annually to Government	700.00
"Total	$4,419.04

"Defendant's average annual earnings (4-

year period) $6,000.00
"Balance remaining for defendant or a monthly income of $131.74 $1,580.96

from which amount the defendant must supply food, clothing, lodging for himself, car expense, his own personal life insurance and liquidate some $2,000.00 in attorney fees, $665.13 in bills and the costs of his own counsel in this action."

A divorce from bed and board is in the nature of a conditional decree, leaving the legal status of the parties unchanged in many respects but relieving both parties from all obligations and rights to cohabitation while making necessary adjustments of their property to assure support during the continuance of the relationship. It was not intended that the parties in a limited divorce would have all of the benefits of an absolute divorce except the legal dissolution of the marriage.

Section 42-318, R. R. S. 1943, provides as follows: "Upon every divorce from the bonds of matrimony for any cause, excepting that of adultery committed by the wife, and also upon every divorce from bed and board for any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case. All such decrees shall provide that all payments of money shall be made to the clerk of the district court and by him disbursed to the party entitled thereto."

In Shomaker v. Shomaker, *supra*, we said: "The division of property and the allowance of alimony and support money in divorce actions are always to be determined by the facts in each case relating to and in

accord with the many factors and elements heretofore announced by this court."

We now say that while the court has the power to adjust all the respective property interests of the parties in a limited divorce, it will not be done any further than necessary to effect a proper separation under the facts of the particular case.

We will not disturb the decree of the trial court so far as it grants a limited divorce to the plaintiff, but we see no reason in this case to make any property distribution except the following: The plaintiff is to have the exclusive use and occupancy of the home of the parties; the defendant is to make the mortgage payments and to pay for all necessary repairs; the parties are to work out some mutual arrangement for the joint use and occupancy of the Kings Lake property, but if they are unable to do so, the court is to do it for them; and the defendant is to have the use, occupancy, and management of the business property, and the sole management of the business operated therein. The defendant is to pay the plaintiff $125 per month support for herself and $50 per month for each of the children during their minority, or until the further order of the court, and to pay the medical and dental bills for the family. This will give the plaintiff $225 per month and a home, which is more than the defendant will have even considering the rent from the apartments above the tavern. The plaintiff should be awarded the custody of the two minor children, subject, however, to a right of reasonable visitation and the right of defendant to have the custody of the children at least two Sundays a month, if he so desires.

We said in Shomaker v. Shomaker, *supra*: "On appeal in a divorce suit from the amount of the fee allowed to the wife for services rendered by her attorney, wherein there is no direct evidence of the value thereof other than the record of the proceedings, this court will interfere only to correct a patent injustice resulting

from an allowance which is clearly excessive or insufficient."

On the record in this case, we feel that the allowance made by the trial court was ample for the services rendered by plaintiff's attorneys, and no allowance is made for their services in this court.

We reverse the decree, remand the cause, and direct the trial court to enter a decree in accordance with this opinion.

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

U. P. TERMINAL FEDERAL CREDIT UNION, A CORPORATION, APPELLANT, V. EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, A CORPORATION, APPELLEE.
109 N. W. 2d 115

Filed May 5, 1961. No. 34933.

1. **Contracts.** A cardinal principle of construction of written instruments is that an interpretation shall be made which will reflect the true intention of the parties.
2. ———. Ordinarily in construing a contract, due force will be given to the grammatical arrangement of the clauses, unless by so doing it appears that this would be at variance with the intent of the parties as indicated by the contract as a whole.
3. ———. If a clause contained in a written contract would by grammatical construction have one application, but from the tenor of the whole instrument it is manifest that the parties intended it to have a more extended application, it will be construed according to the manifest intention of the parties.
4. **Insurance.** Where an insurance policy by its insuring clause covers an article, and an exemption clause does not clearly exclude it, the policy will be held to cover such article.
5. ———. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.
6. ———. In case of ambiguity or uncertainty in an insurance policy the meaning thereof should be resolved against the

insurer, it being the one who prepared the contract.

7. ———. In interpretation of an insurance contract it is not proper to indulge in scholastic subtleties to make words with certainty of meaning ambiguous in order to make liable the insurer.

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

Albert C. Walsh, for appellant.

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by U. P. Terminal Federal Credit Union, a corporation, plaintiff and appellant, against Employers Mutual Liability Insurance Company of Wisconsin, a corporation, defendant and appellee, to recover a judgment for $1,755, with interest, expenses, a reasonable attorney's fee, and costs. In the action the plaintiff filed a petition to which the defendant filed a general demurrer in which it was asserted that the petition does not state sufficient facts to constitute a cause of action. This demurrer was sustained. The plaintiff elected to stand on its petition and not to plead over. The action was thereupon dismissed. The plaintiff in due course appealed from the judgment of dismissal.

To the extent necessary to set forth herein, the plaintiff in its petition defined the respective capacities of the parties and then alleged that on June 26, 1952, the parties entered into a "Credit Union Chattel Lien Nonfiling Bond" which was marked exhibit A and attached to and made a part of the petition; that on March 9, 1955, one Archie R. Tietsort gave a promissory note in the sum of $1,950, secured by a chattel mortgage on an automobile, to the plaintiff on which payments of $65 each for the months of April, May, and June were made;

that in June 1955, the plaintiff discovered that the automobile had been removed from Douglas County, Nebraska, and its whereabouts did not become known until about June 1958, when it was found in Rawlins, Wyoming, totally wrecked, and against it there were storage charges in excess of its salvage value; that there has been and is due plaintiff from Tietsort $1,755 with interest; and that plaintiff was prevented from obtaining possession of the automobile, and therefore within the meaning of paragraph I of that part of exhibit A designated "Insuring Agreements" the plaintiff is entitled to recover judgment with interest, expenses, an attorney's fee, and costs from the defendant.

Paragraph I is as follows: "I. COVERAGE. To indemnify the insured for any loss sustained by reason of having in good faith and in the usual course of business purchased, taken, received, made advances on, made loans against or extended credit upon an instrument, as hereinafter defined, but only insofar as the loss results from the insured being prevented from (1) obtaining possession of the property represented by such instrument or retaining the proceeds thereof, or (2) enforcing its rights under such instrument, solely as the result (a) of the failure of the insured or the insured's representatives duly to record or file the instrument with the proper public officer or public office, or (b) of the failure of the insured or the insured's representatives duly to have the proper public officer or public office show the insured's encumbrance on the instrument, or (c) of errors or omissions in the instrument which has been duly recorded or filed with the proper public officer or public office or upon which the proper public officer or public office has shown the insured's encumbrance."

The question of whether or not the judgment of the district court was erroneous, as is contended by the plaintiff, depends upon what was embodied in paragraph

I as the intention of the parties when exhibit A was issued to the plaintiff by the defendant.

It is clear that there was a declared intent of the parties that the defendant was to indemnify the plaintiff for loss in the event the plaintiff had purchased, taken, received, made advances on, or made loans against or extended credit on an instrument or instruments, subject to certain conditions.

The plaintiff contends substantially that its petition stated a cause of action and was not subject to general demurrer since it declared only that it was prevented from recovering the automobile. It contends that these conditions constituted the measure of its right of recovery and that the instrument contains no other provisions which would amount to a bar.

On the other hand the substantial contention of the defendant is that the petition is invalid for the reason that conditions other than and in addition to those advanced by the plaintiff have not been pleaded which are indispensable to a right of the plaintiff to recover indemnity from the defendant, and therefore the petition fails to state a cause of action and is vulnerable to a general demurrer.

The other conditions, one or more of which the defendant insists must attend the prevention from obtaining possession of the property represented by the instrument, are (a) failure of the insured, that is the plaintiff or its representative, to duly record the instrument received from the party from whom the instrument was taken, (b) failure of the plaintiff or its representative to have the proper public officer or office show the plaintiff's encumbrance on the instrument, or (c) errors or omissions in the instrument which had been filed with the proper public officer or office showing the insured's encumbrance.

It is true, as is apparent from an examination of the quoted paragraph I, that the conditions upon which the defendant insists are contained there. The plaintiff

however urges that they have no reference whatever to a situation such as this where indemnity is claimed on account of the alleged fact that it was prevented from obtaining possession of the automobile described in the instrument it had received from Tietsort. It contends substantially that if for any reason it was unable to obtain possession the defendant is liable. It is pointed out here that all of the conditions urged by the defendant were nonexistent. The only reason given as the basis for recovery is inability to locate the automobile.

If the contention of the plaintiff is to be accepted it is of course true that the judgment of the district court was erroneous. Whether or not it is to be accepted depends upon the true intent of the parties to the instrument at the time it was executed and became effective. This intent must be gleaned from the contract itself. The process includes of course the reasonable inferences and implications which flow from the language employed.

A cardinal principle of construction of written instruments is that an interpretation shall be made which will reflect the true intention of the parties. See Baylor v. Hall, 106 Neb. 786, 184 N. W. 886.

Another principle to be recognized is that ordinarily in construing a contract a court will give due force to the grammatical arrangement of the clauses, unless by so doing it appears to be at variance with the intent of the parties as indicated by the contract as a whole. See Baylor v. Hall, *supra.*

Another statement of principle is that if a clause contained in a written contract would by grammatical construction have one application, and from the tenor of the whole instrument it is manifest that the parties intended it to have a more extended application, it will be construed according to the manifest intention of the parties. See Baylor v. Hall, *supra.*

The parties to this action have treated it as one based on a contract of insurance. With particular reference

to interpretation of contracts of insurance this court has announced a number of admonitory rules.

In Coad v. London Assur. Corp., 119 Neb. 188, 227 N. W. 925, it was said: "Where an insurance policy by its insuring clause clearly covers an article, and an exemption clause does not clearly exclude it, the policy, being strictly construed against the company preparing it, will be held to cover said article." See, also, Paltani v. Sentinel Life Ins. Co., 121 Neb. 447, 237 N. W. 392; Woodring v. Commercial Casualty Ins. Co., 122 Neb. 734, 241 N. W. 285; Baumgart v. Sovereign Camp, W. O. W., 127 Neb. 865, 257 N. W. 269; Updike Investment Co. v. Employers Liability Assur. Corp., 131 Neb. 745, 270 N. W. 107; Howie v. Cosmopolitan Old Line Life Ins. Co., 132 Neb. 367, 272 N. W. 207.

In this last-cited case the court quoted the following with approval from 14 R. C. L., Insurance, § 103, p. 931: "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense."

In Moffitt v. State Automobile Ins. Assn., 140 Neb. 578, 300 N. W. 837, it was said: "Plaintiff contends for the rule that in case of ambiguity or uncertainty the meaning thereof should be resolved against the insurer, it being the one who prepared the contract. As a principle of law, the statement is correct. But the court must not indulge in scholastic subtleties to make words with certainty of meaning ambiguous in order to apply the rule. In the words of the late Judge Sanborn: 'This rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the insured.'"

In the light of these rules exhibit A, in its entirety, and not alone paragraph I thereof, must be examined in order to ascertain the intent of the parties. This

examination discloses that the insurance is of an instrument received by plaintiff from a third person which if in proper form and recorded or filed would evidence or create or reserve a lien or interest in or on property of the third person in the plaintiff. This is declared by paragraph II of that portion of exhibit A denominated "Insuring Agreements."

There is nothing in exhibit A the effect of which is to say that liability depends upon any kind of act or failure to act on the part of the third party, who is in this case Tietsort, except as to the validity of the instrument itself, after the instrument has come into the hands of the insured, in this case the plaintiff.

Specifically, liability under the terms of exhibit A attaches only if the plaintiff itself or its representatives fail to file the instrument with the proper public officer or office; or fail to have the proper public officer or office show the plaintiff's encumbrance on the instrument received from the third party, here Tietsort; or that it shall appear that there were errors or omissions in the instrument itself, here the mortgage from Tietsort to the plaintiff, which had been duly recorded or filed with the proper public officer or office.

In this there is no ambiguity. In specific terms the insurance contract or bond states that the defendant will respond if the plaintiff is prevented from (1) obtaining possession of the property, or (2) enforcing its rights under the instrument solely as the result of the conditions named under (a), (b), or (c) of paragraph I of exhibit A.

Coupled with what has already been said as to the wording of the declared purpose and intent of the contract or bond is the title which supports it. The title is "Credit Union Chattel Lien Nonfiling Bond." Also it appears that the estimated annual rate of premium on the Tietsort instrument has some significance. It was only 40 cents. This is of course not conclusive on any question of intent, but this is a pleaded part of the trans-

action between plaintiff and defendant, and is a circumstance to be considered in determining the intent of the parties with regard to the extent of the risk. Reasonably it would be unlikely that the defendant would assume such a possible liability as the plaintiff seeks to impose in this action for a premium in this amount.

The plaintiff has failed by its petition to state facts sufficient to constitute a cause of action against the defendant within the meaning and intent of the "Credit Union Chattel Lien Nonfiling Bond" which is the basis of this action.

The judgment of the district court is therefore affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

LIBBY HLADKY, WIDOW AND SOLE DEPENDENT OF ANTON J. HLADKY, APPELLANT, V. OMAHA BODY AND EQUIPMENT CO., INC., APPELLEE.

109 N. W. 2d 111

Filed May 5, 1961. No. 34941.

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. ———. An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
3. ———. In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
4. ———. Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.
5. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.
6. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered

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

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

Tesar & Tesar, for appellant.

Kennedy, Holland, DeLacy & Svoboda and *Joseph P. Cashen,* for appellee.

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

BROWER, J.

This is an action arising under the provisions of the Nebraska Workmen's Compensation Act. The cause was tried in the Nebraska Workmen's Compensation Court on September 19, 1957, before the Honorable O. M. Olsen, one of the judges thereof. An order of dismissal was entered on October 4, 1957, finding plaintiff had failed to meet the burden of proof sufficient to show with reasonable certainty that the illness, disability, and death of the deceased resulted from an accident arising out of his employment. Plaintiff waived rehearing before the compensation court and appealed directly to the district court for Douglas County.

The district court ordered plaintiff's petition on appeal to be dismissed. A motion for new trial was overruled by the court and thereupon plaintiff appealed.

The question involved in this appeal is whether plaintiff's decedent sustained an accident within the meaning of the Nebraska Workmen's Compensation Act, or whether any injury of the decedent was caused by sickness or by mere exertion no greater than that ordinarily incident to the employment.

The statutory law governing this question is set out in the Workmen's Compensation Act in section 48-151,

R. R. S. 1943. Subsection (2) of this section reads as follows: "(2) The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Subsection (4) thereof, so far as here material, is as follows: "(4) The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. * * * The terms shall not be construed to include disability or death due to natural causes but occurring while the employee is at work."

This court has adopted certain rules in construing and applying these subsections in similar cases arising under the Workmen's Compensation Act. They have been stated repeatedly. Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394; Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379; Murray v. National Gypsum Co., 160 Neb. 463, 70 N. W. 2d 394; Eschenbrenner v. Employers Mutual Casualty Co., 165 Neb. 32, 84 N. W. 2d 169; Schanhols v. Scottsbluff Bean & Elevator Co., 168 Neb. 626, 97 N. W. 2d 220. They are set out in Feagins v. Carver, *supra*, as follows: "A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

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

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

"Mere exertion, which is no greater than that ordi-

narily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.

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

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

Plaintiff's deceased husband Anton J. Hladky was 67 years of age. He had been employed at the defendant's body assembling plant in Omaha, Nebraska, for about 5 years prior to November 2, 1956. Previous to that date he had been engaged in grinding corners on truck bodies. On that day he was assigned by defendant's supervisor to the task of operating a small airpowered hammer riveting gun. It was used in the riveting of floorboards to truck beds manufactured by defendant. The racks or beds were placed on stands and the operator of the gun would stand upon the bed and operate the gun while another workman would "buck" the rivets from underneath. The workmen would change off between these two jobs every other truck bed. It took generally 1 minute on a small bed and up to 20 minutes on a large bed. The deceased had never done this work before. He was assigned to the job because they were shorthanded that day. He worked at this riveting throughout the day. On arriving home he was very nervous, shaky, nauseated, and ill. His wife testified that he went to bed, took aspirin tablets, and that she rubbed his back and stomach. The next day was Saturday. They did not work on Saturday or Sunday. On Monday he went back to work and was placed on the same job.

He said the riveting with the airhammer shakes you from your "ears to your toes." He complained to the boss but the boss said it would be good for his rheumatism. Monday evening at the conclusion of his work he was sick and shaky and could hardly walk. On Tuesday he told the boss he couldn't do that work and he was employed the rest of the week putting on washers. He did not again use the rivet gun. He continued to have shaking of his feet and legs, and felt sick. The following Monday when he tried to get up he fell down and could not stand up as his legs gave away. He went to see Dr. Zarbano. After coming home he was still sick. On November 12, 1956, he was taken to St. Catherine's Hospital where his condition became progressively worse and paralysis developed. On February 6, 1957, he was taken to the Douglas County Hospital. There he died on March 21, 1957.

Anton J. Hladky gave his testimony by deposition before his death. The evidence does not describe anything that might be termed an accident within the meaning of the cited portions of section 48-151, R. R. S. 1943. In fact it tends affirmatively to show there was no such accident. He testified as follows: "Q. What, if anything, did you notice on November 2nd, when you first started using the rivet gun? A. Well, that was on a Friday that I riveted. And it was on the small ones and then Monday we started in on the big ones and I worked only on two of them and I quit. Q. Nothing happened as far as your working—all you did was just rivet; is that right? A. Yes, sir. Q. You didn't fall off of the rack or anything, did you? A. No. Q. You didn't slip while you were up there on the rack? A. No. Q. But this is something that came on gradually? A. Yes. Q. In other words, you first felt it on November 2nd; is that right? A. I know how it happened—it shook me up, but the other guys was there so long and nothing happened. Q. After Friday, you were off Saturday and Sunday? A. Yes. Q. And you went back

to work on Monday? A. Yes. Q. And you used the riveter on Monday? A. Yes. Q. Then on Tuesday, from then on all you did was put washers on? A. Yes; I just put washers on. Q. And that following week you were putting washers on, you still didn't feel too good? A. No. Q. Then it was on the following Monday that you went to the doctor, Dr. Mnuk? A. Yes. Q. When you got back to your house after seeing the doctor you had pains in your stomach; is that correct? A. Yes. Q. You were pretty sick? A. Yes. Q. That was on Monday? A. Yes."

Thereafter he again testified on cross-examination as follows: "Q. You didn't slip or trip or anything while you were out there at work? A. No. Q. You never fell? A. No. Q. And you never had any accidents that you can remember? A. No." There was no other testimony had with respect to what happened during the period when Hladky was working.

After the deceased went to work with the airhammer on Friday, November 2, 1956, there is no testimony that while working he complained to anyone. He did experience trouble after going home and was nervous, shaky, went to bed, took aspirin, and his wife rubbed him. On Monday he went back to work. Again he worked through the day. The next day he gave the boss the airhammer and began putting on washers and did lighter work. He stayed on the job the rest of the week. He did not go to the doctor until the following Monday. There is no testimony of anyone else as to any unusual happening. There is his own testimony that he did not slip; that he did not fall; and that he had no accident. We cannot under these circumstances find that he had an accident. We cannot award compensation unless there was one.

Over half of the bill of exceptions is taken up with medical testimony. The plaintiff introduced in evidence voluminous hospital reports, and summaries and statements from four physicians, the purport of which was

that the deceased's cause of death was anterior spinal artery thrombosis or some similar condition. Most all of them said they believed the vibrations of the air-hammer aggravated the decedent's condition.

On the other hand the defendant introduced as a witness a doctor who was a pathologist and who had performed a post mortem on the deceased. He testified and was cross-examined at length. A detailed report was given. He said the autopsy showed conclusively the decedent's ailment was not that given in these doctors' statements; that it was caused by a disease presently designated as Guillain-Barre syndrome; that it had affected the entire spinal cord; and that in his opinion it was not possible for it to have been in any way caused or its course affected by trauma or the vibrations of the airhammer on the date of November 2, 1956. In this opinion he was joined by another doctor, a neurologist, who was present when the autopsy took place.

We do not think it is necessary for this court to decide which theory was correct. Whichever was true his condition was not caused by an accident within the meaning of the Workmen's Compensation Act. Neither was it caused by exertion which was greater than that ordinarily incident to the employment. Even if such ordinary exertion combined with a pre-existing disease produced disability, it is not under that act compensable.

It follows that the judgment of the district court must be affirmed at appellant's costs.

AFFIRMED.

PEARL C. HOPWOOD, APPELLANT AND CROSS-APPELLEE, V. GEORGE VOSS, APPELLEE AND CROSS-APPELLANT, AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, ET AL., APPELLEES.
109 N. W. 2d 170

Filed May 5, 1961. No. 34950.

1. **Negligence.** Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it.
2. **Automobiles: Master and Servant.** The fact that the plaintiff and the driver of a motor vehicle are fellow servants of a common employer and are both acting in the course of their master's employment and in furtherance of his business does not make them participants in a joint enterprise, whether the vehicle is owned by the master, the fellow-servant driver, or the plaintiff.
3. **Highways.** A spraying machine engaged in spraying an insecticide on trees, shrubbery, and grass along the side of a street is not engaged in work upon the surface of a highway within the meaning of section 39-766, R. R. S. 1943.
4. **Negligence: Trial.** Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded.*

Kenneth H. Dryden, for appellant.

John E. Dougherty, for appellee Voss.

Tye, Worlock & Knapp, for appellees Aetna Cas. & Surety Co. et al.

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

CARTER, J.

This is an action for damages for injuries sustained by plaintiff in a collision between an automobile owned and operated by the defendant George Voss and a tractor owned by the city of Kearney and operated by its employee Gene Harvey. The Aetna Casualty and Surety

Company and the city of Kearney were made parties defendant because of their right of subrogation in any recovery by plaintiff for payments made to plaintiff under the Workmen's Compensation Act. The jury returned a verdict for plaintiff for $500 and plaintiff appealed.

The evidence shows that on June 24, 1958, the plaintiff and Gene Harvey were operating a spraying machine belonging to the city of Kearney at the direction of the street commissioner of the city. Harvey was driving the tractor and plaintiff was operating the sprayer mounted on a two-wheel trailer being pulled by the tractor. It is not disputed that Harvey and plaintiff were employees of the city. They used an insecticide in the spraying machine, which, after developing a proper pressure, was thrown out in a fine mist or fog and settled on trees, grass, and shrubbery to kill mosquitoes, flies, bugs, and worms. The direction of the wind is important in obtaining a proper application of the mixture.

The evidence of plaintiff and Harvey is to the effect that they had been operating the spraying equipment for about 2 hours when they approached the intersection of Twenty-sixth Street and Avenue E. At this intersection they turned east, traveled 25 or 30 feet on the south side of the street, and then turned to the north side. The spraying equipment was then traveling east on its left-hand side of the road against traffic. The evidence is that they were traveling with the left wheels of the equipment in the bottom of the borrow pit and the right wheels on the shoulder just off the traveled portion of the graveled street. The front of the tractor was equipped with two four-inch headlights, which were turned on. The rear of the trailer was equipped with a red flasher kerosene light, which was also burning. A light wind was blowing to the northwest which carried the spray in that direction and off the street. They testified that it was because of the direction of the wind that the equipment was turned across to the north side of the road. Plaintiff and Harvey both testified that

they knew where the machine was to be operated before starting out on the work and that there had been no conversation between them as to where they were to go or how the tractor was to be driven. Although plaintiff had worked on the sprayer for 3 or 4 years and Harvey was a new employee of a few weeks, neither was a superior of the other.

Plaintiff testified that as the machine turned east on Twenty-sixth Street he saw the lights of a vehicle approaching 3 or 4 blocks distant. He then occupied himself with the operation of the sprayer and did not again see the approaching vehicle prior to the collision. His work required him to face to the rear of the trailer which prevented his watching the road ahead. He stated that he knew that the spraying equipment was traveling east in the borrow pit on the north side of the road and that he neither gave instructions for nor objected to the movements of the tractor operated by Harvey.

Harvey testified that he drove the spraying equipment to the north side of the road because of the direction of the wind and without any suggestion or direction by the plaintiff. He stated that he was driving with the left wheels in the bottom of the borrow pit and the right wheels on the shoulder off the graveled portion of the street. He stated he was straddling a ridge of gravel which had been flattened out and pushed to the north side of the road. He admitted he was watching the left wheels in the borrow pit and for overhanging tree limbs, and was not watching for oncoming traffic.

Other witnesses testified that after the collision the left wheels of the equipment were in the bottom of the borrow pit and the right wheels were on the shoulder of the road just off the traveled portion of the street. The defendant's car was immediately in front of the tractor and clearly had hit it head-on.

The defendant testified that he was driving west on Twenty-sixth Street prior to the accident at a speed

of 20, 25, or 30 miles an hour. He testified that the headlights on his car were on and that they permitted him to see for approximately 80 feet. As he approached the scene of the accident he saw a fog that looked like smoke, which he assumed was the result of the burning of trash. He stated that he was driving on the north edge of the traveled portion of the street and he saw two "little bitty" lights when he was 10 or 15 feet from them. He stated that the fog was too thick to see the lights on the tractor at any greater distance. He did not have time to apply his brakes and was traveling about 30 miles an hour when he hit the tractor. The driver of the wrecker who removed defendant's car from the street testified that it was on the traveled portion of the street after the collision and, in effect, that he would not have driven it as far to the right as did the defendant.

The evidence is conflicting as to whether or not the spraying equipment was in the borrow pit, as contended by the plaintiff, or on the main portion of the street, as contended by the defendant Voss. This issue of fact clearly presented a question for the jury. It is not disputed that plaintiff suffered serious injuries to his person as a result of the collision.

Plaintiff contends that the trial court erred in submitting to the jury the question of contributory negligence on the part of plaintiff, and in instructing on the comparative negligence doctrine in force in this state. In this connection plaintiff asserts that any contributory negligence on the part of Harvey is not imputable to him. The operation of the tractor was the exclusive duty of Harvey. It was the duty of plaintiff to operate the spraying equipment on the trailer. There was no duty imposed on the plaintiff with respect to the operation of the tractor. Under such circumstances the negligence of Harvey, if any, is not imputable to plaintiff. It is contended by defendant that plaintiff and Harvey were engaged in a joint enterprise and for that reason

the negligence of one is imputed to the other.

Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. Koplitz v. City of St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74. The fact that the driver of a tractor and an occupant of a trailer being pulled by the tractor had a common employer does not of itself constitute such a joint enterprise or common purpose as is frequently referred to in cases dealing with the subject. The rule is stated in Restatement, Torts, § 491 d, p. 1275, as follows: "The fact that the plaintiff and the driver are fellow-servants of a common master and are both acting in the course of their master's employment and in furtherance of his business does not make them participants in a joint enterprise, and this is true irrespective of whether the vehicle is owned by the master, the fellow-servant driver or by the plaintiff himself." See, also, Ahlstedt v. Smith, 130 Neb. 372, 264 N. W. 889; 4 Blashfield (Perm. Ed.), Encyclopedia of Automobile Law and Practice, § 2498, p. 702. The evidence is insufficient to sustain a finding of contributory negligence, imputed or otherwise, on the part of the plaintiff. The trial court committed prejudicial error in submitting the issue of contributory negligence by plaintiff to the jury.

The plaintiff contends that by virtue of section 39-766, R. R. S. 1943, it is not negligence to operate a tractor and sprayer on a public street against traffic, even if the jury should so find. The exclusionary provision therein is: "The provisions of said sections shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work." The spraying of an insecticide with mechanical equipment is not "work upon the surface of a highway" within this section of the statute.

The sole issue in this case is whether or not the defendant was negligent and, if so, if such negligence was the proximate cause of the accident, or a proximately contributing cause irrespective of negligence on the part of Harvey. If, however, the negligence of Harvey is found by the jury to be the sole proximate cause of the accident, the jury should be instructed to find for the defendant.

The defendant Voss has cross-appealed, asserting that his motion for a directed verdict should have been sustained. The basis of the contention is that plaintiff was guilty of contributory negligence more than slight and that plaintiff assumed the risk of danger. Our previous holding disposes of the question of contributory negligence contrary to defendant's contention. As to the assumption of risk theory, we find no evidence of the assumption of any risks known to the plaintiff. If the spraying equipment was being operated in the borrow pit and off the traveled portion of the street, plaintiff would have no reason to anticipate danger. If the driver of the tractor drove it onto the traveled portion of the street and as a result plaintiff was injured, it cannot be said that he is required to anticipate the conduct of the driver in placing the plaintiff in a place of possible danger. We find no merit in defendant's cross-appeal.

Since the result at which we have arrived will require a new trial, it is not necessary to discuss other errors assigned. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

RICHARD E. DWORAK, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
109 N. W. 2d 160

Filed May 5, 1961. No. 35016.

1. **Workmen's Compensation.** A workmen's compensation case is

triable de novo in the Supreme Court, and to entitle the plaintiff to a recovery he must sustain the burden of proving by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment.

2. ———. 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 nor does it permit a court to award compensation where the requisite proof is lacking.

3. **Trial: Evidence.** Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony.

4. ———: ———. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.

5. ———: ———. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false.

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

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, Edward M. Stein, and Steven J. Lustgarten, for appellant.

Richling & Shrout, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Workmen's Compensation Act. The appellee, who was the plaintiff below, was an employee of the appellant, the City of Omaha, which was the defendant below.

Following a hearing before a single judge of the Ne-

braska Workmen's Compensation Court, the action was dismissed. The plaintiff waived rehearing and appealed to the district court. The defendant requested a rehearing before the Nebraska Workmen's Compensation Court, and a second hearing was held before the full court. After the second trial an award was entered for the plaintiff, one judge dissenting. The defendant then appealed to the district court which, in effect, affirmed the award made by the full compensation court. The defendant's motion for new trial was overruled and it then perfected this appeal.

The only assignments of error which require consideration are those relating to the sufficiency of the evidence to sustain the award for the plaintiff.

A workmen's compensation case is triable de novo in the Supreme Court, and to entitle the plaintiff to a recovery he must sustain the burden of proving by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment. Schanhols v. Scottsbluff Bean & Elevator Co., 168 Neb. 626, 97 N. W. 2d 220. 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 nor does it permit a court to award compensation where the requisite proof is lacking. Gotfrey v. Sakurada, 169 Neb. 879, 101 N. W. 2d 470.

The bill of exceptions in this case consists of thirteen volumes of testimony and exhibits. Much of the evidence is repetitious and cumulative. No attempt will be made to summarize all of the evidence in this opinion. The following is a brief summary of the evidence that is material to the decision in this case:

The plaintiff testified that he reported to the police station at about 7:30 a. m. on February 4, 1957; that roll-call was at about a quarter to eight; that he signed out for his cruiser car but did not leave the station for

about 2 hours because the car was being worked on and was not ready; that he left the station around 10 a.m. and drove out to his territory which was west of Seventy-second Street; that a police callbox was located to the rear of a filling station at Seventy-second and Dodge Streets; that he was required to report each hour on the hour by telephone to the station; that he reported to the station through the callbox at 11 a. m.; that after reporting in he stepped down from a retaining wall that he had been standing on; that his feet went out from under him and he fell backward to the ground, striking the small of his back on the wall; that he picked himself up, dusted himself off, and returned to the cruiser car; that he became nauseated; that he drove west on Dodge Street across Seventy-second Street and turned off into a vacant lot where he vomited; that he had pain in his back and left leg; that he received a radio call to return to the station; that he returned to the station; that he reported to Sgt. Wilson who took him into the office of the chief of police; that the chief ordered him taken to the hospital; that he vomited again while he was at the station; that he reported to Sgt. Elias that he fell backwards in stepping off a wall after reporting at the callbox at Seventy-second and Dodge Streets; that he was taken to the county hospital; and that he later returned home and was then placed in another hospital by his own physician.

The only evidence as to how the accident happened is the testimony of the plaintiff. There is no evidence which directly contradicts the plaintiff's statement that he fell as he stepped down from the wall. However, the plaintiff's testimony as to the events which took place that morning before and after the accident is directly contradicted by the records of the police department and other testimony.

The plaintiff testified that he was delayed in leaving the station for about 2 hours because his cruiser car was being worked on. The garage tickets for the day in

question and the record of the police garage in reference to car No. 30, the car assigned to the plaintiff on that day, contain no record of any work being done on car No. 30 on that day except that the daily gasoline record shows that 10 gallons of gasoline were placed in car No. 30. On cross-examination the plaintiff testified that, probably, he had asked to have the car washed. The evidence is that it took from 10 to 15 minutes for the police garage to wash a cruiser car.

The detail sheet for the change of shifts on the day in question shows that the plaintiff reported in by radio at 7:43 a. m. The evidence shows that this report is intended to mean that the officer reporting is then in service in his cruiser car in the district assigned to him.

The radio log for the day in question shows that car No. 30 reported out of service for a short relief period at 8:20 a. m. at Seventy-second and Dodge Streets. According to the plaintiff's testimony he had not left the station at that time.

The police callbox report sheet for the day in question shows that the plaintiff reported to the station from box No. 94 at 9:11 a. m. The evidence shows that callbox No. 94 was located at Seventy-second and Dodge Streets on February 4, 1957. This was approximately 1 hour before the plaintiff left the police station, according to his testimony, and is the only call from the plaintiff listed on the callbox report for that day.

The radio log also shows that at 10:34 a. m. car No. 30 was notified to come to the morals squad office.

The written report of Sgt. Elias states that at 10:11 a. m. the plaintiff slipped on the ice at Seventy-second and Dodge Streets as he got out of the cruiser car and injured his back.

The plaintiff claims that he sustained a herniated intervertebral disc as a result of the alleged accident on February 4, 1957. The plaintiff has a long history of back trouble. In 1943, while in the military service, the

plaintiff was injured when some telephone poles fell and struck him, knocking him to the ground. Following this injury the plaintiff wore a canvas belt but he testified that the belt was required because of his nervous stomach.

In 1950 the plaintiff was struck while directing traffic. Thereafter the plaintiff wore a steel brace for 3 or 4 months.

In 1952 the plaintiff was injured in an automobile accident while off duty. Later the plaintiff commenced an action to recover damages for his injuries. In his petition he alleged that he had sustained a herniated disc which would require surgery. Several medical reports diagnosed his injury as a "herniated disc lumbar" and "Protrusion 4th L intervertebral disc due to trauma."

Dr. Iwersen, who operated on the plaintiff on October 16, 1957, testified that he found and removed a herniated, degenerated disc between the 4th and 5th lumbar vertebrae. The disc between the 5th lumbar vertebra and the sacrum was also removed in that operation. Dr. Iwersen also testified that herniated discs may occur without trauma and the cause of herniated discs is not known.

Throughout his testimony the plaintiff consistently attempted to minimize his history of back trouble. The plaintiff would have the court believe that his previous injuries were of little significance and produced little or no disability. Yet the record shows that the plaintiff has complained of his back since 1943.

The plaintiff's testimony is filled with evasions and inconsistencies. Much of the record consists of cross-examination of the plaintiff in reference to his testimony at the first hearing and in reference to claims for disability which he made prior to February 4, 1957.

Although the plaintiff's testimony concerning how the accident happened is not directly contradicted, triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct

evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. Teresi v. Filley, 146 Neb. 797, 21 N. W. 2d 699. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. Marston v. Drobny, 166 Neb. 747, 90 N. W. 2d 408.

Upon consideration of the evidence de novo, we conclude that the plaintiff has failed to sustain the burden of proving by a preponderance of the evidence that his disability is the result of an accident arising out of and in the course of his employment by the defendant. The findings of fact of the district court are not supported by the evidence as disclosed by the record and its judgment must be set aside.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

RUTH BALLANTYNE, APPELLANT, V. ROLAND PARRIOTT, APPELLEE.

109 N. W. 2d 164

Filed May 12, 1961. No. 34948.

1. **Appeal and Error.** Assignments of error not discussed in the brief will ordinarily not be noticed, in accordance with rule 8a2(4) of the Revised Rules of the Supreme Court, 1960.
2. **Trial.** It is the law of this jurisdiction that it is the duty of the trial court to correctly instruct on the issues reflected by the pleadings. However, a trial court is entitled to assume that tendered instructions express the theory of the party tendering them on the point involved.

3. **Trial: Appeal and Error.** A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory.
4. ———: ———. When a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness.
5. **Appeal and Error.** We regard it as a sound principle, as well as a salutary one, that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about.

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

Frederick M. Deutsch and *William I. Hagen*, for appellant.

Jewell & Otte, for appellee.

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

SPENCER, J.

This is an automobile damage suit for personal injuries growing out of an intersection collision. The jury returned a verdict aganst each party on his affirmative demands. Plaintiff appeals.

Plaintiff alleges four assignments of error. The first two assignments of error, that the verdict is contrary to the evidence and that the verdict is not sustained by the evidence, are not discussed in the brief, and in accordance with rule 8a2(4), of the Revised Rules of the Supreme Court, 1960, will not be noticed herein.

The third assignment of error is substantially that the court did not instruct the jury on the plaintiff's theory of the case, but gave the ordinary right-of-way instruction to the effect that the defendant had the directional right-of-way notwithstanding the "Yield Right of Way" sign, and, in effect, instructed as though the "Yield Right of Way" sign was nugatory except as a warning.

Plaintiff tendered three instructions relative to the issue. They are as follows: "You are instructed that the

plaintiff was warranted in taking into consideration the traffic sign at the southeast corner of the intersection in determining her movement into the intersection.

"You are instructed that the defendant was required to give such effect to the traffic sign that a reasonable and prudent person would give to it under the circumstances.

" 'Slow', 'School', 'Yield the Right-of-way', and similar traffic signs are erected as warnings although not controlling on the right-of-way and a motorist is required to give such regard thereto as a reasonable and prudent person would give under the circumstances."

The district court gave the tendered instructions in exactly the same language as tendered except for the language "You are instructed that" in the first two. This language, however, was used at the start of the instructions.

It is obvious that the tendered instructions adopted the theory, right or wrong, that a "Yield Right of Way" sign was merely a warning and was not controlling on the right-of-way. This then became plaintiff's theory of the case. The court adopted that theory and the plaintiff is now estopped to complain.

It is the law of this jurisdiction that it is the duty of the trial court to correctly instruct on the issues reflected by the pleadings. However, a trial court is entitled to assume that tendered instructions express the theory of the party tendering them on the point involved.

A party requesting instructions on a certain theory cannot be heard to complain on appeal that the trial court gave other instructions on the same theory. O'Dell v. Goodsell, 152 Neb. 290, 41 N. W. 2d 123.

"When a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness." Sorter v. Citizens Fund Mutual Fire Ins. Co., 151 Neb. 686, 39 N. W. 2d 276.

We regard it as a sound principle, as well as a salutary one, that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about. Missouri P. Ry. Co. v. Fox, 60 Neb. 531, 83 N. W. 744.

The fourth assignment of error is that the court erred in giving instruction No. 2, which is as follows: "This case grows out of a collision between automobiles operated by the respective parties. Plaintiff claims that on the 23rd day of August, 1959, she was driving an automobile in an easterly direction along Madison Avenue within the City of Norfolk; that defendant was driving his automobile in a northerly direction along Seventeenth Street within said city; that a 'Yield' sign was located against traffic entering said intersection from the south; that both streets were paved; that plaintiff was operating her automobile in a reasonable and careful manner at the rate of speed approximating 20 miles per hour; that without slowing down, stopping or otherwise regarding said yield sign, defendant struck the automobile driven by plaintiff in the center of the right side, causing the same to upset and turn over; that the proximate cause of said collision was the negligence of the defendant in driving at a high and excessive rate of speed, in failing to maintain a proper lookout, in failing to yield the right-of-way to plaintiff, and in failing to obey said yield sign.

"Plaintiff further says that as a result of said collission (sic) she was injured and shocked and suffered excruciating pain, all of said injuries being permanent; that she was damaged thereby in the sum of $25,000.00, for which amount she prays judgment against defendant.

"Defendant admits that the collision occurred between the automobiles of the parties hereto at the place and on the date set forth in the petition.

"He denies that he was in any way negligent in the operation of his said automobile.

"Defendant says that the automobile of defendant approached and entered said intersection before the automobile operated by plaintiff approached and entered the same; that said accident was caused solely and proximately by the negligence of plaintiff in failing to yield the right-of-way to defendant, in failing to maintain a proper lookout, in failing to have her automobile under control, in traveling at a high and excessive rate of speed, and in failing to apply her brakes or turn her automobile to avoid said collision.

"He asks that plaintiff's cause of action be dismissed, and that he recover the sum of $350.00 on his cause of action."

Defendant's answer and cross-petition alleged that the "Yield Right of Way" sign was unauthorized, invalid, void, and without effect.

Plaintiff, in her answer and reply, alleged as follows: "3. That the 'yield sign' referred to in said petition and cross-petition was duly erected and maintained by the City of Norfolk according to law; that said sign was plain, open and obvious to said defendant; that said defendant wholly disregarded the warning extended by said sign; that said Ruth Ballantyne, prior to said accident, knew that such signs had been erected against traffic entering into said Madison Avenue from Seventeenth Street and from other cross streets into said Madison Avenue, relied thereon and had a right to rely thereon, and pursuant thereto assumed and had the right to assume that any motorist approaching said intersection would yield and accord the right-of-way at said intersection to traffic on said Seventeenth Street."

Plaintiff alleges that instruction No. 2 is erroneous because it did not incorporate the above paragraph from the plaintiff's answer and reply.

The defendant attempted to urge the invalidity of the yield sign by a motion to strike, a motion to omit all reference to it at the trial, and by objections at the trial. In each instance defendant's motions and objections

were overruled. Defendant did not attempt to introduce any proof that the "Yield Right of Way" sign was void or unauthorized. The case was tried upon the theory of the plaintiff that the yield sign was valid. The plaintiff was permitted to testify that she was conscious of the sign and relied upon it. Defendant was cross-examined about the sign and admitted he did not see it and consequently paid no attention to it. The question of the validity of the sign was not an issue submitted to the jury and plaintiff's assignment of error is without merit.

For the reasons given we find that the judgment of the district court should be affirmed.

AFFIRMED.

YEAGER, J., not participating.

VICTOR D. SHADA, EXECUTOR OF THE ESTATE OF NICHOLAS J. W. SHADA, DECEASED, APPELLEE, V. CARL WHITNEY, APPELLANT, IMPLEADED WITH MISSOURI VALLEY CONSTRUCTION COMPANY, APPELLEE.
109 N. W. 2d 167

Filed May 12, 1961. No. 34959.

1. **Workmen's Compensation.** The Workmen's Compensation Act creates new remedies, new rights, and new liabilities. It provides both the adjective and substantive law.
2. ———. The appellate jurisdiction of the district court and this court is limited to those matters which were properly at issue in the Nebraska Workmen's Compensation Court.

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

H. L. Blackledge, for appellant.

Ward W. Minor, for appellee Shada.

Tye, Worlock & Knapp, for appellee Missouri Valley Constr. Co.

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

SIMMONS, C. J.

This is a workmen's compensation case. Nicholas J. W. Shada, the employee, was killed. The executor of his estate is plaintiff. The defendants are Carl Whitney and Missouri Valley Construction Company, a corporation. They will be referred to herein as Whitney and Missouri Valley.

The matter went to a hearing before one of the judges of the Nebraska Workmen's Compensation Court, resulting in a finding that Whitney was liable for the statutory compensation payments and dismissing Missouri Valley. On appeal to the district court by Whitney, a like judgment was rendered.

Whitney appeals here. He admits that Shada's death occurred during the course of his employment, the amount of wages, and the dependency of a son. He presents the sole question as that of the liability as between himself and Missouri Valley. He contends that Missouri Valley was in effect his insurer and should be determined equally liable with Whitney to the plaintiff and "fully liable to Whitney" for benefits accruing to the plaintiff.

We affirm the judgment of the trial court.

The facts of this case so far as important here may be briefly stated. Whitney was the owner of a number of gravel-hauling trucks and employed drivers for them. His system of payment included elapsed time when a truck was temporarily out of operation for mechanical or tire defects.

Missouri Valley operated trucks but did not pay on an elapsed time basis. Missouri Valley hired trucks from Whitney for use in hauling gravel. Whitney sent his drivers with the trucks. Whitney apparently assumed that Missouri Valley would pay the Whitney drivers while so employed. A written contract was prepared

and signed by representatives of the parties. Whether or not it became binding between the parties then or later is a question we need not decide. When the time came to pay the employees, Missouri Valley was apparently willing to pay the Whitney drivers; however it did not have the social security and withholding tax information that was necessary to prepare a payroll, and it also paid on a different time-employed basis as above indicated.

A representative of Missouri Valley discussed the matter with a representative of Whitney and it was agreed that Whitney would continue to pay his employees while in the service of Missouri Valley. Compensation between Whitney and Missouri Valley was to be adjusted accordingly. Shada was so paid. There is no contention here that he established an employer-employee relationship with Missouri Valley.

Shada was killed in an accident while so employed.

Whitney here states: "Although this is a workmen's compensation case, the issue to be determined is between the two defendants, and this presents a question of contract." That contract contention is that Missouri Valley became obligated by contract to idemnify Whitney; that both defendants should be determined to be liable to the plaintiff; and that Missouri Valley be determined to be liable to Whitney.

Whitney here relies upon our often repeated holding that "where a court has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters at issue, and thus avoid all unnecessary litigation."

Whitney here overlooks the fact that: The Workmen's Compensation Act creates new remedies, new rights, and new liabilities. The manner in which it operates is to be found in the legislation itself. Fidelity & Casualty Co. v. Kennard, 162 Neb. 220, 75 N. W. 2d 553.

The Workmen's Compensation Act provides both for the substantive and adjective law. We are here, then,

presented largely with a question of adjective law. Are the construction of the contract and the liability of Missouri Valley to Whitney issues that may be determined in a workmen's compensation case?

Section 48-173, R. R. S. 1943, sets out the requirements of a petition in the compensation court. Section 48-176, R. R. S. 1943, provides that the answer shall admit or deny the substantial averments of the petition and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition. Thus the issues are framed that are to be determined in the action.

Here plaintiff's petition in the compensation court took the position that Shada was an employee of both Whitney and Missouri Valley at the time of his death. Whitney by his answer took the position that Shada was an employee of Missouri Valley and prayed for dismissal of the action as to him. Missouri Valley answering denied that Shada was its employee and prayed for dismissal of the action as to it.

Thus the issues were framed under the act.

The one judge of the compensation court who heard the matter under the provisions of section 48-178, R. R. S. 1943, held that Shada was an employee of Whitney and dismissed the petition as to Missouri Valley.

Rehearing before the compensation court was waived. Appeal was taken to the district court by Whitney under the provisions of section 48-181, R. R. S. 1943, where the court is authorized "to try, hear, and determine the cause as in equity" which "shall be a trial de novo."

Upon appropriate allegations Whitney prayed for a determination that he was not liable for compensation to Shada and that Missouri Valley was liable.

Missouri Valley answered and on appropriate allegations prayed for a decree that it was not liable and that Whitney was liable for compensation to plaintiff.

Plaintiff filed his petition in the district court wherein he alleged that Shada was an employee of both Whit-

ney and Missouri Valley at the time of his accidental death. He prayed for the relief to which he was entitled under the act.

Whitney appeals here under the provisions of section 48-185, R. R. S. 1943, where the cause is to be considered "de novo upon the record." Whitney here takes the position that because the cause was to be determined as in equity in the district court and here, that he has the right to a determination of the contract liability of Missouri Valley to him in this cause.

We think it obvious that our jurisdiction here is limited to those matters which were properly at issue in the compensation court and the district court. It is just as obvious that a compensation case cannot be used as a vehicle for bringing a question of contract interpretation as to whether Missouri Valley is liable to assume Whitney's obligation before the district court or this court for determination merely because the procedure is one "as in equity."

The district court and this court in hearing these matters are hearing them under appellate jurisdiction created and limited by the Workmen's Compensation Act. The decision which Whitney here seeks is one outside the jurisdiction so created.

This brings us to the application of the plaintiff for allowance of an attorney's fee. The affirmance of the judgment of the district court authorizes the allowance of an attorney's fee to the plaintiff for proceedings in this court under the provisions of section 48-125, R. R. S. 1943. Under the situation presented an attorney's fee is allowed plaintiff of $250 to be taxed as costs against the defendant Whitney.

The judgment of the district court is affirmed, and an attorney's fee allowed for services in this court.

AFFIRMED.

JOHN BAUM, APPELLANT, V. THE COUNTY OF SCOTTS BLUFF, NEBRASKA, A CORPORATION, ET AL., APPELLEES.
109 N. W. 2d 295

Filed May 19, 1961. No. 34900.

1. **Waters: Drains.** While one who obstructs the flow of a drainage ditch in the furtherance of a public purpose is liable for damages thereby caused by the flooding of the lands of another, the burden of proof is on the latter to prove the obstruction, that there was an overflow, that the overflow would not have occurred if it were not for the obstruction, and the extent of the damage attributable to it.
2. ———: ———. One who builds a structure in a drainage ditch is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through the ditch.
3. **Waters.** In order for a flood to come within the term act of God, it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected.
4. **Waters: Negligence.** An act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effect. It is enough that the flooding should be such as human foresight could not be reasonably expected to anticipate and whether it comes within this description is ordinarily a question of fact.
5. **Waters: Damages.** Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and the combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable.
6. **Trial.** In every action for the recovery of money only, the jury may render a general or special verdict.
7. ———. A general verdict is that by which a jury pronounces, generally, upon all or any of the issues either in favor of the plaintiff or defendant.
8. ———. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law.

9. **Waters: Damages.** Section 70-671, R. R. S. 1943, applies only to public power and irrigation districts.

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

Holtorf, Hansen & Fitzke, for appellant.

W. H. Kirwin, Wright & Simmons, and *James R. Hancock,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

MESSMORE, J.

The plaintiff, John Baum, brought this action against the County of Scotts Bluff and the Gering-Fort Laramie Irrigation District to recover damages to growing crops and personal property alleged to have resulted from floodwaters caused by a structure jointly constructed by the County of Scotts Bluff and the Gering-Fort Laramie Irrigation District in the district's drainage ditch. This appeal involves the second trial of this action. Our first opinion appears in Baum v. County of Scotts Bluff, 169 Neb. 816, 101 N. W. 2d 455.

The trial court, in instruction No. 7 in the second trial, instructed the jury as follows: "Your determination of the facts in issue in this case will be shown by your answers to Special Findings. It will be necessary for you to give your answers to the findings in the order of their numbers, bearing in mind all of the law set out in these instructions.

"The various questions which you will be required to answer as your Special Findings of fact are stated as follows:

"1. Has the plaintiff sustained the burden of proving by a preponderance of the evidence that the opening in the structure placed in the drainage ditch by the defendants was too small to carry the water and debris that could reasonably be expected to come down said ditch in times of heavy rainfall? Answer yes or no. ——

"(If your answer to No. 1 is 'No' you will go no further but return this as your verdict. If your answer to No. 1 is 'Yes' you will then answer Questions Nos. 2 through 5.)"

The jury answered question No. 1 "No" and returned its verdict accordingly, which verdict was accepted by the trial court. Judgment was rendered on the verdict dismissing the plaintiff's action. The plaintiff filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. This motion was overruled. The plaintiff perfected appeal to this court.

The Gering-Fort Laramie Irrigation District is a governmental subdivision organized to furnish irrigation water to privately owned lands within the district and to provide drainage for such lands resulting from seepage and surface waters. It is organized for a public purpose. The county of Scotts Bluff is likewise a governmental subdivision charged with the statutory duty of building and maintaining highways and bridges for public use. In so doing it is engaged in carrying out a public purpose.

The plaintiff was a tenant farmer on the southeast quarter of Section 21, Township 21 North, Range 55 West of the Sixth P. M., in Scotts Bluff County, which will hereafter be referred to as plaintiff's farm. There is a county road which runs north and south, and a county road which runs east and west past the plaintiff's farm. A little east of the center of the plaintiff's south line, the district's drainage ditch crossed to the north under a county bridge on the highway onto plaintiff's land, continued in a diagonal course to the northeast to about the center of plaintiff's east line, and then continued in a northerly direction. The ditch was crossed by a beet spur railroad track approximately 100 feet north of the highway bridge. In 1957, the county and district jointly constructed a single row of steel sheet piling across the ditch about 50 feet north of the highway bridge. The purpose of the district in assisting in the

building of this structure was to stop the ditch from washing wider and deeper by retarding the flow of water. The purpose of the county in assisting in its construction was to prevent the washing out of the approach to the east end of the highway bridge.

The plaintiff testified that on June 1, 1958, there was a heavy rain at Gering, and when he arrived home it was still raining. The water was around his house, almost up to the door. The cattle corral was full of water. The water started to run through his farm about 5 or 5:30 p.m. The water was coming from the structure, and was running around both the east and west sides of the structure. Very little water was going through the opening in the structure because the opening was closed up with debris which came down the drainage ditch. The water was running fast, and was 24 or 25 inches deep running through his farmyard. North of the structure there was very little water, but south of the structure it formed a reservoir. There was no water on his farm coming from any direction other than from the structure. There was a steel culvert between the structure and the bridge, the purpose of which was to catch water that would come down the county road from the west and let this water go into the drain. On June 8, 1958, the same thing occurred as did on June 1. The structure was plugged up again. It started to rain, and in 45 minutes the water started to run on his land. He observed the water coming on his land from the structure. The water in the drainage ditch was backed up south of the structure and formed a reservoir. The water was overrunning the drainage ditch, and it ran in the same course on June 8 as it did on June 1. There was no water coming on his land from any source other than the water by the structure. The plaintiff further testified that on June 1, 1958, he received 1¾ inches of rain, and on June 8, he received 2¼ inches of rain. He further testified that he had received 4¾ inches of rain at one time in 1947; that on

July 18, 1957, he received 3¾ inches of rain; in 1951 he received 3¼ or 3½ inches of rain at one time; and that during the years 1947, 1951, and 1957 the drainage ditch did not overflow.

A witness who resides 1 mile south and 1½ miles west of the plaintiff's farm testified that on June 1, 1958, he stopped at the plaintiff's farm and observed the plaintiff standing in water which was about 2 feet deep and was running to the northeast. After he left the plaintiff's farm he traveled south and passed the intersection of the two county roads. He then looked to the west and observed that the water was coming from the drainage ditch south of the obstruction. He observed the ditch at the next section corner south of the plaintiff's farm and it had not broken its banks. There was no water flowing across the half section of land south of the plaintiff's farm. The borrow pits were not full of water. On June 1, 1958, he received 1.4 inches of rain. He further testified that he had received rainfalls of the same size previously.

A witness who lived 1 mile south and 1⅛ miles west of plaintiff's farm testified that he was at the plaintiff's farm between 6 and 6:30 p.m. on June 1, 1958. At that time there was water and debris flowing northeast through the plaintiff's yard and corrals. After leaving the plaintiff's farm he traveled south. When he reached the intersection south of the plaintiff's farm he looked to the west and observed water coming from the drain. On June 1, 1958, he received 1½ inches of rain. He further testified that he had seen other rains of that size since he lived on his farm. On the way to his farm he observed other drains and they were not running over.

A Standard Oil agent from Scottsbluff testified that on June 1, 1958, at about 6 p.m., he was at the plaintiff's farm. He observed water running through the plaintiff's yard and corrals. This water was coming from

the drainage ditch, and any water coming from the south was running toward the east.

A civil engineer and surveyor with considerable experience as an engineer in irrigation and drainage work testified that in 1957 he designed a structure in the drainage ditch near the plaintiff's farm; that in designing this structure it was necessary to know the amount of water that might reasonably be expected to pass through the structure; and that he was familiar with the drainage system of the irrigation district in the area involved in this litigation. He further testified that the reason the structure was placed in the drainage ditch was because the rains previous to that time washed out the east approach to the bridge. He desired to so build the structure that it would dispense with the erosion at the bridge as it had done previous to the building of the structure. He further testified that it was bad business to have a drainage ditch make a right-angle turn, as had to be done to get under the bridge, and with the velocity of water it was hard to maintain anything on the east side of the bridge, consequently, he put the steel-sheet piling as a drop to correct this difficulty and trouble; that the opening in this structure he believed to be about 12 feet wide and 7 or 8 feet deep; that the opening in the structure was about 3 or 4 feet above the bottom of the ditch; that the reason the opening in the structure did not need to be as large as the ditch was that the water falling over the piling and having room to drop down would gather velocity and that would require a considerably smaller area than the ditch back of the structure; and that the opening was more than sufficient to take care of the water that came down through the ditch.

A witness testified that in the evening of June 1, 1958, he went to where the structure was located. He observed that there was water running down the road south of the plaintiff's farm. There were two cottonwood trees, more than a foot in diameter, that had been

cut down by the Consumers Public Power District about 2 years previously and left on the side of the bank, and these trees had become stuck crosswise in the structure. By the use of a rod, he pried them loose. After he succeeded in removing the trees, the structure seemed to take all water that would flow through it without any difficulty. This witness further testified that on June 1, 1958, there was water running across the Schwindt place located about half a mile south of the structure. This water was running through the field and spread over the Schwindt farm. About one-eighth of the Schwindt farm on the east side of the ditch was under water. Some of the water from the Schwindt farm ran down onto the plaintiff's farm. This witness testified that there was water in the borrow pit along the road going south from the plaintiff's farm. A part of this water came down to the corner and then went onto the plaintiff's farm, including the water from the structure. This witness further testified that there were three different places that the water collected on the plaintiff's farm was coming from; that on June 8, 1958, there was water all over; that all of the Schwindt farm was under water; and that this water would flow to the north on the road, then to the plaintiff's farm. This witness further testified that the dam, which is located approximately 2 miles south of the plaintiff's farm, went out at about 5 minutes after 9 p.m., on June 8, 1958. All of the water released by the dam flooded to the north. Because of this, he was unable to go down the road north to the plaintiff's land. He testified that a considerable amount of water ran down the north road. This witness further testified that on June 1, 1958, water did not go out of the drain ditch on the west side of the structure.

A witness testified that he was near the intersection southeast of the plaintiff's farm on June 1, 1958; that he observed that the intersection was covered with water; and that there was water in the field southwest

of the plaintiff's farm and nearly as far as one could see to the south.

A director of the irrigation district testified that a day or two after June 1, 1958, he was at a place a mile south of the plaintiff's farm. He observed that the north bank of the drainage ditch had been washed away, and 3 or 4 feet had been washed off the top for a distance of probably 100 to 150 feet.

The engineer who designed the structure further testified that the road running south from the plaintiff's corner sloped to the north with a fall of 39.4 feet in a mile; and that water escaping from the drainage ditch a mile south of the plaintiff's farm would travel north, and part of this water would stay in the road borrow pits and part of it would run to the west then would run back to the southeast corner of the plaintiff's farm. He further testified that he was at the site of the structure on June 2, 1958, and examined the county road from the bridge on west; that there was considerable erosion from the section corner west of the bridge to the bridge; that there was washing in the north borrow pit of the road for quite a distance; that there was quite a bit of washing between the county road and the railroad right-of-way; and that water had crossed the railroad tracks at three different places which he discerned by deposits of debris on the tracks. He further testified that there had been no water going over the tracks at or near the railroad bridge for several hundred feet on either side.

A witness who lived approximately a mile and a half south of the plaintiff's farm testified that on June 8, 1958, there occurred the heaviest rain he had ever seen in that area where he had lived for 30 years. He also testified that he had never seen so much water run into the drainage ditch.

Another witness testified that he lived south and east of the plaintiff's farm in the same drainage area, and had lived there for a period of 40 years; and that on June 8, 1958, in the area there was a "regular flood,

wash out or cloud burst." He measured the rain at one time and found it to be 2½ inches. He believed the rain had ceased, but it started to rain again. He again measured the rain and found it to be 3½ inches, or a total of 6 inches. During the 40 years he had lived in that area, he did not recall a rain of that size.

A witness who lived in the same drainage area south and west of the plaintiff's farm testified that on June 1, 1958, there were probably about 5 inches of rain. He had lived in that area all of his life, for 51 years. He further testified that on June 8, 1958, there was a flood, and he measured the rain and found it to be about 7 inches. He further testified that he had never seen a rain of such proportions since around 1922 or 1923.

A witness who had lived in the drainage area and to the south and west of the plaintiff's farm since 1927 on a branch of the drainage which is called Little Cedar Creek, testified that on June 8, 1958, this creek overflowed to the east, and looked more like a river than a creek. This witness further testified that from a point one-eighth of a mile southwest of his house, all along the east as far as he could see, Little Cedar Creek was overflowing; and that in 1947 and 1948 this creek overflowed but not to the extent that it did on June 8, 1958, when there was the largest amount of water he had seen in Little Cedar Creek.

The plaintiff contends that the verdict is not sustained by the evidence. From a review of the evidence, there is no question but that it is sufficient to submit the case to the jury. See Baum v. County of Scotts Bluff, *supra*.

The question then arises, is the verdict contrary to the law? In this connection, the plaintiff cites Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542, wherein this court said: " 'Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge

in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain.' Roe v. Howard County, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. N. S. 831." The court also held: "It is the duty of those who build structures across natural drainways to provide for the natural passage through such obstructions of all waters which may be reasonably anticipated to drain there." There are several cases to this effect which need not be cited.

The contention of the plaintiff is that in the light of cases cited, the defendants have a duty, not only to provide an adequate opening, but also have a duty not to arrest or interfere with the waters flowing in the drainage ditch; and that the court failed to instruct on this duty owed by the defendants, even though the plaintiff requested instructions on this point.

In Baum v. County of Scotts Bluff, *supra,* this court held: "While one who obstructs the flow of a drainage ditch in the furtherance of a public purpose is liable for damages thereby caused by the flooding of the lands of another, the burden of proof is on the latter to prove the obstruction, that there was an overflow, that the overflow would not have occurred if it were not for the obstruction, and the extent of the damage attributable to it. * * * One who builds a structure in a drainage ditch is charged with a duty to provide for the passage of all waters, ice, and debris which may reasonably be anticipated to flow or be carried through the ditch."

The law announced in Baum v. County of Scotts Bluff, *supra,* as heretofore stated, is the law in this case. This being true, the plaintiff's requested instructions were properly refused.

Some objection is made by the plaintiff to the fact that the evidence is insufficient to submit to the jury the instruction covering the defendants' defense that

the floods complained of by the plaintiff resulted from an act of God. We will not repeat this evidence which has heretofore been set forth.

In Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146, 75 N. W. 2d 661, this court said: "In order for a flood to come within the term act of God, it must have been so unusual and extraordinary a manifestation of nature as could not under normal conditions have been reasonably anticipated or expected. * * * An act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effect. It is enough that the flooding should be such as human foresight could not be reasonably expected to anticipate and whether it comes within this description is ordinarily a question of fact."

Suffice it is to say that the evidence in this case is sufficient to submit the defense of an act of God to the jury.

The plaintiff tendered instructions on this issue which the trial court refused. We hold that the trial court did not commit prejudicial error by refusing plaintiff's tendered instructions.

The plaintiff contends that instruction No. 11 given by the trial court was prejudicially erroneous.

Instruction No. 11 instructed the jury that the plaintiff must not only prove that the structure involved was not large enough to accommodate all of the water that could reasonably be expected to come down the ditch, but also that the inadequate size of the opening in the structure was the proximate cause of the damages sustained by the plaintiff. The plaintiff's contention is that this instruction placed too great a burden on the plaintiff, because it required the plaintiff to prove that the inadequate size of the opening in the structure was *the* proximate cause of the damages sustained by him; that all the plaintiff needed to prove was that the structure arrested the flow of the water or inter-

fered with it; and that in any event, under certain circumstances the plaintiff's burden of proof would only require that he prove that the structure, either by arresting the flow or by an inadequate opening, was *a* proximate cause.

In the instant case the plaintiff alleges that his damages occurred by reason of one cause, the placing of the structure in the drainage ditch. The plaintiff was entitled to recover only if this structure caused damage to him. The plaintiff would not be entitled to recover damages done by water from sources other than from the structure. The plaintiff has the burden of showing that all the damages he sustained resulted from one cause. The overflow of the structure would be the proximate cause of the damage if the plaintiff proved his cause of action as pleaded.

In Mohatt v. Olson, 146 Neb. 764, 21 N. W. 2d 516, this court said: "Where a substantial amount of water from another source or sources has been added to the water for which defendant is liable, and combined waters have caused the damage, then it is incumbent upon the plaintiff to establish either that his damages would have occurred from the waters for which defendant is liable, or to establish the amount of his damage that had been caused by the waters for which defendant is liable." See, also, McGill v. Card-Adams Co., 154 Neb. 332, 47 N. W. 2d 912; Faught v. Platte Valley Public Power & Irr. Dist., 147 Neb. 1032, 25 N. W. 2d 889.

The evidence discloses that there was a substantial amount of water that came from sources other than the structure. This evidence does not seem to have been contradicted or denied. Under the circumstances, we conclude that the trial court did not err in the giving of instruction No. 11.

We have heretofore set forth instruction No. 7 given by the trial court. The plaintiff contends that the trial court erred in giving instruction No. 7 for the reason

that he was entitled to have the jury return a general verdict.

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

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

Section 25-1122, R. R. S. 1943, provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce, generally, upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law."

In the case at bar, under the pleadings and under the instructions, the only issue was whether or not the structure placed in the drainage ditch was of sufficient size to carry all of the water which could reasonably be expected to come down the drainage ditch in times of heavy rainfall. If the structure was too small or of insufficient size to carry all of the water which could reasonably be expected to come down the drainage ditch, then the plaintiff would be entitled to recover. On the other hand, if the structure was sufficiently large to carry all the water which could reasonably be expected

to come down the drainage ditch in times of heavy rainfall, then the defendants would be entitled to recover. When this issue was decided by the jury there was nothing further for it to consider. The jury, under instruction No. 7, must certainly have known the issue involved, and it decided this issue against the plaintiff. The verdict in reality had the effect of a general verdict as defined by section 25-1122, R. R. S. 1943. We find no merit to the plaintiff's contention.

The plaintiff complains of the failure of the trial court to give plaintiff's requested instruction No. 14. This instruction reads as follows: "You are instructed that under Section 70-671 the Defendant Irrigation district is liable for all sources of water that came upon the plaintiff's land from any break, or overflow from any of their ditches or drains."

Section 70-671, R. R. S. 1943, reads as follows: "Any such district shall be liable for all breaks, overflow and seepage damage. Damages from seepage shall be recoverable when and if it accrues."

Section 70-671, R. R. S. 1943, comes under Chapter 70, article 6, and relates to public power and irrigation districts. The district here involved was organized pursuant to Chapter 46, titled "Irrigation." See §§ 46-101 to 46-128, R. R. S. 1943. Section 70-671, R. R. S. 1943, applies only to public power and irrigation districts, and has no applicability to an irrigation district such as the district here involved, nor to the County of Scotts Bluff.

The plaintiff contends that the trial court erred in admitting, over objections, the defendants' evidence with reference to the breaking of the dam; that there was no evidence in the record that the breaking of the dam contributed to the floodwaters which damaged the plaintiff, for the reason that the dam did not break until after 9 p.m., and the plaintiff's farm was flooded at 6 p.m.; and that the admission of this evidence was prejudicial because it was calculated to draw the attention

of the jurors away from the real cause of the plaintiff's damages.

The evidence did show that the breaking of the dam caused a large amount of water to escape and flow upon the plaintiff's land, bringing with it further debris. The evidence also showed that the plaintiff's cattle stood in water until after midnight. He claimed this as damage to his cattle. In addition, the evidence as to the breaking of the dam shows that had the plaintiff not been damaged by the water coming from the structure in the drainage ditch, his crops would have received damage from the water caused by the breaking of the dam.

Defendants were in no manner liable for the escape of the water by the breaking of the dam. We conclude that the trial court did not commit prejudicial error in admitting this evidence.

We have determined the assignments of error necessary for a determination of this appeal, and other assignments of error need not be considered.

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

AFFIRMED.

EDWIN C. TOELLE, APPELLEE, V. ALBERT C. PREUSS, APPELLANT.
109 N. W. 2d 293

Filed May 19, 1961. No. 34938.

Easements. If an owner of an easement, by his own act, renders the use of the easement impossible, or himself obstructs it in a manner inconsistent with its further enjoyment, the easement will be considered as abandoned by him.

APPEAL from the district court for Cuming County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

H. M. Nicholson, for appellant.

Moodie & Moodie, for appellee.

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

BOSLAUGH, J.

This is an action for equitable relief brought by the appellee as plaintiff against the appellant as defendant to enjoin the latter from interfering with the plaintiff's use of an easement across the defendant's land and quieting the title to the easement in the plaintiff. The district court found for the plaintiff and granted the relief sought. The defendant's motions for new trial were overruled and the defendant appealed.

This being an appeal in an action in equity, it is the duty of the court to try the issues of fact complained of de novo and reach an independent conclusion without reference to the findings of the district court. § 25-1925, R. R. S. 1943.

The answer alleged that the plaintiff had abandoned the easement claimed and that it was extinguished. The assignments of error which require consideration are those relating to the finding of the trial court that the easement had not been abandoned and extinguished.

There is very little conflict in the evidence in this case. The plaintiff is the owner of a 144-acre tract of land in Cuming County, Nebraska, which will be referred to herein as the plaintiff's land. In 1949 the plaintiff purchased an 80-acre tract of land lying directly west of the 144-acre tract and north of the defendant's land. The plaintiff concedes that at this time there is no issue before the court with respect to the allegations of the amended petition claiming an easement of way appurtenant to this 80-acre tract. Therefore, it will not be necessary to refer to this 80-acre tract of land again in the opinion.

The defendant owns a tract of land south and west of the plaintiff's land. A county road runs to the southwest corner of the defendant's land. A road or

trail then runs generally northeast from the southwest corner of the defendant's land to a fork. At the fork, one branch runs east to the buildings on the defendant's land. The other branch runs north and then east to a point on the west boundary of the plaintiff's land.

Before 1945 the Elkhorn River crossed the west boundary of the plaintiff's land near the northwest corner of the land and then flowed generally to the east, south, and west, describing a curve or loop and separating the plaintiff's land into two tracts. That part lying west of the river at different times varied in area from 10 to 40 acres. Prior to 1945 the road across the defendant's land was the only means of access that the plaintiff had to his land lying west of the river. The road was used primarily for the purpose of taking cattle to and from this land. The evidence establishes that prior to 1945 the plaintiff had acquired by prescription the right to use the road running from the southwest corner of the defendant's land to that part of the plaintiff's land lying west of the river.

In 1945 the channel of the Elkhorn River was relocated so that it flowed generally south along the west boundary of the plaintiff's land. The relocation was accomplished by a cut made by the plaintiff, together with some of his neighbors, including the defendant. After the 1945 channel change, the plaintiff had no land west of the river and he did not again use the road to take cattle onto his land until 1950 or 1951.

In 1948 the Beemer Drainage District again relocated the channel of the river. The drainage district straightened the channel so that the river now flows generally to the southeast. The river now cuts off the southwest corner of the plaintiff's land leaving a triangular area of approximately 4 or 5 acres south and west of the river which, prior to 1948, had never been west of the river.

If an owner of an easement, by his own act, renders

the use of the easement impossible, or himself obstructs it in a manner inconsistent with its further enjoyment, the easement will be considered as abandoned by him. Polyzois v. Resnick, 123 Neb. 663, 243 N. W. 864. See, also, Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334; Williams v. Lantz, 123 Neb. 67, 242 N. W. 269.

The plaintiff here participated in the 1945 channel relocation which not only obstructed the easement and rendered the use of it impossible, but also eliminated any further use or need for the easement at that time. This act exhibited a clear intention to abandon the easement, and outweighs his direct testimony that he did not intend to abandon the easement and that he used the road between 1945 and 1948 to check on the land and cattle and recover cattle that had forded the river.

There is some evidence that since 1940 there had been discussion about the formation of a drainage district to straighten the channel of the river. However, in 1945 there was no definite plan for relocation of the channel by such a district and the evidence does not show that the plaintiff considered the 1945 channel relocation to be a temporary measure.

We conclude that the evidence establishes that the plaintiff abandoned the easement in 1945 and that it has been extinguished. The judgment of the district court is reversed and the cause remanded with directions to enter judgment for the defendant in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, RELATOR, V. JACK D. OBBINK, RESPONDENT.
109 N. W. 2d 288

Filed May 19, 1961. No. 34944.

1. **Pleading.** A demurrer to an answer searches the entire record and is applicable to the first pleading found to be defective.

2. ———. A general demurrer admits all of the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded.
3. **Constitutional Law: Officers.** Article IV, section 1, of the Constitution of Nebraska, provides that the heads of all executive departments set forth in the section and all of such departments as shall be established by law, other than those to be elected also as provided in the section, shall be appointed by the Governor with the consent of a majority of all the members elected to the Legislature, which officers so appointed may be removed by the Governor.
4. ———: ———. By the terms of Article IV, section 12, of the Constitution, the Governor is empowered to remove any officer appointed by him, in the case of incompetency, neglect of duty, or malfeasance in office.
5. ———: ———. By the terms of Article IV, section 6, of the Constitution, the supreme executive power is vested in the Governor.
6. **Statutes: Officers.** The provisions of Chapter 3, article 1, R. R. S. 1943, define the Department of Aeronautics of the State of Nebraska and its functions, and by section 3-103 thereof provision is made for a Director of Aeronautics.
7. Officers. In an instance where the term of an office is fixed by law the Governor may dismiss such officer only for incompetency, neglect of duty, or malfeasance, based upon specific charges, after hearing or opportunity for hearing.
8. ———. In the case of an office which has no fixed term the Governor may dismiss an officer without cause and without notice, hearing, or opportunity for hearing.

ORIGINAL ACTION. *Demurrer to answer sustained.*

Clarence A. H. Meyer, Attorney General, and *Gerald S. Vitamvas,* for relator.

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for respondent.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

YEAGER, J.

This is an original action filed in this court. It was instituted by information of the State of Nebraska on relation of Clarence S. Beck, Attorney General of the

State of Nebraska. The information is in quo warranto and included is an application for temporary injunction. By reason of interim proceedings the matters involved in the application for temporary injunction require no consideration herein. The State of Nebraska will be hereinafter referred to as relator.

By the information to the extent necessary to state herein, it was alleged that Jack D. Obbink, who will be hereinafter referred to as respondent, was on April 30, 1959, appointed to the office of Director of Aeronautics of the State of Nebraska, pursuant to section 3-103, R. R. S. 1943; that he accepted the appointment, qualified, and was confirmed by the Legislature on June 25, 1959; and that on October 17, 1960, while the respondent was such Director of Aeronautics, the Honorable Dwight W. Burney, Governor of Nebraska, addressed a communication to him, the pertinent part of which is as follows: "This will confirm in writing the notice given you today that your services as Director of the Department of Aeronautics of this State are no longer required after today.

"You will please turn over the keys to the office occupied by the Department to either this office or the Building Custodian on leaving the office today."

It was further alleged that the communication was duly delivered; that thereby the office was vacated, respondent was removed as Director of Aeronautics, and he became ineligible to hold the office; that notwithstanding his removal the respondent usurped and invaded the office and unlawfully undertook to perform the duties of the office; and that the respondent would not vacate the office unless required so to do by the judgment of this court.

By the prayer the relator asks this court to inquire into the matter of the claimed right of the respondent to continue to perform the functions of Director of Aeronautics; that the order of the Governor of the State of Nebraska relieving the respondent of the duties

of the office be declared valid; and that the office be declared vacant.

To the information the respondent filed an answer. To the extent necessary to state its contents it is pleaded that the respondent was appointed by Governor Ralph G. Brooks for a term expiring January 5, 1961, and was regularly confirmed by the Legislature; that he performed his duties to October 20, 1960, when he was restrained from further performance thereof by order of this court; that the letter mentioned in the information was delivered to him; that no proceeding was instituted by Governor Burney to remove him from office and no inquiry or investigation was instituted for determining whether or not legal grounds existed for his removal; and that no legal cause existed for his removal as Director of Aeronautics.

By the prayer the respondent asked for a trial on the question of whether or not there was cause for his dismissal, and that he be declared the legal incumbent of the office.

To the answer the relator filed a general demurrer on the ground that the answer did not raise a valid defense.

The case is before this court on the question of whether or not the answer contains sufficient allegations of fact under law to constitute a defense to the information of the relator.

Two rules are always to be borne in mind in appraising the extent and sufficiency of a general demurrer to an answer. About this there is no controversy in the briefs. One of these is the following: "A demurrer to an answer searches the entire record and is applicable to the first pleading found to be defective." Wilcox v. Havekost, 144 Neb. 562, 13 N. W. 2d 889. Under this rule it becomes necessary to consider fully the information and the answer.

The other rule is that a general demurrer admits all of the allegations of fact in the pleading to which

it is addressed, which are issuable, relevant, and material, and which are well pleaded. See A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687.

In the light of these principles and the pertinent facts which appear in the summary herein of the pleadings it is ascertainable that the paramount issue which this court is called upon to determine is that of whether or not Governor Burney had the power and right to dismiss and discharge the respondent as Director of Aeronautics without affording him the opportunity to have a hearing on the question of whether or not there was cause for dismissal, and without any assignment or declaration of cause.

The information without question discloses that the dismissal was on its face peremptory and without stated or declared cause.

The position of the respondent substantially is that he was not subject to dismissal without statement of grounds therefor, opportunity to be heard thereon, and a finding of the existence of grounds.

The relator on the other hand contends substantially that the Governor had the right and power to dismiss respondent at his will and that the right and power was not contingent upon grounds or hearing.

A determination of which of these two contentions is to be accepted depends upon the status of the respondent under the Constitution of the State of Nebraska, the pertinent provisions of statute, and the interpretation and definition of the rights of the respondent within that status.

Article IV, section 1, of the Constitution, contains the following: "The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. * * * The heads of all executive departments established by law, other than those to

be elected as provided herein, shall be appointed by the Governor, with the consent of a majority of all members elected to the Legislature, but officers so appointed may be removed by the Governor."

Article IV, section 12, of the Constitution, provides: "The governor shall have power to remove any officer, whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and he may declare his office vacant, and fill the same as herein provided in other cases of vacancy."

Article IV, section 6, of the Constitution, provides: "The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."

Chapter 3, article 1, R. R. S. 1943, contains the statutory provisions defining the Department of Aeronautics of the State of Nebraska and its functions, and the manner of its control. By section 3-103, R. R. S. 1943, provisions are made for a Director of Aeronautics. It was this position from which the respondent was dismissed.

The respondent has presented his case here on the assumption that the Department of Aeronautics is an executive department of government within the meaning of Article IV, section 1, of the Constitution, and that the director is an officer also within the meaning of the provision.

If this assumption is valid it follows that under the power specifically declared by Article IV, section 1, of the Constitution, the Governor had the power of removal. The position of the respondent is however that this power is limited by Article IV, section 12, of the Constitution, and the valid inferences and implications which flow therefrom.

In the light of the language of this provision and what this court has said in interpretation and application thereof the Governor may dismiss an officer

only for incompetency, neglect of duty, or malfeasance, after hearing or opportunity for hearing. An officer within the meaning of the provision is one whose term of office is fixed by law.

As to the power to dismiss this court said in State ex rel. Beck v. Young, 154 Neb. 588, 48 N. W. 2d 677: "The lodging of the supreme executive power in the Governor by the Constitution reposes in the Governor the power to remove executive officers and employees of the government appointed by him, except as limited by the Constitution itself. The only limitation placed upon the executive power of the Governor in connection with the removal of executive officers and employees appointed by him is Article IV, section 12, of the Constitution, * * *. Under this section of the Constitution we think it is clear that the Governor must specify charges against an officer or employee falling within its provisions, give notice and hearing, allege a ground of removal set forth in the constitutional provision, and produce evidence sufficient to sustain the action taken."

The requirements of Article IV, section 12, of the Constitution, as to hearing have no application where the appointment was to an office having no definite term. It is pointed out here that no term of office is fixed by law for the Director of Aeronautics.

In State ex rel. Hastings v. Smith, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791, in a paragraph of the syllabus, it was said: "Where by law there is no fixed term of office and the incumbent holds during the pleasure of the appointing power, the power of removal is discretionary and may be exercised without notice or hearing." This statement was quoted with approval in State ex rel. Fischer v. City of Lincoln, 137 Neb. 97, 288 N. W. 499.

In State ex rel. Beck v. Young, *supra,* it was said: "The power of the Governor to remove an executive officer or employee, appointed by him for a definite term,

is found in Article IV, section 12, of the Constitution."

In the same opinion it was said: "As to all officers and employees in the executive department appointed by the Governor who do not fall within the class designated by Article IV, section 12, of the Constitution, they are removable at the will of the Governor by virtue of the grant of the supreme executive power to him by Article IV, section 6, of the Constitution."

It is true that there is no specific declaration or statement in the Constitution which makes Article IV, section 12, applicable only where an appointment is made to an office having a legally fixed term, and attention has not been called to any decision of this court in which that question was directly in issue. Such announcements have been made however in cases where there has been an enumeration of essential incidents and conditions which cause the provision to become applicable.

The generally accepted rule however is that where no provision is made by statute or Constitution for the removal of an incumbent from office, and it does not appear to have been the intention that he should hold office during his life, and there is no fixed tenure, it is necessary to consider the power of removal as incident to the power of appointment and as exercisable without notice and hearing. Cases from numerous jurisdictions supporting this rule are collected in Annotation, 99 A. L. R. 381.

It is also a general rule supported by cases in numerous jurisdictions that where no term of office has been fixed by law but the appointing authority has attempted to fix a definite term for the particular officer, the attempt is unavailing to prevent dismissal without notice and hearing. See Annotation, 91 A. L. R. 1097.

In the light of this analysis of the Constitution and the statutes creating the office of Director of Aeronautics and the facts as disclosed by the pleadings, it

must be said that the Governor, without hearing or notice of hearing, had the right and power to dismiss the respondent, unless for some other reason he was deprived of that right and power. The respondent by his brief has contended that there is some other reason which makes Article IV, section 12, applicable, and accordingly precluded the Governor from dismissing without notice and hearing.

He points out, and correctly, that the Legislature of 1945, by present section 3-103, R. R. S. 1943, created the Department of Aeronautics as a department and provided for a director, an officer, as its head. This was a department other than those previously existing which are named in section 81-101, R. S. Supp., 1959. This creative section did provide for confirmation of the director but it did not provide a term of office. It did not by specific reference or reasonable implication add this department to those named in either section 81-101, R. S. Supp., 1959, or section 81-109, R. R. S. 1943. The provision relating to fixation of term contained in section 81-109, R. R. S. 1943, has no application to the office of Director of Aeronautics.

This must be true since the terms of section 81-101, R. S. Supp., 1959, limit its application, and incidentally the application of section 81-109, R. R. S. 1943, to the departments named therein. It contains no provision for legislative addition of other departments. Neither by amendment nor by independent enactment has there been any legislation the effect of which would be to remove the restrictive character of the section, or permit other departments to come into being and be added to those departments specifically named in this provision.

The respondent's claim that he had been appointed to a fixed term within the meaning of sections 81-101, R. S. Supp., 1959, and 81-109, R. R. S. 1943, is without merit.

It must be said therefore that under no theory contained in the language of the answer of the respond-

ent or in its intendments may it be said that the Governor did not have the right and power to dismiss the respondent in the manner in which that dismissal was effected.

The demurrer of the relator to the answer is therefore sustained.

DEMURRER SUSTAINED.

SIMMONS, C. J., participating on briefs.

ROBERT D. MCFARLAND, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
109 N. W. 2d 397

Filed May 26, 1961. No. 34916.

1. **Habeas Corpus.** The sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings.
2. **Criminal Law.** The holding of an accused person for trial in the district court at the conclusion of a preliminary examination upon a valid complaint gives that court jurisdiction until he be discharged by due course of law.
3. **Habeas Corpus: Courts.** It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated.
4. ———: ———. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts.
5. **Judges: Contempt.** It is the general rule that a judicial officer, when required to exercise his judgment or discretion, is not liable criminally for any error which he commits, provided he acts in good faith. A judicial officer who acts fraudulently or corruptly is responsible by criminal contempt, whether he acts under the law or without the law.
6. ———: ———. When a judge collaborates with one charged with crime to secure his release by the issuance of a void writ

of habeas corpus and thereafter cites the judge of the court having jurisdiction of the criminal proceeding for criminal contempt for disregarding the void writ, such judge, under proper evidence, may be punished for criminal contempt.

7. ———: ———. Where the evidence shows that the conduct of a judge charged with contempt was calculated to destroy the authority, dignity, and integrity of another court and to obstruct the proceedings and hinder the administration of justice in such other court in a matter of which it had jurisdiction, the rule of judicial immunity may not be invoked in a contempt proceeding against the offending judge.

8. ———: ———. The test of guilt in such a case is not necessarily found in the mental processes by which a defendant attempts to justify his acts. The motive of the defendant and the effect intended are subjects of judicial scrutiny, and evidence may be sufficient to refute oral testimony of innocence and the asserted intention to exercise a legal right.

ERROR to the district court for Morrill County: ALBERT W. CRITES, JUDGE. *Affirmed.*

Dwight Griffiths, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Rush C. Clarke*, for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

CARTER, J.

Defendant was proceeded against for a constructive criminal contempt. The trial court found the defendant guilty and sentenced him to serve 30 days in the Morrill County jail and pay a fine of $500 and costs. Defendant seeks a review in this court by petition in error. In reviewing the case we shall refer to the plaintiff in error as the defendant and the defendant in error as the State.

The record shows that on November 21, 1959, a complaint was filed in the district court for Morrill County charging one Paul E. Rhodes with the crime of arson. On December 4 and 5, 1959, a preliminary hearing was held before Albert W. Crites, judge of the district court for the Sixteenth Judicial District, presiding as judge of

the district court for Morrill County. At the conclusion of the preliminary hearing Rhodes was held for trial and his bail fixed at $1,000, which was posted. On January 11, 1960, an information was filed in the district court charging Rhodes with the crime of arson. On the same day Rhodes was surrendered to the sheriff of Morrill County by his bondsmen. Rhodes immediately filed a petition for a writ of habeas corpus in the county court of Morrill County in which it was alleged that he was unlawfully deprived of his liberty by the respondent sheriff of Morrill County under the commitment issued by the district court in the arson case in that the preliminary hearing in the district court was not in accordance with law, and that the evidence there adduced was insufficient to show that an offense had been committed or probable cause for holding Rhodes to answer for the alleged offense.

The defendant was at all times herein mentioned the county judge of Morrill County. The defendant as such county judge issued the writ of habeas corpus on January 11, 1960. The respondent sheriff of Morrill County made a return of the writ in which it was stated that Rhodes was hereby delivered to the county court, that he had been surrendered to him at 11:15 a.m., on January 11, 1960, by his bondsmen, and that he was being detained for trial in the district court on a charge of arson by an order of the district judge entered on December 5, 1959, while acting as an examining magistrate in the arson case pending against Rhodes in the district court. The habeas corpus case was set for hearing on January 27, 1960, and Rhodes was released on his own recognizance.

After his release by the defendant as county judge, Rhodes was taken by the sheriff of Morrill County and arraigned in the district court before Albert W. Crites, district judge. Objection was made to the arraignment because of the previous issuance of the writ of habeas corpus by the defendant as county judge. The objection

was overruled. Rhodes was arraigned and stood mute, a plea of not guilty was entered by the court, bond was fixed at $1,000, and a commitment issued directing the sheriff of Morrill County to take Rhodes into custody and hold him in the jail of Morrill County or any other county jail in the state until bond was furnished. The sheriff certified on the commitment on January 11, 1960, the date of the commitment, that Rhodes was committed to the custody of the jailor of the Scotts Bluff County jail.

On January 27, 1960, the defendant, as county judge, issued the document described "bench warrant and complaint" set out in the information in the proceeding presently before the court. We shall hereafter refer to it as the bench warrant. No petition, complaint, or affidavit was filed in the county court prior to the issuance of the bench warrant. The bench warrant issued by the defendant as county judge asserted at length that the preliminary hearing held by Judge Albert W. Crites was in violation of the Constitution and laws of Nebraska and the Constitution of the United States; that Rhodes was willfully and unlawfully deprived of his liberty by the orders of Judge Albert W. Crites; that Rhodes was confined unlawfully in the county jail of a county outside the jurisdiction of the county court of Morrill County; and that Judge Albert W. Crites did willfully, unlawfully, and contemptuously disobey and resist the lawful processes and orders of the county court and willfully, unlawfully, and contemptuously attempted to obstruct the proceedings and hinder the administration of justice in the county court of Morrill County. The respondent sheriff of Morrill County was thereupon directed to pursue and arrest Albert W. Crites and bring him before the court and the judge thereof, Robert D. McFarland, to be dealt with according to law.

The bench warrant was not served. On February 1, 1960, defendant entered an order withdrawing the bench warrant. On February 5, 1960, the information in the

instant case was filed charging that on January 27, 1960, the defendant willfully, unlawfully, and contemptuously attempted to obstruct the proceedings and hinder the due administration of justice in the case of State v. Rhodes, the arson case pending in the district court, by preparing, writing, signing, issuing from the county court of Morrill County, and delivering to the sheriff of that county, the bench warrant hereinbefore referred to, contrary to the authority and integrity of the district court for Morrill County and against the dignity thereof.

The district court file in State v. Rhodes and the transcript of the evidence taken at the preliminary hearing before the district judge were offered and received in evidence without objection. The defendant admitted that he issued the bench warrant as alleged.

The evidence shows that Rhodes was an attorney at law who had been engaged in the practice of law at Bridgeport, the county seat of Morrill County, for many years. On January 26, 1960, he and the defendant called on Marvin L. Holscher, an attorney for Rhodes, at his office in Scottsbluff. The possible disqualification of Judge Albert W. Crites was there discussed by Holscher and defendant in the presence of Rhodes. Holscher testified that during the discussion of the possible disqualification of Judge Crites the defendant inquired as to how was he going to hear the habeas corpus proceeding if he is in jail, at which time Holscher stated: "I will have nothing to do with it." On January 10, 1960, and January 19, 1960, Holscher had discussed with Rhodes in his office at Scottsbluff the proposed filing of the habeas corpus action in the county court, and on both occasions the defendant was present and participated in the conferences. Holscher appeared and tried the habeas corpus case for Rhodes before the defendant as county judge on January 27, 1960. On that day, after the hearing, the defendant and Rhodes again came to the office of Holscher in Scottsbluff where a conference was held and a journal entry prepared for filing in the

county court of Morrill County. Holscher testified that he had been employed by Rhodes on November 21, 1959, and had terminated that employment following the habeas corpus hearing on January 27, 1960.

The evidence further shows that defendant had conferred with Rhodes in Rhodes' office on several occasions concerning the habeas corpus action pending in his court. Defendant stated that he had a key to Rhodes' law office and that he habitually used the office for legal research. The defendant admits that the bench warrant was drafted in Rhodes' office and that Rhodes typed it as defendant dictated it. Defendant testified that he was not admitted to the bar and his knowledge of law was limited to his 3 years experience as county judge. He asserted that he did all the work of preparing the bench warrant and that Rhodes' service was limited to the typing of the instrument. Defendant further testified that he talked to two other Scottsbluff lawyers who gave him no encouragement in his plan to cite Judge Crites for contempt of the county court. On the day of the trial a subpoena was issued for Rhodes. The sheriff testified that it was not served because Rhodes could not be found in the county.

The defendant contends that the trial court erred in failing to find that the county court had jurisdiction of the action for habeas corpus filed in the county court of Morrill County. The State asserts that the county court was without jurisdiction to hear the habeas corpus case irrespective of the concurrent jurisdiction granted to district and county courts in habeas corpus proceedings by section 29-2801, R. R. S. 1943. It is fundamental, of course, that where courts have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of the other. Terry v. State, 77 Neb. 612, 110 N. W. 733.

It is the established rule in this state that the sufficiency of evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is

charged may be raised and tried in habeas corpus proceedings. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357; Neudeck v. Buettow, 166 Neb. 649, 90 N. W. 2d 254.

It is the rule, also, that the holding of an accused person for trial to the district court at the conclusion of a preliminary examination upon a valid complaint gives that court jurisdiction until he be discharged by due course of law. Dobrusky v. State, 140 Neb. 360, 299 N. W. 539. In the arson case pending against Rhodes in the district court the court not only had jurisdiction by virtue of a bind over but it had jurisdiction from its commencement since the original complaint was filed in that court.

The question posed is whether or not, after the district court acquires jurisdiction of a criminal action, a court of equal or inferior jurisdiction may determine the sufficiency of the evidence adduced at a preliminary examination to hold a defendant for trial to the district court.

The rule is stated in 39 C. J. S., Habeas Corpus, § 53, p. 596, as follows: "Pursuant to a general rule of wide application, on which there is no conflict of authorities, it has been held that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated." See, also, 25 Am. Jur., Habeas Corpus, § 108, p. 223.

In Peff v. Doolittle, 235 Iowa 443, 15 N. W. 2d 913, the court said: "As valuable and important a right as is the writ of habeas corpus, and as essential as it is in guarding and preserving human liberty, yet, like any other order or judgment of a court, it can be granted only by a court having jurisdiction. Nor can the exercise of this power to grant the writ be used to unsettle valid legal proceedings or to interfere with the exercise of the jurisdiction of other courts."

In State ex rel. Bressman v. Theisen (Mo. App.), 142 S. W. 1088, the court in a similar case said: "Where one court has competent jurisdiction of the person and is proceeding to exercise it, it would be a great outrage upon the administration of justice if a court of equal or inferior jurisdiction should by virtue of the writ of habeas corpus seek to override the jurisdiction of the former by discharging the person and thus annulling its writs and processes and rendering abortive any judgment it might lawfully render."

Other cases to the same effect are: Hart v. Best, 119 Colo. 569, 205 P. 2d 787; Zimmerman v. Angele, 137 Colo. 129, 321 P. 2d 1105; Commonwealth v. Gordon, 197 Ky. 367, 247 S. W. 45; Spurrier v. Spurrier, 111 Okl. 242, 238 P. 956; State v. Callahan, 93 Kan. 172, 144 P. 189.

We necessarily conclude that the district court for Morrill County at all times had jurisdiction of the case charging Rhodes with the crime of arson, and that the county court of Morrill County was without jurisdiction to interfere with or hinder the processes of that court by habeas corpus, or otherwise, during its pendency in the district court. The purported release of Rhodes by the county court was therefore wholly void and of no force and effect.

We find one case in this state which appears to be in conflict with this holding. In Rhea v. State, 61 Neb. 15, 84 N. W. 414, it appears that a county court tested the sufficiency of the evidence on a preliminary hearing by a justice of the peace by habeas corpus. The question of jurisdiction was not raised or decided. We now hold that the inference to be drawn from that case, that a county judge has jurisdiction to test the sufficiency of the evidence of a preliminary hearing after a bind over to the district court for trial, is without support in the law and that the county court is without jurisdiction to so do. In such a case an application for a writ of habeas corpus must be made to the district court.

The defendant contends that the defendant was acting

judicially in the issuance of the bench warrant and was therefore immune from prosecution for contempt. In such a proceeding where the act charged was not committed in the presence of the court the prosecution should be in the name of the state and by information. This method was followed in the case before us. The county court, however, in issuing the bench warrant and complaint for the arrest of Judge Crites did so without a complaint, information, or affidavit being filed, and the issuance of the bench warrant and complaint under such circumstances was wholly void. Leeman v. Vocelka, 149 Neb. 702, 32 N. W. 2d 274; Maryott v. State, 124 Neb. 274, 246 N. W. 343; Harkness v. Hyde, 31 Idaho 784, 176 P. 885. It is argued that although the issuance of the bench warrant was a void act it was a judicial act to which the rule as to judicial immunity applies. The rule as to judicial immunity is stated in 48 C. J. S., Judges, § 71, p. 1038, as follows: "It is well settled that a judicial officer, when required to exercise his judgment or discretion, is not liable criminally for any error which he commits, provided he acts in good faith. However, any judicial officer who acts fraudulently or corruptly is responsible criminally, whether he acts under the law or without the law." See, also, 30A Am. Jur., Judges, § 86, p. 55.

We necessarily conclude that the county court was without jurisdiction in the habeas corpus case in which it purported to release Rhodes on his own recognizance and thereby hinder, delay, and interfere with the jurisdiction of the district court acquired over the person of Rhodes in the arson case. While it is fundamental that a person is not subject to punishment for violating a void order, the defendant proceeded to issue a bench warrant without a complaint, information, or affidavit being filed, a condition precedent to the exercise of jurisdiction in such a case. If such acts were performed in good faith, particularly by a county judge who had not been trained in the law, this court could with pro-

priety give greater consideration to the defense of judicial immunity. But in this case the evidence shows that the defendant, while occupying the office of county judge, collaborated with Rhodes on matters in which Rhodes had a personal interest before and after they were filed in his court. He drafted the bench warrant citing Judge Crites for contempt in Rhodes' law office with Rhodes present and participating. His testimony that Rhodes did not participate other than in the performance of stenographic services is, under the circumstances, difficult to accept. The evidence sustains the conclusion that defendant collaborated with and acted at the direction of Rhodes. To say that such conduct was outside the realm of judicial action is to put it mildly.

Defendant asserts that in issuing the bench warrant he was protecting the jurisdiction of his court against another court that was invading the jurisdiction of the county court. The evidence will not support this assertion. While it is the duty of courts to protect their own jurisdictions, the issuance of a bench warrant for the arrest of the offending judge for contempt is a most unusual method of determining questions of jurisdiction. Such matters can be decided on review by exercising the ordinary processes of the law. The arrest of a judge of a superior court for contempt in such an instance is astonishing to say the least. In fact, in our research we have not been able to find a single instance where an inferior court has ever attempted such a procedure. The defendant clearly acted fraudulently and corruptly, and beyond the jurisdiction of his court, and willfully used the powers of his office to improperly and unlawfully give aid and assistance to one charged with crime in another court having jurisdiction thereof. As was stated in Braatelien v. United States, 147 F. 2d 888: "Judicial title does not render its holder immune to crime even when committed behind the shield of judicial office." We necessarily hold that the defense of judi-

cial immunity is not available to the defendant in the instant case. See Terry v. State, *supra,* wherein it is said that a disclaimer of intention, disrespect, or design to embarrass the due administration of justice is not a defense.

The defendant contends that he purged himself of contempt by withdrawing the bench warrant before it was served, and asserting his good faith performance of the acts with which he was charged. From what we have heretofore concluded, the defendant acted in bad faith. The record shows that when defendant suggested the contempt proceeding to Holscher, Rhodes' attorney, the attorney stated he would have nothing to do with it. He visited two other attorneys who, he admits, gave him no encouragement in such a procedure. Defendant states that he did not intend to contemptuously attempt to obstruct the proceedings or to hinder the due administration of justice in the district court in State v. Rhodes, or to degrade the authority, integrity, and dignity of that court and the judge thereof. We point out, however, the acts done, and the manner of their accomplishment, indicate the purpose of the acts committed more than his assertions of innocence when he is called to account for his acts. While it is true that the bench warrant was not served, it was calculated to create in the minds of the public a disrespect for courts and to lessen respect in the authority, dignity, and integrity of courts generally, and particularly the court toward which it was directed. The defendant well knew that in the dissemination of news the unusual constitutes a fruitful source for news stories, and the defendant was bound to know that a bench warrant for the arrest of a district judge for contempt of the county court was so unusual and scandalous that it would be headlined in the public press. The conduct of the defendant was calculated to destroy all respect for the court, and whether or not it actually accomplished its purpose is immaterial. Cornett v. State, 155 Neb. 766, 53 N. W. 2d 747. With respect

to defendant's contention that he intended no harm, it may be said that in the commission of the acts charged, it will be presumed that he intended the results attained and their natural probable consequences. The test of guilt in a prosecution such as this is not necessarily found in the mental processes by which the defendant attempts to justify his acts. The motive of the defendant and the effect intended are subjects of judicial scrutiny, and evidence, as here, may be sufficient to refute oral testimony of innocence and the asserted intention to exercise a legal right.

Lastly, the defendant contends that the sentence was excessive. We think not. The evidence clearly shows that the contemptuous acts were willful, premeditated, perverse, and contumacious. The evidence is sufficient to sustain the judgment of the district court under the required quantum of proof. The contempt is a most pernicious one and the trial court was justified in imposing the judgment it did to vindicate the dignity of the court and to preserve its authority and integrity.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

SIMMONS, C. J., concurring in result.

I concur in the result.

My disagreement with the opinion goes not to the conclusion but to the use of the quotation from 48 C. J. S., Judges, § 71, p. 1038. It is the foundation for syllabus point five of the court.

The quote goes to criminal liability of a judge for his acts.

Judge McFarland is not here charged with a crime or crimes, but with acts which we have defined as criminal contempts. As to them we have held: "A proceeding for contempt is sui generis and summary in its nature. It partakes of some of the elements of both civil and criminal proceedings but, strictly speaking, it is neither. It belongs to a class of proceedings inherent in the court and deemed essential to its existence." State

ex rel. Beck v. Lush, 168 Neb. 367, 95 N. W. 2d 695, 72 A. L. R. 2d 426.

Beginning at least with State v. DeWolfe, 67 Neb. 321, 93 N. W. 746, in an opinion by Sullivan, C. J., with intervening decisions down to Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227, in an opinion by Carter, J., we have consistently held: "In this state all public offenses are statutory, and no person can be punished for any act or omission which is not made penal by the plain import of a properly enacted statute."

We are not here dealing with a criminal case.

If Judge McFarland is here punishable, it is because he is liable for a criminal contempt and not because he has committed a crime. "Judges are liable for contempts committed by them; * * *." 17 C. J. S., Contempt, § 35, p. 50.

I would apply a rule of law applicable to the facts of this case and the nature of this action. By the use of a citation which goes to criminal law, by inference Judge McFarland is found guilty of the commission of a crime. Judge McFarland was neither charged with, tried for, nor found guilty of a crime.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SARPY, NEBRASKA, APPELLEE, V. EVERETT C. PETSCH, APPELLANT.

109 N. W. 2d 388

Filed May 26, 1961. No. 34936.

1. **Zoning.** A zoning regulation may not operate retroactively to deprive a property owner of a previously vested right to a use to which his property was put before the zoning regulation became effective.
2. ———. Where a property owner, prior to the effective date of a zoning regulation, has put the property to a use for which it is adapted by performing work and construction, by expending funds, or assuming liabilities or making commitments with reference thereto, he ordinarily acquires a vested right to

continue such use although it is a nonconforming use under such zoning regulation.

3. ———. The determination as to whether or not such a vested nonconforming use exists is usually a question of fact, and each case must be decided on its own merits.

4. ———. The right to a vested nonconforming use under zoning regulations is, when established, a property right, and any statute or law purporting to take away such right is invalid.

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

Richard G. Stehno, for appellant.

Dixon G. Adams, for appellee.

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

CARTER, J.

This is a suit to abate an alleged violation of zoning regulations of Sarpy County enacted pursuant to section 23-166, R. R. S. 1943, and to enjoin the operation, construction, maintenance, and extension of the use of defendant's property as a trailer court. The trial court held that defendant had a right to a nonconforming use of a portion of his property to the extent of 29 specified trailer spaces and enjoined the extension of such use without a permit pursuant to the zoning regulations of Sarpy County. The defendant appealed.

The evidence shows that zoning regulations were first adopted on or before 1955. Such regulations were held invalid by this court on February 27, 1959. Board of County Commissioners v. McNally, 168 Neb. 23, 95 N. W. 2d 153. On April 15, 1959, the board of county commissioners of Sarpy County enacted a new zoning ordinance and plan pursuant to section 23-166, R. R. S. 1943, which became effective April 17, 1959, and are the subject matter of the present action.

It is the contention of defendant that the zoning reg-

ulations are void for three reasons: (1) In failing to appoint a zoning commission before enacting the zoning regulations and plan, (2) in failing to hold public hearings and make reports required by the act, and (3) in attempting to enact new legislation by ratifying proceedings which had been declared invalid.

The former zoning regulations were declared invalid by this court for failure to publish the entire zoning resolution, including any map, plat, or zoning plan attached to, made a part of, or referred to in the resolution, as required by the applicable statute. Thereafter the matter was referred by the county board to the zoning commission for its further consideration. The zoning commission thereupon held meetings, took into consideration the facts determined in the previous attempt to zone, made minor changes, gave notice and held a public hearing on its preliminary report, and made a final report to the county board. Thereafter the county board gave notice, held a public hearing on the final report of the zoning commission, and subsequently adopted such final report and published the same as required by section 23-171, R. R. S. 1943. The members of the zoning commission had been appointed and reappointed since 1942. The appointment of a new commission was not required. An examination of the proceedings contained in the record shows that the zoning regulations and plan were in compliance with statutory provisions and in all respects valid. Defendant relies on Shanahan v. Johnson, 170 Neb. 399, 102 N. W. 2d 858, to sustain his position. In that case the county board physically located and completed the construction of a drainage improvement and paid for the same in full, all without complying with statutory conditions precedent to its authority to do so. Upon a holding that the assessment of the cost thereof to adjoining landowners was void, the county board attempted to correct its invalid proceedings by doing subsequently what it was required to do before it could properly assume

any authority to act. This court held, under such circumstances, that a county board has no statutory power to make a reassessment after the previous assessment to pay the cost of a drainage improvement had been declared void by a court of competent jurisdiction. The case does not resemble the situation we have before us in the present case.

It is contended by defendant that he was using the lands in question as a trailer court before April 17, 1959, the effective date of the zoning regulations, and that he was entitled to a nonconforming use of the property involved as a trailer court to the extent to which it could be so used, to wit, 59 house-trailer spaces. The trial court found that 29 trailer spaces had been put to use prior to April 17, 1959, and limited defendant's right to a nonconforming use, except by permit, to 29 trailer spaces. The defendant asserts that the trial court was in error in so limiting his nonconforming use.

It is fundamental that a zoning regulation may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning regulation cannot deprive the owner of a use to which his property was put before the zoning regulation became effective. City of Omaha v. Glissmann, 151 Neb. 895, 39 N. W. 2d 828. The question presented by the present case is the extent of the nonconforming use to which defendant is entitled by virtue of the use to which the property had been put prior to the enactment of the zoning regulations on April 17, 1959.

The evidence in this case shows that defendant was the owner of the 20-acre tract of land described in the pleadings. All except 3 acres were used in connection with an out-door theatre operation. Prior to April 17, 1959, the effective date of the zoning regulations, defendant had used a part of the 3-acre tract as a trailer court. The 3 acres consisted of a strip of ground along the north end of the tract and a larger plot of ground lying to the northwest of the theatre operation. These

two tracts were contiguous and were used in conjunction for trailer-court purposes. Prior to April 17, 1959, 8 trailers had been installed in the north strip. Of these 8 trailers, 5 had been connected with power, telephone, water, and sewer facilities, 1 trailer was supplied with power, and 2 were not connected with any of these services. In the northwest plot, 5 trailers had been installed, all of which had been connected with telephone, power, water, and sewer services. The evidence further shows that sewer and water taps had been provided for 12 trailers in the north strip and 17 in the northwest plot. The evidence further shows that defendant had staked out 59 spaces for trailers on the 3-acre tract. Water and sewer mains were laid which connected both locations. Septic tanks had been installed to handle the sewerage. Defendant expended approximately $3,200 for labor and materials in establishing the trailer court before April 17, 1959. The water and sewer mains were constructed in a manner consistent with a full use of the 3 acres as a trailer court. Power and telephone service was available for the 3-acre tract.

Plaintiff's building inspector and a member of the zoning commission inspected the property on April 16, 1959, the day before the effective date of the zoning regulations. Their evidence is substantially the same as that of defendant as to the number and location of trailers on the 3-acre tract on that date. They did not observe the sewer outlets and water taps testified to by the defendant and his witnesses. They saw no boundary stakes which a witness for defendant testified had been removed at that time to permit mowing of the unused ground. We think under this evidence the defendant had acquired a vested right to a nonconforming use of the 3-acre tract as a unit for a trailer court prior to the effective date of the zoning regulations. Lamb v. A. D. McKee, Inc., 10 N. J. Misc. 649, 160 A. 563.

The question presented in the instant case is whether

or not prior to the effective date of the zoning regulations defendant had performed such work, expended such funds in its development, assumed such liabilities, and made such commitments on the 3-acre tract of land that he had acquired a vested interest in a nonconforming use, permitting him to complete the project irrespective of the zoning regulations. It is clear that where none of these factors exists, no vested right to a nonconforming use exists. But where improvements have been made, or contracts entered into, while the owner was violating no law, ordinance, or regulation, the question is whether or not such improvements or contracts are sufficient to establish a vested nonconforming use. City of Omaha v. Glissmann, *supra*. The evidence heretofore recited is clearly sufficient to sustain a vested nonconforming use of the 3-acre tract as a unit for a trailer court.

A nonconforming use is the use of a building or land in a manner that does not agree with the regulations in the zoning district in which it is situated. By the terms of the zoning regulations, nonconforming uses existing at the time of their adoption can be continued. Under the evidence in this case defendant had made use of the 3-acre tract as a unit for a trailer court before the effective date of zoning regulations. Open areas in connection with an improvement existing at the time of the adoption of zoning regulations are exempt from such regulations as a nonconforming use, if such open areas were in use or partially used in connection with the use existing when the regulations were adopted. A contemplated or intended use, standing alone, is not sufficient. In other words, where a trailer-court project is partially completed when zoning regulations become effective, and the evidence is clear as to the extent of the project, the completed project will ordinarily determine the scope of the nonconforming use.

The general rule is: "'As understood in the ordinance, "existing use" should mean the utilization of the

premises so that they may be known in the neighborhood as being employed for a given purpose; i. e., the conduct of a business. Ordinarily an existing use for business combines two factors: (a) Construction or adaptability of a building or room for the purpose, and (b) employment of the building or room or land within the purpose.'" Chayt v. Board of Zoning Appeals, 177 Md. 426, 9 A. 2d 747. See, also, Haller Baking Company's Appeal, 295 Pa. 257, 145 A. 77; Board of Supervisors of Scott County v. Paaske, 250 Iowa 1293, 98 N. W. 2d 827; Village of Skokie v. Almendinger, 5 Ill. App. 2d 522, 126 N. E. 2d 421; City of Omaha v. Glissmann, *supra.*

In the Village of Skokie case it is held that the right to a nonconforming use under zoning regulations is a property right, and any statute or law purporting to take away that right is invalid.

In Board of Supervisors of Scott County v. Paaske, *supra,* the court said: "It is impossible to fix a definite percentage of the total cost which establishes vested rights and applies to all cases. It depends on the type of the project, its location, ultimate cost, and principally the amount accomplished under conformity. Each case must be decided on its own merits, taking these elements into consideration."

We think the trial court was in error in limiting defendant's nonconforming use of the 3 acres as a trailer court. The judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

MID-AMERICA APPLIANCE CORPORATION, A CORPORATION, APPELLEE, V. FEDERATED FINANCE COMPANY, A PARTNERSHIP, APPELLANT, IMPLEADED WITH CONSUMERS MART, INC., A CORPORATION, APPELLEE.
109 N. W. 2d 381

Filed May 26, 1961. No. 34949.

1. **Assignments.** An assignee generally acquires no greater right than that possessed by the assignor.
2. ———. An assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed as modified.*

Wagener, Marx & Galter, for appellant.

Viren, Emmert, Hilmes & Gunderson and *Eleanor Knoll Swanson,* for appellee Mid-America Appliance Corp.

Emory P. Burnett, for appellee Consumers Mart, Inc.

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

BOSLAUGH, J.

This is an action for an accounting brought by Mid-America Appliance Corporation, the appellee, who will be referred to as plaintiff, against Federated Finance Company, the appellant, who will be referred to as defendant. The plaintiff recovered judgment in the sum of $4,285.57 in the trial court. The defendant's motion for new trial was overruled, and the defendant appealed.

The defendant's assignments of error are, in substance, that the court erred in permitting the plaintiff to recover. In an appeal in an action in equity the issues of fact complained of are tried de novo and the court will reach an independent conclusion without reference to the findings of the district court. § 25-1925, R. R. S. 1943.

The evidence consists of stipulations, several exhibits, and the testimony of J. L. Caplan, a partner in Federated Finance Company, the defendant.

The evidence shows that in February 1953, Earl Burnett, Jr., representing Consumers Mart, Inc., a corporation, talked with Caplan about establishing a finance connection with the defendant. Consumers Mart was looking for someone to purchase its installment paper, consisting of conditional sales contracts, and to finance its inventory of appliances under a floor-plan arrangement. The defendant agreed to purchase installment paper from Consumers Mart upon a selected basis, with full recourse. That meant that the defendant would consider installment paper offered to it by Consumers Mart upon an item-by-item basis and that the defendant was not obligated to purchase any paper offered to it. It was further agreed that the defendant would withhold a part of the amount due Consumers Mart on each item purchased which would be credited to a reserve account and held by the defendant as a protection "against any and all liabilities" arising between Consumers Mart and the defendant. The reserve accounts have remained in the hands of the defendant and under its control at all times. The defendant did not enter into a floor-plan arrangement with Consumers Mart until July 1954.

On November 19, 1953, Consumers Mart executed and delivered its promissory note to the plaintiff in the amount of $6,320.68. The note was due 5 years after date. On May 28, 1955, Consumers Mart paid $3,000 on the note. Consumers Mart has been insolvent since this action was commenced.

To secure the payment of its note, Consumers Mart executed and delivered to the plaintiff a written assignment of any reserve accounts due and owing to it by the defendant and State Securities Company. The assignment was made "subject to the right, title and interest of the said finance companies in the said reserve

accounts" and "subject to the condition, that the said State Securities Co. and Federated Finance Co. have some right, title or interest therein by virtue of the purchase from us of deferred payment obligations which gave rise to the said reserves and deferred payment certificates." The assignment also provided that in the event of the insolvency of the maker or default on the note, the holder of the note was authorized to collect the collateral. There is no evidence that the plaintiff made any demands upon the defendant until this action was brought.

On November 21, 1953, a written notice of the assignment was delivered to the defendant. The notice stated that the defendant was "authorized and directed to hold the said reserve accounts" for the plaintiff.

As of November 21, 1953, the balance of the reserve accounts held by the defendant amounted to $9,204.20. Thereafter $739.93 was added to the reserve accounts and $7,991.86 was withdrawn. Of the amount withdrawn, $33 represented losses on paper purchased after November 21, 1953, and $1,508.36 for loss resulting from the floor-plan arrangement.

The defendant admits that it holds $1,954.77 which may be applied to the indebtedness between the plaintiff and Consumers Mart. The controversy is over the defendant's right to charge $1,508.36 loss from the floor-plan arrangement and $33 loss from contracts purchased after November 21, 1953, to the reserve accounts.

An assignee generally acquires no greater right than that possessed by the assignor. Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N. W. 2d 458. The assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor. Babson v. Village of Ulysses, 155 Neb. 492, 52 N. W. 2d 320.

The assignment from Consumers Mart conveyed to the plaintiff only the rights that Consumers Mart had in the reserve accounts. Thus, the real inquiry in this case is what rights did Consumers Mart have in the reserve

accounts held by the defendant on the date of the assignment.

The undisputed evidence is that "the function of that reserve account was to protect us against any and all liabilities arising between their company and our company. Between Consumers Mart and Federated Finance Company, if you prefer." Consumers Mart had no absolute right to any part of the balance in the reserve accounts until all liabilities, contingent or otherwise, between Consumers Mart and the defendant had been ascertained and discharged.

The reserve accounts were intended to protect the defendant against liabilities from future transactions as well as past transactions. Consumers Mart and the defendant contemplated a floor-plan arrangement at the time the reserve accounts came into being. Consumers Mart wanted a floor-plan arrangement from the first but the defendant was not willing to make such an arrangement until after Consumers Mart had built up a reserve account. There is no evidence as to any provision in the agreement permitting Consumers Mart to withdraw any part of the balance in the reserve accounts while the defendant was purchasing paper from Consumers Mart.

The plaintiff contends that after notice of the assignment, the defendant had no right to continue to purchase installment paper, enter into the floor-plan arrangement, and charge the losses resulting from these transactions against the reserve accounts. The difficulty with this position is that it assumes that the assignment of the reserve accounts changed the rights of the defendant in the reserve accounts. To sustain the plaintiff's position it would be necessary to say that the defendant had less rights in the reserve accounts after the assignment than before. This would amount to giving the plaintiff some of the defendant's rights in addition to those which it obtained from Consumers Mart.

The parties have not cited and our attention has not

been directed to any case involving an identical fact situation. However, Grossi v. Rialto Security Corp., 273 N. Y. 403, 7 N. E. 2d 836, involved a somewhat similar fact situation. In the Grossi case the defendant had entered into an accounts receivable financing agreement with a shoe company. Unlike the agreement in the case at bar, the shoe company had agreed not to apply for advances on accounts receivable from any source other than the defendant Rialto Security Corporation and all such advances were to be made by the defendant. The agreement also provided for the assignment of accounts receivable to the defendant, and the defendant had the right to apply money collected from one group of accounts to a deficiency existing in any other group of accounts. The plaintiff was the assignee of a group of accounts that had been previously assigned to the defendant, and the plaintiff's assignment was made subject to rights of the defendant. A controversy arose when the group of accounts assigned to the plaintiff produced a surplus of $750 and the defendant sought to apply this surplus to a deficiency in a group of accounts assigned to the defendant after notice of the plaintiff's assignment. The New York court held that the factoring agreement was a continuing one and that the assignment from the shoe company to the plaintiff could not deprive the defendant of its right to make up any deficiency out of all accounts, whether assigned before or after the assignment of the defaulting accounts, and to make additional advances to spread its risk.

Cronkleton v. Hastings Theatre & Realty Corp., 134 Neb. 168, 278 N. W. 144, cited by the plaintiff, did not involve a similar fact situation. In the Cronkleton case the court held that rent accruing under a lease to the payee of certain nonnegotiable notes could not be set off against an assignee of the notes. The notes had been assigned approximately 8 years before the first of the series became due and the rent was not delinquent at the time of the assignment. The court held that the

parties had not made an arrangement for mutual credit.

The plaintiff is entitled to judgment in the amount of $1,954.77, with interest at 6 percent per annum from May 5, 1960. All costs should be taxed to the plaintiff. The judgment of the district court should be modified to conform to this opinion, and as so modified is affirmed.

AFFIRMED AS MODIFIED.

EVERETT SATTERFIELD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

109 N. W. 2d 415

Filed May 26, 1961. No. 34964.

1. **Judgments.** It is proper for a court to make an entry nunc pro tunc in order to correct its records so that they shall speak the truth.
2. **Constitutional Law: Statutes.** Legislation applicable alone to a portion of the state is not for that reason forbidden by the Constitution when there is a reasonable relation between the objects of the legislation and the area to which it is applicable.
3. **Criminal Law: Venue.** The Legislature may properly establish venue for prosecutions under the brand act in the county of origin of the cattle or in the counties through which the cattle pass in leaving the brand area.
4. **Statutes: Administrative Law.** The exercise of a legislatively-designated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations and standards, is not an exercise of legislative power. It is administrative in its nature, and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended.
5. **Criminal Law.** A person charged with the commission of a crime who has reached the age of accountability is conclusively presumed to know the law of the land, including both common law and statutory law.
6. ———. Ignorance of the law excuses no one.
7. **Juries.** Objections to the mode of selecting petit jurors must be made before the trial to be of any avail.

ERROR to the district court for Loup County: ERNEST G. KROGER, JUDGE. *Affirmed as modified.*

E. L. Vogeltanz, for plaintiff in error.

Clarence A. H. Meyer, Attorney General, and *Dwain L. Jones,* for defendant in error.

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

SPENCER, J.

This is an appeal from a conviction for transporting cattle from within the brand area to a point outside without first having a brand inspection.

The plaintiff in error, Everett Satterfield, hereinafter referred to as defendant, lists 24 assignments of error, nearly all of which are either not discussed or are improperly presented. Rule 8a2(4), Revised Rules of the Supreme Court of Nebraska, 1960, provides: "Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paraghaphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned." This rule disposes of most of defendant's assignments. However, we will hereinafter discuss all of the principal ones.

The defendant, on December 1, 1959, hired a trucking firm to transport branded cattle from Loup County, Nebraska, inside the brand area, to a ranch 17 miles east of St. Paul in Merrick County, which is outside the brand area. No brand inspection was made of the cattle. A brand inspector learned of this violation and caused a brand inspection to be conducted. On January 29, 1960, a complaint was filed against defendant in the county court of Loup County. A jury found the defendant guilty as charged, and he was fined $50 and ordered to pay the costs.

He appealed to the district court for Loup County, and

was found guilty by a jury. He was sentenced to pay a fine of $200 and costs, and to serve a term of 30 days in the county jail, which jail sentence was suspended. He appealed to this court.

The complaint on which defendant was tried in the district court did not bear a filing stamp until after the trial. There is no question it was in the court before and during the trial, but that the clerk of the district court neglected to place a filing stamp on it. Before the trial, defendant waived arraignment and entered a plea of not guilty to the complaint. After the trial the court entered a nunc pro tunc order to the effect that the complaint and original papers in the county court were admittedly filed October 24, 1960, before the defendant's plea, but that the clerk, through inadvertence and oversight, did not place the filing stamp upon them, and directed her to do so showing their filing as of October 24, 1960.

In Fisher v. Minor, 159 Neb. 247, 66 N. W. 2d 557, we said: "It is proper for a court to make an entry nunc pro tunc in order to correct its records so that they shall speak the truth."

As early as Garrison v. People, 6 Neb. 274, a rape case in which the clerk had failed to journalize an entry, we said: "Courts retain authority over their records after the entry of judgment, and possess authority to supply a record which has been lost or destroyed, and in doing so must be governed by the rules of evidence. A court may amend its record to correspond with the facts, and this may be done from the judge's notes, or any other satisfactory evidence." The defendant could not have been prejudiced by the failure of the clerk to stamp the complaint to show its filing date. The entry nunc pro tunc was entirely proper.

Defendant at several stages attempted to raise the constitutionality of sections 54-141 and 54-143, R. R. S. 1943. Section 54-143, R. R. S. 1943, provides as follows: "No owner, shipper, person, persons, firm, motor car-

rier, railroad company or other carrier or corporation or his, her, its or their agent or agents or servant or servants, shall move, drive, ship or transport, in any manner, any cattle from any point within the brand area to any point outside the brand area, unless such cattle shall first have a brand inspection by the Nebraska Brand Committee; Provided, if the line designating the brand area divides any ranch or farm, written permission may be given, at the discretion of the Nebraska Brand Committee, to the owner or owners of cattle on such ranch or farm to move the cattle in and out of the brand area without inspection. In cases of prosecution for violation of this section, venue may be established in the county of origin or any other county through which the cattle may pass in leaving the brand area."

Section 54-141, R. R. S. 1943, provides as follows: "The committee shall have the power and authority to pass rules and regulations relating to the administration of, but not inconsistent with the provisions of sections 54-134 to 54-156."

Defendant has restricted the issue of constitutionality to the above two sections. Consequently, we are restricting our discussion to them.

Defendant contends that section 54-143, R. R. S. 1943, provides a different right for people in different parts of the state and is discriminatory between citizens of the state. There is no question but that the act sought to remedy an evil existing in a certain area and operates equally upon all persons located within that area. The area included in the act represents the cattle and range area of Nebraska. As such, it can be readily distinguished from the rest of the state.

In McFadden v. Denter, 118 Neb. 38, 223 N. W. 462, this court said: "Stock raising affects the general supply of food everywhere and calls for legislative protection. It has already been held that 'protecting the sources of food supplies is a legitimate function of government.'" We hold that legislation applicable alone

to a portion of the state is not for that reason forbidden by the Constitution when there is a reasonable relation between the objects of the legislation and the area to which it is applicable.

Without the inspection provided by section 54-143, R. R. S. 1943, of cattle leaving the brand area, the brand law would be ineffective. It is an essential part of the enforcement of the act.

The act affects all persons and not merely those who maintain residence in the area, and cannot be considered to be special legislation. In Bauer v. State Game, Forestation & Parks Commission, 138 Neb. 436, 293 N. W. 282, we held: "A statute is not special or local merely because it prohibits doing a thing in a certain locality. It is, notwithstanding this fact, a general law if it applies to all the citizens of the state, and deals with a matter of general concern."

Defendant argues that the provision of section 54-143, R. R. S. 1943, providing for trials in various counties, deprives defendant "of personal privilege and personal liberty, in having to be tried in some county not his residence." The defendant also argues that this provision is an unreasonable delegation of legislative authority to bring an action in any county. Defendant misconstrues the section. It is the Legislature which has established the venue "in the county of origin or any other county through which the cattle may pass in leaving the brand area." The act of transporting cattle is a continuing one. The violation is as improper in any county through which the cattle pass as it is in the county of origin.

Defendant contends further that no crime was committed in Loup County. The moving, shipping, and transporting of cattle from one point within the brand area without inspection brings the act into operation. The point of origin was Loup County. The action was properly brought in Loup County, the county of defendant's residence.

The defendant also argues that: "Sec. 54-143 describes the location of the brand area but leaves entirely to the Nebraska Brand Committee the inspection regulations and thus delegates and grants to an administrative agency legislative power." This statement from defendant's brief is not argued further or supported in any way by a reference to regulations alleged to be an exercise of legislative power by an administrative agency. Certainly defendant's mere statement of a conclusion is not sufficient to overcome a presumption of constitutionality. In any event, we believe the following from Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227, states the applicable rule: "The exercise of a legislatively-delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations and standards, is not an exercise of legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended."

The defendant contends that instruction No. 5 of the trial court's instructions is improper because it tells the jury that the defendant is presumed by law to know that Loup County was in the brand area and that Merrick County was outside such area. This is not further discussed in the defendant's brief. We refer to it in passing, although we have ignored other like assignments, because of defendant's attempt at the trial to offer ignorance of the law as a defense. Suffice it to say that a person charged with the commission of a crime who has reached the age of accountability is conclusively presumed to know the law of the land, including both common law and statutory law. 22 C. J. S., Criminal Law, § 586, p. 901.

In City of Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293, we said: "Ignorantia juris neminem excu-

sat (Ignorance of law excuses no one) is a maxim sanctioned by centuries of experience."

Defendant filed a supplemental motion for new trial, attacking a jury panel which was drawn from the primary poll books rather than those of a general election. It has frequently been held by this court that provisions of statute relating to the selection of grand and petit jurors are mandatory and must be strictly followed. However, here the objection came too late.

In Brown v. State, 9 Neb. 157, 2 N. W. 378, it was held that as the law then stood, a district judge in calling a special term of court had no authority to order the sheriff to summon grand and petit jurors, but it was held that an objection to the mode of selecting the jury must be made by challenge or plea in abatement, and that after the accused had pleaded to the indictment it was too late to object that the jurors were not legally summoned.

In Davis v. State, 31 Neb. 247, 47 N. W. 854, we held: "Objections to the mode of selecting petit jurors must be made before trial to be of any avail."

There can be no question on the record presented but that the defendant received a fair trial. The trial court fully protected his rights at all stages of the proceedings, and all rulings made during the trial are strictly in accord with the law. The statute for the offense involved provides a penalty of a fine of not less than $50 and not more than $500, imprisonment in the county jail not to exceed 6 months, or both, in the discretion of the trial court.

The trial court, after passing sentence, attempted to suspend the jail term. Under the circumstances of this case, we find the imposition of a jail sentence is excessive. Under the authority of section 29-2308, R. R. S. 1943, the sentence is reduced to the payment of a fine of $200 and the costs of the action, and the judgment of the trial court is in all other respects affirmed.

AFFIRMED AS MODIFIED.

IN RE GUARDIANSHIP OF RONALD JAMES EDWARDS, A MINOR. ROBERT S. FINN, GUARDIAN AD LITEM FOR RONALD JAMES EDWARDS, APPELLEE, V. MABEL OLA WHITTEN, GUARDIAN FOR RONALD JAMES EDWARDS, A MINOR, AND WESTERN SURETY COMPANY, SIOUX FALLS, SOUTH DAKOTA, A CORPORATION, APPELLANTS.
109 N. W. 2d 376

Filed June 2, 1961. No. 34917.

1. **Trial: Judgments.** A summary judgment may be properly rendered only if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
2. **Guardian and Ward.** The county court has jurisdiction to examine and judicially ascertain the status of the account of a guardian.
3. **Guardian and Ward: Appeal and Error.** The district court on appeal has jurisdiction to examine and judicially ascertain the status of the account of a guardian.
4. ———: ———. Neither the county court nor the district court on appeal has jurisdiction to render a money judgment against the guardian and in favor of the guardianship estate in the absence of proceedings involving finality of accounting at the time or ultimate finality in the county court.

APPEAL from the district court for Johnson County: VIRGIL FALLOON, JUDGE. *Reversed and remanded.*

Raymond B. Morrissey and *Thomas L. Morrissey,* for appellant Whitten.

William L. Walker and *Earl Ludlam,* for appellant Western Surety Co.

Robert S. Finn, for appellee.

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

YEAGER, J.

This is an action which, as it appears, originated in the county court of Johnson County, Nebraska, by the filing of an application of Mabel Ola Whitten, who will

hereinafter be referred to as appellant, guardian of Ronald James Edwards, to have approved a guardian's account filed on April 1, 1959. This appears by recital only. The account, if any was filed, does not appear in the record before this court, and neither does anything authentically representing it. It appears that this was not a final but an interim or current account covering the period beginning November 1, 1957, and ending November 1, 1958. As it appears Robert S. Finn, who will be hereinafter referred to as appellee, denominated guardian ad litem of Ronald James Edwards, filed objections to the report. Apparently the account was submitted to the county court for consideration where the account was disapproved and judgment was rendered against the appellant and in favor of the appellee. Apparently from the judgment appellant took an appeal to the district court. The term "apparently" is employed since nothing authentically appears in the record before this court to indicate what was presented to the county court or what judgment was there entered. There is no transcript from that court presented here.

In the district court the appellant filed a petition for the approval of a guardian's account which she declared contained a copy of her report made to the county court on April 1, 1959. To this report the appellee filed objections in which he prayed for an order finding that the appellant was indebted to the estate of Ronald James Edwards in the amount of $2,125; that the appellant be directed to reimburse the estate in that amount; and that for failure so to do the surety on appellant's bond should be required to make up the shortages with statutory interest from the time of the defalcations. Thereafter the appellee submitted to appellant requests for admissions which requests were responded to by the appellant. This was followed by a motion made by the appellee for a summary judgment.

The appellant filed objections in which she declared that summary judgment was not proper. The pertinent

declared reason was in substance that there was an issue as to the extent, if any, of the shortage in her account as a whole as guardian which could not be ascertained except by a trial, in consequence of which no proper summary judgment could be rendered.

The case came on for hearing and a summary judgment was rendered in favor of appellee for $1,478.07 with interest at the rate of 3 percent per annum from May 18, 1951, $146.93 with interest at the rate of 3 percent per annum from December 7, 1953, and $500 with interest at the rate of 3 percent per annum from April 18, 1956.

A motion to vacate the summary judgment or in the alternative for a new trial was filed. The motion for new trial was overruled. From the order overruling the motion and from the judgment the appellant prosecutes this appeal. There are numerous assigned grounds for reversal but in the view taken of the record it is deemed necessary to refer to only one of them specifically. That one is that the court erred in its finding and judgment that there was no genuine question of fact presented, and that on that account the appellee was entitled to a summary judgment.

A summary judgment may be properly rendered only if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See, § 25-1332, R. R. S. 1943; Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299; Fidelity & Deposit Co. v. Bodenstedt, 170 Neb. 799, 104 N. W. 2d 292.

Within the meaning of this exaction the record before the court disclosed that the appellant disbursed the amounts of money which the appellee contends were disbursed and for which the judgment was rendered from the guardianship estate at the times indicated and for the purposes alleged, and in effect that she was obligated to account therefor to the estate. The answers

of appellant to the interrogatories make her obligation clear and unmistakable.

There was however nothing in the pleadings or proceedings before the court or otherwise upon which to adjudicate the question of whether or not her account as a whole as guardian would sustain a summary money judgment in the amount for which judgment was rendered or in fact for any amount. This was an issue raised by the appellant and of course a determination could not be made on it without a proper trial.

It is true that the county court had jurisdiction to examine the account of the appellant and judicially ascertain its status. See Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. S. R. 627. It is also true that the district court had the same jurisdiction on appeal. It does not follow however that either had the right to render a money judgment against the guardian in favor of the estate in the absence of accounting where accounting becomes an issue as it did in this case.

There is nothing in the record here to indicate that whatever judgment was rendered in the county court or in the district court was made with reference to proceedings involving either finality of accounting at the time or total and ultimate finality.

Under a well-established rule no action can be maintained on a guardian's bond until the amount due thereon is ascertained by the county court. See, Bisbee v. Gleason, 21 Neb. 534, 32 N. W. 578; Langdon v. Langdon, 104 Neb. 619, 178 N. W. 178; In re Estate of Montgomery, 133 Neb. 153, 274 N. W. 487.

It appears to follow reasonably, logically, and necessarily that if a final accounting in the county court is essential to a judgment against a surety on a guardian's bond that the liability of the guardian as principal for a money judgment must depend at least upon a complete accounting at the time the liability is sought to be established. Without this there could be no way of arriving

at the true amount for which judgment should be rendered.

It must be said therefore that there was a genuine issue as to a material fact presented in this case on which a judgment could not be rendered as a matter of law on the pleadings, depositions, admissions, and affidavits which were on file in the case, and the district court erred in rendering the summary judgment.

It is observable that Western Surety Company, Sioux Falls, South Dakota, a corporation, is denominated an appellant on this appeal. Previous reference to it has been avoided since it was never made a party, but appears to have joined the appellant without authorization of any kind. It appears that it is surety on the appellant's bond but in nowise a party to the action. No costs should be taxed in its favor.

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

REVERSED AND REMANDED.

SPENCER, J., dissenting.

I cannot agree with the opinion for the following reasons: (1) We are permitting the appellant to benefit from her failure to file a complete record and in essence putting the burden of a complete record on the appellee; (2) there is no genuine issue as to any material fact involved herein; and (3) appellant is liable for the shortages listed as a matter of law.

Supplementing the facts set out in the opinion, there is no transcript from the county court attached to this record. The appellant, who was the guardian of the minor, on August 11, 1959, filed a petition for approval of the guardian's account in the district court. This petition recited that the guardian on April 1, 1959, filed a report and accounting and that a copy of said annual report is set forth in the *transcript filed herein.* The petition further had attached a copy of the report which was marked exhibit A and made a part of the petition. Objections were filed by Robert S. Finn, guardian ad

litem. These objections recite that he was appointed by the county court of Johnson County as guardian ad litem for the minor. The objections were filed July 31, 1959, or 11 days before the petition, apparently sometime after the transcript on appeal was filed. This pleading of the guardian ad litem objected to the reports on file of the guardian insofar as they reflected shortages alleged to exist. Subsequent to the filing of the petition of the appellant, the guardian ad litem, hereinafter referred to as appellee, filed requests for admissions. Answers were filed by the appellant November 24, 1959. The appellee, on December 4, 1959, filed a motion for summary judgment and attached thereto a copy of a petition and application filed by the appellant in the Lewis E. Laflin estate in county court. This attached petition and application sought to recover from the Laflin estate for the money belonging to the ward which the appellant had turned over to Lewis E. Laflin, her former attorney, and for which she admits she has not accounted to her ward. Appellant filed an affidavit in resistance to the motion for summary judgment. In the affidavit, appellant admits that she has not accounted for the shortages resulting from funds which were turned over to her attorney for the purchase of bonds. She alleges that all the liability for the shortages in said guardian's accounts is the primary and direct responsibility and liability of Lewis E. Laflin, her former attorney.

It was the appellant who appealed from the county court. It was the appellant who had the responsibility to see that a proper transcript was filed in the district court. It certainly should have been the responsibility of the appellant to file a proper record in this court.

If the transcript had not been properly authenticated, this court would not acquire jurisdiction. Brockman Commission Co. v. Sang, 52 Neb. 506, 72 N. W. 856. Why should the rule be different if a clearly deficient record or transcript is filed?

Because of the reference to the county court transcript in appellant's petition, it can be assumed one was on file in the district court. If, however, no transcript was filed in the district court, the district court would have been without jurisdiction to hear the appeal, and, of course, if the district court was without jurisdiction, this court should have been without jurisdiction.

We said as late as Anania v. City of Omaha, 170 Neb. 160, 102 N. W. 2d 49: "An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law."

A county court has original and exclusive jurisdiction in guardianship matters. Olsen v. Marsh, 142 Neb. 800, 8 N. W. 2d 169.

We have said many times that a guardianship matter is a probate matter. In re Guardianship of Hergenrother, 141 Neb. 858, 5 N. W. 2d 118. In In re Guardianship of Warner, 137 Neb. 25, 288 N. W. 39, we said that the statute dealing with appeals in probate matters is applicable to guardianship proceedings.

Section 30-1606, R. R. S. 1943, directs that upon the filing of the transcript from the county court in the district court, that court shall be possessed of the action and shall proceed to hear, try and determine the same in like manner as upon appeals brought from the county court in civil actions. It is the filing of the transcript from the county court in the district court which confers jurisdiction upon the district court. Rhea v. Brown, 4 Neb. (Unoff.) 461, 94 N. W. 716.

As early as Galley v. Knapp, 14 Neb. 262, 15 N. W. 329, we said: "Every case submitted to this court for review should contain a transcript of the pleadings constituting the issue tried in the district court, otherwise the judgment of the court below will be affirmed."

In Badger Lumber Co. v. Mayes, 38 Neb. 822, 57 N. W. 519, we said: "* * * some consideration is due to the court, and that appellants should at least be required

to present to this court a record written in a legible manner and arranged in such a way that the court may ascertain upon whose part the different portions of the evidence were offered, if not the order in which they were received, and also without the difficulty of solving an enigma determine (determining) what evidence was before the trial court, and what excluded. If the appellants fail to do this, this court should presume, in matters not clearly appearing, that there was evidence justifying the trial court in its findings."

As I view this record, the appellant did not file a proper transcript. It is the appellant who has failed to make a case to sustain her appeal. Her appeal should be dismissed. The effect of the opinion is to reward appellant because of her failure to bring up the jurisdictional part of the record. The appellant has not raised the question of jurisdiction in any way. In view of the fact that the appellee is the representative of a minor attempting to force a fiduciary to account to her ward, it would make much more sense to require a diminution of the record than to penalize the appellee for the appellant's omission.

The opinion further appears to suggest that a final accounting in county court is essential to a judgment against a surety on a guardian's bond. That was the law previous to 1951. In 1951, the Legislature passed Legislative Bill No. 150 (Laws 1951, c. 54, p. 184), which is now found in the Reissue Revised Statutes of 1943, sections 24-606 to 24-618). That act made it possible for guardians to have interim accountings which would have the legal finality of a final accounting. I suggest that the cases cited in the opinion are no longer applicable and that we are justified in assuming, in the absence of the transcript, that the alleged annual report was such interim accounting. The appointment of a guardian ad litem in county court would certainly indicate such was the case. If it is to be assumed that this court has jurisdiction, then the judgment should be affirmed.

A review of the pleadings which do appear in the record indicates that there is no genuine issue of fact. The appellant has admitted she received the amounts for which she has been surcharged. She admits that she turned these amounts, without the approval of the county court, over to her attorney for investment in bonds, and that she never secured the bonds from him. In her affidavit she attempts to suggest that the attorney should be held as a trustee because of the trust and confidence she reposed in him, and that the primary liability herein is that of his estate and is not hers.

There can be no question but that the primary liability is that of the guardian, and that her liability is not in any manner dependent upon her ability to recover from the Laflin estate. In my judgment the appeal herein should be dismissed for want of a proper record.

MARILYN J. MISLIVEC, APPELLANT, V. MELVIN J. MISLIVEC, APPELLEE.
109 N. W. 2d 393

Filed June 2, 1961. No. 34927.

1. **Divorce.** Condonation is forgiveness for the past upon the condition that the wrong will not be repeated. Condonation is complete if there is a resumption of marital relations after the breach of marital duty.
2. ———. The absence of a plea of condonation does not bar its consideration and application by the court if the proof affords a proper basis for it.
3. ———. No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose.
4. ———. It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances.
5. **Divorce: Attorney and Client.** There is no authority in a divorce suit to assess or tax attorney's fees except as expressly

provided by statute and there is no provision for their allowance against the wife nor to fix those which the husband is to pay his own attorneys.

APPEAL from the district court for Douglas County: HERBERT RHOADES, JUDGE. *Reversed and remanded with directions.*

Shotwell, Marchetti & Samson, for appellant.

Burbridge & Burbridge, for appellee.

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

BROWER, J.

This is an action by Marilyn J. Mislivec, plaintiff-appellant, hereinafter called the plaintiff, praying for an absolute divorce on the ground of extreme cruelty, temporary and permanent support money and alimony, and that the court decree the title to the real estate and all personal property in the plaintiff. The answer was a general denial coupled with a cross-petition which alleges that the plaintiff was guilty of extreme cruelty towards the defendant. It prays for an absolute divorce, custody of the children, and an accounting of the property of the parties.

The trial, beginning in October 1959, was not concluded until March 1960. On March 31, 1960, a decree was entered finding the plaintiff entitled to an absolute divorce and custody of the three children with reasonable visitation allowed the defendant. The court directed the defendant to pay for the support of each minor child the sum of $9 a week; and found the title to the parties' jointly-owned home should remain as then owned. The personal property at the home was given to the plaintiff except the property that was used by the defendant in caring for lawns. The court directed the plaintiff to pay her attorneys $500 and the defendant to pay his attorneys $500, and directed each party to pay his own costs.

Plaintiff filed a motion for new trial and upon its being overruled appealed to this court. Defendant did not appeal on his cross-petition. The plaintiff assigns 17 errors of the court below most of which, in view of our disposition of the case, will not be discussed. She urges that the support allowed for the children was inadequate. She further urges that the court erred in failing to award suitable permanent alimony; in failing to dispose of the jointly-owned real estate, and to award the real estate to the plaintiff, and in failing to provide for the payment of the taxes thereon; in assessing court costs against the plaintiff; and in requiring her to pay her own attorneys and in not assessing her attorney's fees to defendant. Defendant submits questions in the nature of a cross-appeal and complains that the court granted the decree of divorce when the evidence failed to make a case provided by statute, and that the court granted the divorce when condonation was complete and there was a voluntary resumption of marital relations.

This being a divorce case and the defendant below having submitted questions in the nature of a cross-appeal objecting to the granting of the divorce and urging that condonation was complete, it is necessary for these questions to be reviewed by this court, and for that purpose to consider the evidence as disclosed by the record.

It shows the date of the marriage as 1949 and the ages of the three children as follows: Diane Marie, age 7; Melvin John, Jr., almost 4; and James Frank, 15 months, at the time of bringing this suit. The parties were both quite poor at the time of their marriage. The plaintiff had saved a little money. They lived with defendant's mother for the first 3 months after which they rented their own home. Later on plaintiff's father went to Greenland and to save money they moved in with her mother. In 1952, they bought a small home for $5,000 which is presently not worth the purchase price. It was stipulated that a real estate agent would place its pres-

ent value at only $2,750. The defendant insisted it was worth more. The only other property they had consisted of an old truck, one old car, the household furniture, and some equipment for taking care of lawns. The wife had worked in all 10 years of their married life. The defendant husband was a hard worker also but his employment was such that it did not always produce adequate returns. At the time of the marriage he was hauling ashes. He also took care of lawns with the lawn equipment which plaintiff claims to be worth about $500. At times he would make $15 or $20 a day. However, he couldn't work on the lawns in rainy weather or in winter months. In the winter he worked at Rosen-Novak. His wages as shown were $65 per week. Defendant insists his money was given to the wife daily. She admits he gave her wages, as he came home at least part of the time, but claims he withheld part of it to buy and equip his cars and trucks. It would seem clear that they paid for their modest home from both of their earnings. It was modern, though very small with adequate yard room where the children could play.

With respect to her alleged grounds of cruelty the plaintiff testified that the defendant had used intoxicating liquor and on a few occasions became intoxicated and vomited; that he used vile, obscene, and indecent language frequently; and that he spent a great deal of money on automobiles and trucks and their repair concerning which they had violent arguments. Plaintiff further alleges that during the years of their marriage defendant struck her at least five times; that on two past occasions he had wrestled her about, on one of which he set her down in a chair near the window and her arm went through the window glass and was cut; that on most occasions he would not go out with her socially; that on Christmas Eve 1951, he would not go to his parents' home with her because he didn't like some cousins visiting there; that shortly before the divorce he had allowed a man named Don Roberts who

was assisting him in his work to sleep in the basement of their home and eat at least some meals there; that Don Roberts was not clean and smelled and his presence was very annoying; that the defendant had complained without cause when plaintiff kept a small baby for 3 weeks without pay; and that he accused her of going out with other men.

The defendant contends his wife complained constantly of his failure to make more money. He testified he gave her practically all he made but she was never satisfied. The trucks were used in his business. They cost very little and he repaired them and made money by trading them to advantage. His buying of the cars was likewise profitable. He admitted he drank beer and used indecent language before getting religion. But he alleged his wife had used such language; that she struck him and threw an ash tray at him; that Don Roberts had assisted him in his work; and that he was paying him only a small amount besides his board and room.

It is admitted by both parties that the defendant went to the Church of the Four Square Gospel in July 1958. He then got religion and has never since that time used liquor in any form or vile language in any way. He thereafter attended church regularly on Sunday and on many evenings during the week, and read his Bible daily. The minister of the church testified likewise. The plaintiff who had first gone with him to church was then greatly pleased with his religious attitude, but thereafter complained in that he did not go out with her socially. She admits that at least on some occasions he would not go because they had liquor at the social events she attended. It would appear he objected to her going to social affairs where men and women drank but he did not accuse her of indiscretion with other men. She complains that he went from one extreme to the other.

Obviously the defendant's early drinking and foul

language were condoned by his wife continuing to live and cohabit with him after he got religion until immediately before filing the divorce action in July 1959.

In Sewell v. Sewell, 160 Neb. 173, 69 N. W. 2d 549, this court said: "An obstacle to the success of the case of appellee is condonation by her as a result of the foregoing recited facts of any and all breaches of marital duties by appellant to the time of their separation on the day of the institution of this case. Condonation is forgiveness for the past upon the condition that the wrong will not be repeated. Condonation is complete if there is a resumption of marital relations after the breach of marital duty. It is true that condonation is not asserted as a defense in this case, but the absence of a plea of condonation does not bar its consideration and application by the court if the proof affords a proper basis for it. Wright v. Wright, 153 Neb. 18, 43 N. W. 2d 424; Hodges v. Hodges, 154 Neb. 178, 47 N. W. 2d 361; Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299, on rehearing, 159 Neb. 56, 65 N. W. 2d 233."

In view of all the evidence, plaintiff's complaints about defendant's spending for repairs for old cars and trucks and his working upon them, and the presence of Don Roberts in the home where he stayed only a few months do not appear convincing as grounds for divorce.

It is true that the plaintiff and her mother and a friend belonging to her club testified that after the separation she appeared less nervous. It would appear, however, that plaintiff had been a very heavy smoker for 5 or 6 years. Whether the separation or discontinuance of excessive use of cigarettes caused the improvement is not clear.

It is apparent the marriage of these parties was not a happy one. They both had quick tempers and engaged in violent and needless arguments. They were at all times in straitened financial circumstances which is not conducive to even tempers. Perhaps their dispositions were not compatible, but we cannot grant divorces

for incompatibility but only in accordance with statutory authority. Cizek v. Cizek, 69 Neb. 800, 99 N. W. 28, 76 Neb. 797, 107 N. W. 1012; Brown v. Brown, 130 Neb. 487, 265 N. W. 556.

The plaintiff's testimony as to substantial matters was not corroborated. The plaintiff's mother testified in her daughter's behalf. She did not speak of defendant's drinking or mention his use of vile language or substantiate any physical violence. She did testify they had many arguments and that they had financial worries. Further she stated her daughter became nervous and depressed; and that she was better after the separation when she stopped excessive smoking.

Section 42-335, R. R. S. 1943, sets out the requirement for corroboration as follows: "No decree of divorce and of the nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose."

This court has held that corroborative evidence is required of the acts or conduct asserted as grounds for divorce. Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321. In this case the court stated: " ' "It is impossible to lay down any general rule as to the degree of corroboration required in a divorce action, as each case must be decided on its own facts and circumstances." Schlueter v. Schlueter, supra (158 Neb. 233, 62 N. W. 2d 871).' See, also, Hines v. Hines, 157 Neb. 20, 58 N. W. 2d 505."

Aside from the frequent quarrels and arguments about cars and finances we do not find any substantial misconduct of the defendant that is corroborated except that which was condoned.

We have decided the evidence does not justify a divorce to the plaintiff.

The court below directed the plaintiff to pay her attorney's fees at $500 and defendant to pay his own

attorneys $500. This latter fee has been receipted for by the attorneys on the docket and is no longer a lien on the joint real estate. The attorneys however stated in open court before us that only $100 was paid. There is no authority in a divorce suit to assess or tax attorney's fees except as expressly provided by statute and there is no provision for their allowance against the wife nor to fix those which the husband is to pay his own attorneys. O'Neill v. O'Neill, 164 Neb. 674, 83 N. W. 2d 92, 66 A. L. R. 2d 875.

Inasmuch as one of the assignments of error concerns the assessment of the attorney's fees below to the plaintiff and she seeks to have them reassessed in this court, we shall proceed to fix them though it is unusual for this court to do so as far as those in the district court are concerned. We think they should be paid by the defendant but they cannot be large. The parties are in straitened circumstances and the children must be provided for. We therefore assess the fee to be paid to plaintiff's attorney in the district court at $250, and in this court at $250, both to be paid by the defendant, together with the costs in both courts.

The judgment is reversed and the cause remanded with directions to dismiss the plaintiff's petition and the defendant's cross-petition at the costs of the defendant, including the fees fixed herein for plaintiff's attorney.

REVERSED AND REMANDED WITH DIRECTIONS.

RAYMOND ARENDS, APPELLEE, V. MERRITT WHITTEN ET AL., APPELLEES, IMPLEADED WITH SCHOOL DISTRICT NO. 39 OF OTOE COUNTY, NEBRASKA, ET AL., APPELLANTS.
109 N. W. 2d 363

Filed June 2, 1961. No. 34942.

1. **Schools and School Districts: Elections.** The special election authorized by section 79-426.15, R. R. S. 1943, is governed by

the general election laws and is subject to the contests provided in section 32-1001, R. R. S. 1943.

2. ———: ———. The county school district reorganization committee is the real party in interest in a contest over a reorganization plan submitted by them pursuant to sections 79-426.08 through 79-426.15, R. R. S. 1943, rather than the legal voters of the districts involved.

3. **Elections.** The laws regulating the privilege of absentee voting should generally receive a strict construction, for absentee voting is a privilege granted the elector and not an absolute right.

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

Wellensiek & Morrissey, William F. Davis, and *Moran & James,* for appellants.

Griffiths & Lantzy, for appellee Arends.

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

SPENCER, J.

This is an action contesting the announced result of a special election on a proposed plan for reorganization of school districts located in Otoe, Johnson, and Nemaha counties.

Appellee, Raymond Arends, hereinafter referred to as plaintiff, as an elector filed a petition to contest the announced result of the election for the reorganization of school districts Nos. 39, 51, 71, 73, 88, 91, and 106, all of Otoe County, and school district No. 29 of Johnson County. The school districts as legal entities, the county superintendent of Otoe County, the Otoe County committee for reorganization of school districts, and the members thereof, were made defendants. An answer was filed by the defendants, County Committee of the County of Otoe in the State of Nebraska for the Reorganization of School Districts, hereinafter referred to as committee, and the individual members of the committee. This answer alleged that said committee, in accordance with the laws of the State of Nebraska, ap-

pointed a subcommittee in association with the Nemaha and Johnson county reorganization committees. It alleged that this subcommittee held hearings and recommended to the committee a proposed reorganization of the area in and around Talmage, Nebraska; and that said matter was reported to and approved by the State Committee for the Reorganization of School Districts. Thereafter, said committee discussed the calling of an election, and notice was duly and legally published. The answer further alleged that the election was held on Tuesday, December 9, 1958, and the vote in the rural area, which included all of the school districts except school district No. 91, as certified by the election board and county superintendent, was 135 in favor and 135 against said reorganization; and that the vote in school district No. 91, which constituted the other unit, was 202 in favor and 4 against said reorganization. The answer of the committee and its individual members then stated that the committee would abide the order of the court. School district No. 39 filed a motion to strike plaintiff's petition, alleging it was defective and failed to state a cause of action. This motion was overruled. Thereafter, school district No. 88 and school district No. 39 both filed demurrers to the petition. The demurrers were overruled and the defendants answered over, reserving the demurrers.

The answer of school district No. 88 admitted the capacity of the parties and alleged that on December 9, 1958, within the several school districts, places were open purporting to be voting places, and voters of the several districts were given what purported to be official ballots. This defendant further alleged that certain individuals named in plaintiff's petition voted in said purported election by mail by the use of ballots furnished, and in the manner prescribed by the county committee. For further answer, this defendant alleged that it was uninformed as to all the steps taken prior to the opening of the polling places, and for that reason

denied each and every allegation not admitted to be true. This defendant further alleged that no election was ever held under the laws of Nebraska, which require certification that the alleged reorganization was approved.

The answer of school district No. 39 was exactly the same as that of school district No. 88, except that it contained an additional allegation that certain persons voted at said purported election who did not meet the qualifications required of an elector to vote at a school election. While evidence was introduced on this point, there is no specific assignment of error. In any event, we quote the following from Mehrens v. Election Canvassing Board, 134 Neb. 151, 278 N. W. 252: "In an election contest on the ground that, through 'ignorance and mistake' of election officers, enough illegal votes were cast in a voting precinct to change the result of the election, the burden is on contestant to prove the casting of the illegal votes and also the candidates for whom they were cast." This is a sufficient answer, because no attempt was made to show how the alleged unqualified voters actually voted.

A trial of the issues presented resulted in a determination that the reorganization plan was duly approved and adopted by the electors of defendant school district No. 91 voting as one unit by a vote of 200 in favor and 4 against, and was also duly approved by the electors of the remaining defendant school districts voting as one unit by a vote of 135 in favor and 130 against. The decree then directed the county superintendent to proceed with the reorganization. Defendant school districts Nos. 39 and 88 appeal to this court. Both of said school districts, who are the only appellants, will be referred to hereinafter as defendants.

Defendants list 14 assignments of error. Assignments Nos. 6, 10, 12, 13, and 14 involve the sufficiency of the preliminary proceedings or the sufficiency of the election notice or ballots. These issues at best can only be said to be presented by inference in the answers or

demurrers of the defendants. Further, the defendants offered no proof of their contentions.

We said in Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797: "An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the Supreme Court."

In any event, an examination of the record shows a substantial and sufficient compliance with the statutory provision outlining the preliminary steps to be taken in submitting a proposed school district reorganization plan to a vote at a special election. Also, in passing, we observe that the answer of the county superintendent and the individual members of the county committee affirmatively pleaded the sufficiency of the preliminary steps. These allegations were admitted in the plaintiff's reply. That answer stands unchallenged in this record.

Assignments of error Nos. 1 and 2 are necessarily involved in the other assignments and will not be discussed separately herein.

Assignment of error No. 3 questions the jurisdiction of the court to hear and determine the contest. The following are the applicable provisions of the statute on that point. Section 32-106, R. R. S. 1943, provides: "Election shall mean any primary, special, municipal, or general election, *except school election,* at which the electors of the state or of any subdivision thereof choose by ballot public officials or decide any public questions and propositions lawfully submitted to them." (Italics supplied.)

Section 32-105, R. R. S. 1943, provides: "General election shall mean the general election held in the state on the first Tuesday after the first Monday of November in every even-numbered year."

Section 32-104, R. R. S. 1943, provides: "Special election shall mean an election held out of the regular course for a specific purpose or for a particular emergency."

Section 32-716, R. R. S. 1943, provides: "The provi-

sions relating to general elections shall govern special elections, except where otherwise provided for."

Section 32-1001, R. R. S. 1943, provides: "The provisions of sections 32-1001 to 32-1036 shall apply to contests on account of a general election. The election of any person to any public office, the location or relocation of a county seat, *or any proposition submitted to a vote of the people may be contested:* (1) For misconduct, fraud, or corruption on the part of the judges of election in any precinct, township, or ward, of any board of canvassers, or any member of either board sufficient to change the result; (2) when the incumbent was not eligible to the office at the time of the election; (3) when the incumbent has been convicted of felony, unless at the time of the election he shall have been restored to civil rights; (4) when the incumbent has given or offered to any elector, or any judge, clerk, or canvasser of the election, any bribe or reward in money, property or thing of value for the purpose of procuring his election; (5) when illegal votes have been received or legal votes rejected at the polls sufficient to change the result; (6) for any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would change the result; (7) when the incumbent is in default as a collector and custodian of public money or property; or (8) for any other cause which shows that another person was legally elected." (Italics supplied.)

Section 79-426.13, R. R. S. 1943, provides: "If no recommendations for changes are made by the state committee, the proposed plan shall be submitted at a special election called and held as provided in section 79-426.15."

Section 79-426.15, R. R. S. 1943, provides in part: "(1) Not less than thirty nor more than sixty days after the receipt by the county committee of the action of the state committee, the proposition of the adoption or rejection of the proposed plan of reorganization shall be

submitted at a special election to all the electors of districts within the county whose boundaries are in any manner changed by the plan of reorganization."

It is true, as defendants contend, that Chapter 79, R. R. S. 1943, pertaining to our school laws, discloses no authority to contest a school election, and if any authority exists it must be found in Chapter 32, R. R. S. 1943.

Defendants' position is that a school district reorganization election is a school election and as such is included in the exception found in section 32-106, R. R. S. 1943, italicized above. If it is a school election, it is covered by the exception and is not subject to an election contest. If, however, it is not a school election but is a special election, then it is included within the provisions of section 32-1001, R. R. S. 1943, because section 32-716, R. R. S. 1943, provides that the provisions relating to general elections shall govern special elections.

In School District No. 49 v. School District No. 65-R, 159 Neb. 262, 66 N. W. 2d 561, which involved an attack on a school district reorganization, we held such election was not a school election and was subject to the general election laws and an election contest. Defendants attempt to distinguish that case because at the time it was commenced the special election was conducted by the election officials charged with the duty of holding general elections. This provision was changed in 1953 to provide that the county committee for school district reorganization, rather than the general election officials, shall conduct the election and appoint the officials. The statute, however, in other respects remains basically unchanged. It still provides for the apportionment of the election expenses between the counties affected, and not the school districts. Further, the election is still classified in the act as a special election, and while it pertains to a question about school districts, it is not an election held and conducted by a school district or even by school districts. It is held, conducted, and supervised by the county committee for school district re-

organization and not by school district officials. In passing, we further observe that the provisions for a special election authorized by section 79-426.15, R. R. S. 1943, apply uniformly to all classes of school districts throughout the state.

The defendants, failing to make the distinction between a school district election and a special election pertaining to a question about school districts, refer to the case of Farrell v. School Dist. No. 54, 164 Neb. 853, 84 N. W. 2d 126, as supporting their position. Properly interpreted, that case is controlling on the point involved. The action was one to enjoin the enforcement of a contract voted at an annual meeting for the instruction of pupils in another school district. In that case, we said: "With reference to School District No. 49 v. School District No. 65-R, *supra,* it will be observed that the election, by legislative mandate in that case, was not a school election, but was subject to the general election laws and, of course, to an election contest. * * * The appellees in the instant case had no cause of action by way of election contest. An election that can be contested by virtue of section 32-1001, R. R. S. 1943, does not include the voting by the legal voters of a school district, at an annual meeting, upon the proposition of contracting for instruction of pupils."

Defendants complained that the trial court erred in finding it had jurisdiction over all of the parties. If we correctly interpret defendants' position, it is that the qualified electors of the school district involved, and not the districts as legal entities, are the real parties in interest. Defendants therefore contend that all the electors in the various school districts were necessary parties to this action. They rely on Clausen v. School Dist. No. 33, 164 Neb. 78, 81 N. W. 2d 822, as supporting this conclusion. That case, which involved section 79-402, R. R. S. 1943, was one where a petition was duly filed by legal voters of one school district requesting a change of boundaries encompassing other school districts.

The petitioners initiated the proceedings, and in the petition defined the boundaries. There is no authority conferred on anyone to alter the boundaries designated in the petition. The county superintendent, after a hearing to determine if a sufficient number of legal voters signed the petition, sustained the petition. Objectors filed an action in the district court to vacate the order. This court held the signers of the petition, who had initiated the proceedings and designated the limits of the district, were the real parties in interest.

The proceedings in the instant case, however, involve sections 79-426.08 to 79-426.15, R. R. S. 1943. Summarized briefly, section 79-426.08 directs the county committee to submit a comprehensive reorganization plan. It provides for its dissolution, and the appointment of another if it does not do so. Section 79-426.09 authorizes the county committee to formulate plans for changes and provides for a subcommittee where more than one county is involved in the proposed changes. Section 79-426.10 provides for a public hearing before the completion of a plan of reorganization. Section 79-426.11 provides that after the hearing the county committee may formulate and complete a plan of reorganization, and specifies what the plan shall contain. Section 79-426.12 provides for the submission of the plan to the state committee if authorized by a majority vote of the members of the committee. Section 79-426.13 provides, if no recommendations for changes are made by the state committee, the plan shall be submitted at a special election. Section 79-426.14 provides, if recommendations are made by the state committee, the committee may accept or reject the recommendations, and if it so desires may hold public hearings in connection with the recommendations, and provides that the plan as finally approved by the county committee shall be submitted at a special election.

It is evident from an analysis of the statutes involved that the plan submitted at the special election is the

plan of the county committee and is not the plan of any of the voters of the district, the officers of the district, or the districts themselves. It would seem, therefore, that the county school district reorganization committee is the real party in interest.

The plaintiff herein made the county committee, all members of the county committee, the county superintendent, and the school districts as legal entities, parties defendant. The trial court properly held that all necessary parties were before the court.

Defendants' assignment of error No. 5 complains of the overruling of defendants' motion to dismiss at the conclusion of all of the evidence, and was not specifically discussed in the brief. Our discussion on the other points sufficiently demonstrates the correctness of the trial court's ruling.

Assignments of error Nos. 7, 8, and 9 involve the trial court's ruling on four absentee ballots and one disabled ballot. Undisputed evidence indicates that prior to the election the secretary of the committee received written applications for six absentee ballots and one disabled ballot from legal voters in the school districts involved. The disabled ballot and four of the absentee ballots were returned and were counted over objection. Previous to the election, the county superintendent, who was the secretary of the committee, had given a news item to the Nebraska City News-Press stating that absentee and disabled voters' ballots were available and that such ballots to be counted must be postmarked December 9, 1958. December 9 was election day. The five ballots returned, which were all from Class I districts, were cast against the reorganization plan and resulted in a tie vote of 135 in favor and 135 against in the Class I districts which voted as a unit. The secretary of the committee testified that the material generally sent out with absentee and disabled ballots applicable to a general election, and the qualifications of the voters at a general election and a school district election are different,

so he did not mail that portion of the material to the applicants. When the ballots were mailed to the applicants the only envelope enclosed for the return of the ballot was the envelope bearing the county superintendent's return. When the ballots were returned there was no certification on any of the ballots by a notary public or other officer as to the manner of voting, nor was there any identification of who cast the vote or who placed the ballot in the envelope and the envelope in the mail. Two of the ballots were received in one envelope. All of the envelopes were postmarked December 9, election day, and all were postmarked within the voting district.

Sections 32-801 to 32-813, R. R. S. 1943, set out the requirements for absentee and disabled voters. There is no pretense that the ballots involved comply with the provisions of the statute. The defendants, however, argue that the statutes are to be construed liberally in favor of the voter and technical rules of construction in an election contest should not be permitted to disfranchise the voter.

In McMaster v. Wilkinson, 145 Neb. 39, 15 N. W. 2d 348, 155 A. L. R. 667, we said: "The laws regulating the privilege of absentee voting have generally received a strict construction. See 29 C. J. S., sec. 210, p. 297. The reason is not far to seek, for absentee voting is a privilege granted the elector, and not an absolute right." We see no reason to change this rule.

Defendants also suggest those provisions are not applicable to a school election. What we have said previously on the right to contest the election disposes of that contention.

The trial court properly excluded the four absentee ballots and the one disabled ballot. This resulted in a vote in all of the districts except school district No. 91, which voted as a unit, of 135 in favor of the reorganization plan and 130 against the plan. The vote in school district No. 91 was 200 in favor of the reorganization plan and 4 against the plan. The proposition therefore

carried in both units. The trial court properly so held and properly directed the county superintendent of schools to proceed with the plan of reorganization. The judgment of the trial court is therefore affirmed.

AFFIRMED.

ROD GILLESPIE, APPELLEE, V. STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLANT.
109 N. W. 2d 305

Filed June 2, 1961. No. 34947.

1. **Administrative Law: Appeal and Error.** In the review of the action of the State Real Estate Commission by the district court and by the Supreme Court it is required that the matter shall be considered de novo.
2. **Brokers: Principal and Agent.** In general the duties of a real estate broker are essentially the same as those which an agent owes to his principal.
3. ———: ———. A real estate broker who fails to disclose to his principal every material fact in a transaction which is the subject matter of the agency is guilty of fraud and bad faith.
4. **Administrative Law: Licenses.** The State Real Estate Commission has power to revoke or suspend the license of a real estate broker after proper hearing for violation of any of the duties imposed on such broker by statute.

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

Clarence A. H. Meyer, Attorney General, and *Gerald S. Vitamvas,* for appellant.

Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo and *Maupin, Dent, Kay & Satterfield,* for appellee.

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

YEAGER, J.

The proceeding out of which the action in this court

grew was a complaint filed June 18, 1959, before the State Real Estate Commission of the State of Nebraska, entitled State of Nebraska ex rel. State Real Estate Commission of the State of Nebraska, complainant, v. Rod Gillespie, Alyce Brodbeck, and Kenneth Tetro, respondents, who were the holders of real estate licenses issued by the State Real Estate Commission of the State of Nebraska, which will be referred to hereinafter as the commission, and were associated in business under the name of Action Agency, the place of business of which was North Platte, Nebraska.

Prior to the filing of this complaint by the commission a complaint had been filed on April 7, 1959, against the respondents by one Walter C. Wilkening.

The proceedings from the outset were regular. No substantial dispute as to this is presented here. They were instituted and carried on in conformity with statutory provisions for the creation and functioning of the State Real Estate Commission of the State of Nebraska. By sections 81-867 and 81-868, R. R. S. 1943, real estate brokers and real estate salesmen respectively are defined. Section 81-869, R. R. S. 1943, provides for the issuance of licenses. Section 81-879, R. R. S. 1943, provides for the revocation and suspension of licenses. Section 81-881, R. R. S. 1943, specified the grounds on which revocation and suspension might be ordered by the commission. This section was amended which amendment became effective after the date of the acts alleged in the complaint, but none of the grounds of revocation contained in section 81-881, R. R. S. 1943, were removed.

This statutory provision contained 15 separate grounds for revocation but only 4 of them have any significance here. The four are (1) accepting, giving, or charging undisclosed commission, (2) acting as undisclosed principal, (3) inducing a party to a contract of sale to break the contract for the purpose of substituting a new contract with another principal, and (4) demonstrated unworthiness.

By the complaint of the commission it was charged in much greater detail than it is necessary to set out herein that respondent Gillespie entered into an agreement with Walter C. Wilkening, the owner of 320 acres of land, whereby Gillespie was given the exclusive right of sale of the land for 60 days from January 10, 1959, for which, in the event of sale, the Action Agency would be entitled to receive a commission of 5 percent; that on January 12, 1959, respondent Tetro obtained an offer of $40,000 in writing and $3,000 as a down payment from one Paul Potter for the land; that on the same day and before any acceptance was made by Wilkening, respondent Gillespie received an offer from John Washa of $43,200; that this offer was never communicated to Wilkening until January 14, 1959, after he had been caused to accept in writing the offer of $40,000 made by Potter; that after Wilkening had signed the offer in writing he was induced to cancel the Potter contract, a copy signed by him having never been delivered to Potter, on agreement that he would receive $500 in addition to what he would receive out of the sale for $40,000 after deduction of 5 percent commission; that he was further induced to execute and deliver a contract of sale to John Washa for $43,500 which also exacted of Wilkening the payment of a commission on that amount to the Action Agency; and that Wilkening received no information from any of the respondents that prior to the execution by him of the Potter contract they or any of them had an offer of $43,200 from Washa.

A notice of hearing and place thereof was contained in the complaint. The purpose of hearing was to ascertain whether or not the licenses of the respondents should be revoked or suspended.

Tetro filed no answer to the complaint by Wilkening to the commission. Brodbeck and Gillespie did file answers. Tetro filed an answer to the complaint of the commission. Brodbeck and Gillespie did not. Their answers to the complaint of Wilkening were treated for

all purposes as answers to the complaint of the commission.

By his answer Gillespie admitted that he was a licensed real estate broker doing business as the Action Agency. He admitted the transactions described in the complaint, but denied substantially that he was guilty of any act which was improper or illegal. There is much detail in the answer but it is not deemed necessary to set out the details herein.

Alyce Brodbeck in her answer admitted that she was a real estate saleswoman employed by Rod Gillespie. She also denied any wrongdoing.

Kenneth Tetro in his answer admitted that he was a real estate salesman employed by Rod Gillespie. He denied any wrongdoing.

A hearing was had on the complaint before the commission and on November 30, 1959, an order was entered dismissing the complaint as against Alyce Brodbeck and Kenneth Tetro. By the same order it was found that the charges made against Gillespie were true and accordingly his license as a real estate broker was revoked and canceled.

By action of Gillespie a proceeding for review of the action of the commission was instituted in the district court. It was presented to the district court on the record made before the commission including the evidence there adduced, and some additional evidence adduced at the hearing in the district court.

At the conclusion a judgment was rendered reversing the order of the commission and reinstating the real estate license of Gillespie. A motion for new trial was made. This motion was overruled. From the judgment and the order overruling the motion for new trial the commission has appealed.

As grounds for reversal of the judgment of the district court the commission says that (1) the district court erred in finding that the evidence failed to establish any violation of the provisions of section 81-881, R. R. S.

1943, and (2) the district court erred in finding that the order of the commission under date of November 30, 1959, should be reversed and set aside, and in ordering the real estate license of Rod Gillespie reinstated.

From an examination of the record it becomes apparent that the decision herein must depend upon what has been disclosed by the evidence in the light of established principles of law.

In reviewing the action of the State Real Estate Commission the district court and the Supreme Court are required to consider the matter de novo. See, § 81-884.02, R. R. S. 1943; Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823; Rhoades v. State Real Estate Commission, 152 Neb. 701, 42 N. W. 2d 610.

In general the duties and liabilities of a real estate broker are essentially the same as those which an agent owes to his principal. See Gesselman v. Phillips, 110 Neb. 416, 193 N. W. 750.

It is also true that a real estate broker who fails to disclose to his principal every material fact in the transaction which is the subject matter of the agency is guilty of fraud and bad faith. See Ericson v. Nebraska-Iowa Farm Investment Co., 134 Neb. 391, 278 N. W. 841.

The pertinent facts in this case are in large measure not in dispute. The 320 acre farm of Walter C. Wilkening was listed with Action Agency, or Rod Gillespie, a licensed real estate broker and sole owner of the Action Agency, for sale under an exclusive agreement for 60 days after January 10, 1959. Alyce Brodbeck and Kenneth Tetro were licensed as real estate salesmen and employed as such to engage in the sale of real estate for Gillespie. On January 12, 1959, Tetro went with one Paul Potter, a prospective purchaser, to see the land. They returned to Potter's home where an agreement to purchase the land for $40,000 was signed by Potter and his wife. Tetro then took both Potter and his wife to see the land about 5 p.m. When they arrived Gillespie was there showing the land to one John Washa, also a

prospective purchaser. Tetro told Gillespie he had sold the land. On his way back to Gothenburg Tetro called Brodbeck at the office by telephone and told her he had sold the land to Potter for $125 an acre, or $40,000. On their arrival in Gothenburg Potter gave Tetro a check for $3,000 as a down payment. Gillespie and Washa left the farm. Washa testified that as they drove back to town Gillespie told him the land had been sold but the buyer might have difficulty raising the money. Washa said he offered Gillespie $135 an acre with 2 days to accept the offer. Gillespie denies he received such an offer on January 12th. The testimony of Brodbeck and Tetro as to whether or not the offer was discussed is, to say the least, equivocal. The testimony of Brodbeck indicates that Gillespie did have such an offer.

On January 14, 1959, about 11 a.m., Tetro and Gillespie presented the Potter agreement to Wilkening at which time he and his wife signed it. About 12:30 p.m., Tetro called Potter at the suggestion of Gillespie to inquire if he would resell the farm for a profit and Potter agreed to take $1,000. No copy of Wilkening's acceptance had yet been delivered to Potter. About 1:30 p.m., Gillespie and Brodbeck met Washa and secured from him a written agreement to purchase the land for $43,500 and a check for $4,000 as a down payment.

The evident purpose was to obtain Wilkening's acceptance of the Potter contract, get the consent of Potter to destroy the completed contract for a consideration of $1,000, and then have Wilkening accept the offer of Washa for $43,500 for payment to him of $500 above what he had agreed to accept from Potter. Brodbeck demurred to this until legal advice was obtained. Such advice was obtained and in the late afternoon Gillespie and Brodbeck presented the matter to Wilkening and offered him $500 to cancel the Potter agreement and accept the Washa agreement. Wilkening testified that he was induced to sign the Washa agreement on the substantial representation that he had already sold to

Potter and there was nothing he could do about it and he might as well take the offered $500, which amounted to that much more than that to which he was entitled. The Potter agreement was surrendered and the Washa agreement accepted.

If the testimony of Brodbeck is true, from this, the testimony of Washa, the evidence of speed in effecting the Washa transaction, and the fact that this was in its primary aspect a matter of which Gillespie should have had knowledge, a reasonable conclusion is that he did have knowledge and that his design was to evade his proper duty and to unjustly and improperly enrich himself.

A design and purpose of his which flows without question from his own testimony was to charge and retain for himself a commission of $2,000, or 5 percent, on the transaction of Wilkening with Potter and in addition a commission of 5 percent on the completed sale from Wilkening to Washa, out of which he agreed to pay Potter $1,000 and Wilkening $500.

Another incident attended the ultimate closing of the sale from Wilkening to Washa which has no controlling significance but which has significance on the question of whether or not Gillespie acted in good faith toward Wilkening. After obtaining legal advice Wilkening filed a complaint with the State Real Estate Commission relative to the conduct of Gillespie, Brodbeck, and Tetro. He also instituted legal action against these three parties. The legal action was settled by what amounted to waiver of all commission by Gillespie, by allowing Potter to retain the $1,000 paid to him by Gillespie, and by agreement of Wilkening, which was performed, that he would withdraw the complaint he had made to the commission. This represented a loss to Gillespie, in addition to entire loss of commission, of $1,000 to Potter, $800 to Tetro, and at least $350 in advertising cost. The reason given for this by Gillespie was substantially that it was to avoid unfavorable publicity.

Incidentally after withdrawal of complaint by Wilkening the commission refused to let the matter drop, but filed on its own behalf the complaint which is the one on which the present action is predicated.

The review of evidence contained herein, it is believed, presents a fair ultimate analysis of the true intent, motive, and purpose of Gillespie with regard to the matters presented by the complaint. It appears from this analysis that he was guilty of violating each and all of the four inhibitions of section 81-881, R. R. S. 1943, named hereinbefore in this opinion. It also appears he violated his general duty as an agent of Wilkening.

It appears further and specifically that he failed to disclose to Wilkening material facts which had a bearing on the transaction and accordingly was guilty of fraud and bad faith.

Accordingly the judgment of the district court is reversed and the cause remanded with directions to render judgment sustaining the order of the State Real Estate Commission whereby the license of Rod Gillespie was revoked and canceled.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE APPLICATION OF CONSUMERS PUBLIC POWER DISTRICT.
CONSUMERS PUBLIC POWER DISTRICT, APPELLANT, V. TWIN VALLEYS PUBLIC POWER DISTRICT, APPELLEE.

109 N. W. 2d 372

Filed June 2, 1961. No. 34962.

1. **Public Service Commissions: Telecommunications.** The power of the Nebraska State Railway Commission over public power companies, contained in sections 86-317, 86-318, 86-319, and 86-324, R. R. S. 1943, is limited to prohibiting the construction of any line found to be in violation of section 86-317, R. R. S. 1943, and to the denial of applications for the construction of new

lines carrying a voltage of 700 volts or more, when, and only when, the construction of the proposed line does not conform to the terms of section 86-317, R. R. S. 1943.

2. ———: ———. The proviso contained in section 86-319, R. R. S. 1943, that the Nebraska State Railway Commission shall take into consideration the fact of the prior occupancy of the senior company, is not a delegation of general regulation and control of public power companies to the railway commission.

3. ———: ———. Such proviso when considered with other provisions of the act means that the Nebraska State Railway Commission, in considering an application, route map, and specifications for a proposed line, will require a construction of the line that will protect the safety, operation, and efficiency of transmission, telephone, and telegraph lines already in the area.

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

Healey, Wilson & Barlow, for appellant.

Hugh W. Eisenhart and *Perry & Perry,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

CARTER, J.

This is an appeal from a final order of the Nebraska State Railway Commission denying an application by Consumers Public Power District to build an electric transmission line in Harlan County.

The evidence shows that the Western Union Telegraph Company desires electrical service for a new microwave relay station approximately 2 miles north of Orleans, Nebraska, a point served by Consumers. Consumers has a contract to furnish this service. The service requires the construction of a new 3-wire, 2,400 volt line from Orleans to the microwave relay station, a distance of 2.3 miles. The application to the railway commission was for a permit, as required by section 86-318, R. R. S. 1943, to build this line. It is not disputed that the construction of the proposed electric transmission line would be in accordance with the requirements of the railway commission by providing sufficient clearance between

existing transmission, telephone, and telegraph lines so that the reasonable safety, operation, and efficiency of existing lines would not be interfered with, as required by section 86-317, R. R. S. 1943.

At the public hearing held on the application, objection was made to the approval of the application by the Twin Valleys Public Power District. It is the contention of Twin Valleys that the railway commission has statutory power to prevent a duplicating construction under the authority of section 86-319, R. R. S. 1943, which states in part: "Any parties interested may appear, file objection, and offer evidence in support thereof; Provided, however, that the commission shall take into consideration the fact of the prior occupancy of the senior company."

The evidence shows that the microwave relay station is located on Section 3, about 1,650 feet north of the southwest corner of the section. Twin Valleys has a single-phase distribution line along the west side of the road separating Sections 3 and 4 which crosses the road at the southwest corner of Section 3 to serve a farm customer on the southwest quarter of that section. In order for Twin Valleys to render the service required by the microwave relay station it would be required to convert 3½ miles of its single-phase line into a 3-phase, 2,400 volt line, which it asserts it can do more economically than can Consumers in the construction of its proposed new line. It is clear that the new line proposed by Consumers would parallel the single-phase line of Twin Valleys on the opposite side of the road for a distance of 1,650 feet and would cross over it at the southwest corner of Section 3. Twin Valleys has no contract to provide service for the microwave relay station.

The primary issue in this case is whether or not the railway commission has the power to prescribe the territory in which a public power company may render service. The Constitution by Article IV, section 20, in-

vests the railway commission with the regulation and general control of common carriers. Consumers and Twin Valleys, although public utilities, are not common carriers. While public utilities are subject to regulation by the state, any such regulatory power by the railway commission must originate from a delegation of legislative authority by legislative enactment. Twin Valleys contends that the power to prevent the construction of duplicating lines and to limit the territory to be served, and to thereby restrict competition, is granted to the commission by Chapter 86, article 3, R. R. S. 1943. Consumers contends that it does not. A determination of the meaning of the applicable sections is required.

In section 86-318, R. R. S. 1943, it is provided in part that: "If the voltage of any such line exceeds seven hundred volts, application to construct the same shall be made to the State Railway Commission." The contents of such an application are thereafter prescribed. Section 86-324, R. R. S. 1943, provides in part that: "The State Railway Commission shall have full power and authority to prohibit the construction of any line or lines found to be in violation of the terms of section 86-317. After the hearing provided for in section 86-319, it shall make such order and prescribe such terms and conditions for the location, construction and operation of the proposed line or lines as it may deem just and reasonable." Section 86-317, R. R. S. 1943, provides: "All lines constructed for the transmission of electric current, including telephone and telegraph lines, on the public highways or in other places in this state, except as provided in section 86-327, shall provide sufficient clearance between such lines and existing properly constructed transmission, telephone and telegraph lines so that the reasonable safety, operation and efficiency of existing lines shall not be interfered with."

We point out that the only authority the railway commission has to deny an application for the construction of a transmission line is for noncompliance with the

construction requirements of section 86-317, R. R. S. 1943. A certificate of public convenience and necessity is not required. Section 86-317, R. R. S. 1943, contemplates the existence of properly constructed transmission lines in the area of the proposed line. The only conclusion to be drawn from this is that such existing lines are to be protected by adequate clearance in order that their safety, operation, and efficiency will not be jeopardized. It cannot be gathered from this section that a new line is not to be permitted because another transmission line is already in the area.

In the case of City of Bayard v. North Central Gas Co., 164 Neb. 819, 83 N. W. 2d 861, the power of the railway commission to prescribe rates, regulate services, and exercise general control over a public utility was in issue. In that case we said: "In the light of the evidence and foregoing rules of law, we conclude that defendant is not a common carrier for hire or a consideration, and is not subject to regulation and control by the commission as a common carrier. Thus, we conclude that the state railway commission had no jurisdiction or authority to render the order involved herein. We find no constitutional or statutory provisions which would authorize us to hold otherwise." It is clear, therefore, that the railway commission authority over public utilities cannot be grounded on constitutional provisions and statutes authorizing it to regulate and control common carriers.

Twin Valleys asserts that the authority to deny applications other than for noncompliance with section 86-317, R. R. S. 1943, is found in section 86-319, R. R. S. 1943, wherein it is said: "Upon such application being filed, the railway commission shall notify all parties liable to be affected by the construction of such lines, to appear at a public hearing, at a time and place to be fixed by the commission for hearing of such application. Any parties interested may appear, file objections, and offer evidence in support thereof; Provided, however,

that the commission shall take into consideration the fact of the prior occupancy of the senior company."

The provision "that the commission shall take into consideration the fact of the prior occupancy of the senior company" cannot be construed as a grant of power to the railway commission to generally control and regulate public utilities, particularly public power companies. We think the provision means that in determining whether the application, route map, and specifications are sufficient to meet the requirements of section 86-317, R. R. S. 1943, the railway commission will see to it that transmission, telephone, and telegraph lines already in the area are protected as to their safety, operation, and efficiency. In other words, the new line for which approval is sought must protect transmission, telephone, and telegraph lines in the area and the railway commission may properly see to it that this is done by the applicant seeking to construct a new line before its application is approved. In construing the foregoing statutes together, as we are required to do, the provision relied upon by Twin Valleys can be given no other construction. The title to the act by which the foregoing provisions came into the statute sustains the construction we have given the provision. Such title states: "An act to amend sections 86-318, 86-322, 86-324 and 86-327, Revised Statutes of Nebraska, 1943, relating to electric transmission lines; to regulate the manner of construction of such transmission lines; to provide the extent of the jurisdiction of the State Railway Commission over the construction of such transmission lines; to repeal the original sections and section 86-320, Revised Statutes of Nebraska, 1943." Laws 1945, c. 258, p. 800. We submit that the title to the act clearly indicates the legislative intent to delegate to the railway commission power to regulate the manner of construction of transmission lines and to provide the extent of its jurisdiction in so doing. There is nothing to indicate a legislative intent to grant to the railway commission

any general powers of regulation and control over public power companies. Since the railway commission denied the application under an asserted authority which it did not possess, the result is controlled by City of Bayard v. North Central Gas Co., *supra*. The railway commission has no authority to restrict a public power company to the rendition of service in a specified area. Its attempt to do so is beyond the scope of its authority and cannot be sustained. The order denying the application for the construction of the proposed transmission line is therefore reversed.

REVERSED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. GORDON DRAYTON, APPELLEE.
109 N. W. 2d 369

Filed June 2, 1961. No. 34972.

1. **Public Service Commissions: Railroads.** Where an application is made by a railroad company to discontinue an existing service operating at a loss, the primary question to be determined is the public need therefor.
2. ———: ———. It is the duty of a carrier to seek the aid of regulatory agencies to permit the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent.
3. ———: ———. The matter of time necessary to devote to the performance of duties by station agents, whose agencies are sought to be combined, is a matter of importance in determining whether or not the Nebraska State Railway Commission acted arbitrarily and unreasonably in denying a railroad's application for permission to combine such agencies.
4. ———: ———. Unless public necessity requires, the discretion of a railroad company in establishing a dual agency should not be interfered with by the Nebraska State Railway Commission, and where the undisputed evidence shows that the essential needs

of a community can be served as a part of a dual agency, an order denying an application for the establishment of such an agency is arbitrary and unreasonable.

5. ———: ———. When the service sought to be discontinued or modified is one of convenience rather than necessity, the question of expense to the company, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded.

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

Mason, Knudsen, Dickeson & Berkheimer and *Richard M. Duxbury,* for appellant.

No appearance for appellee.

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

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission denying an application of the Chicago, Burlington & Quincy Railroad Company for authority to dualize the station agencies at Orchard and Brunswick, Nebraska.

The railroad company operates a railroad line from South Sioux City, Nebraska, to O'Neill, Nebraska. The stations of Orchard and Brunswick are on this line. Orchard has a population of 458 and Brunswick 260. It is 15.8 miles between the stations by highway, and 13.88 miles by rail. The agents at these stations work a 5-day week, Monday through Friday, 8 a.m. to 5 p.m. The stations are serviced by two westbound trains which arrive in Brunswick and Orchard on Mondays and Thursdays at 12:15 p.m. and 12:55 p.m., respectively. They are also served by two eastbound trains which arrive in Orchard and Brunswick on Tuesdays and Fridays at 2:01 a.m. and 2:40 a.m., respectively. A check of the work performed by the agent at Brunswick shows that it can be done in 1 hour and 35 minutes per day and the work at Orchard can be performed in 1 hour and 55

minutes per day. The evidence of the railroad is that the work of the two stations can be performed by a single agent working a half day at each station. The saving to the railroad company by using a single agent at both stations is in excess of $5,000 per year. This loss is indicated by exhibits showing income and expense which we shall not set out since it is not disputed. The evidence of the railroad's officials is that the arrangement will provide adequate service to both communities in a manner testified to by them.

An objection was made to the approval of the application by Gordon Drayton, a resident of Orchard who operates a grain elevator and engages in the sale of feed and fertilizer. Several witnesses testified in support of the objection made. The evidence of the objector and these witnesses is to the effect that a half-time station would be very inconvenient to them and other users. While there is evidence of some inconvenience to the public, there is no evidence that a half-time agent could not perform all the work of the station and supply the needs of these two communities.

"The purpose of commission control of railroads is to secure adequate, sustained service for the public at a minimum cost. The commission is not in the position of an owner. It has a duty to the railroads as well as to the public. It must protect and conserve the investments in the railroads and insure a reasonable return to railroads that are efficiently maintained and operated." Chicago & N. W. Ry. Co. v. Save the Trains Assn., 167 Neb. 61, 91 N. W. 2d 312.

Stations in this part of the state were originally established at a time when railroads provided the only available transportation. They were located to meet the needs of a farm economy. The situation has changed and competitors have drawn off substantial amounts of passenger and freight traffic from the railroads. Station agents in small communities have not been subjected to work adjustments, with the result that the time of sta-

tion agents has not been effectively utilized. It is the function of management to operate economically and it is charged with the duty of reducing costs where it can do so and still continue to perform essential services to the public. "It is the duty of a carrier to seek, and of regulatory agencies to permit, the elimination of those services and facilities that are no longer needed or used by the public to any substantial extent." Chicago, B. & Q. R. R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541.

When an application is made to discontinue an existing service or facility, the need for the service or facility and not mere local convenience provides the yardstick. The relation of costs to revenue is also an important element to be considered. When the service sought to be discontinued or modified is one of convenience rather than necessity, the question of expense to the company, the volume of business done, the community need, the revenue return, and the relative benefit to the public are factors that cannot be disregarded. Chicago & N. W. Ry. Co. v. Save the Trains Assn., *supra*.

The evidence clearly shows that the combining of the agencies at Orchard and Brunswick will provide all essential services at these two points. The inconveniences testified to are not sufficient to justify an expenditure in excess of $5,000 to eliminate them. The evidence shows without substantial conflict that there is no actual public need for a full-time station agent at either point and that the public need can be adequately served by one agent in the manner outlined by the carrier. Under such circumstances the denial of an application to dualize these two station agencies is not sustained by evidence and is unreasonable and arbitrary. A reversal of the order of the railway commission is required.

REVERSED.

DARRELL MCDUFFEE, APPELLEE, V. SEILER SURGICAL COMPANY, INC., A CORPORATION, ET AL., APPELLANTS.
109 N. W. 2d 384

Filed June 2, 1961. No. 34999.

1. **Workmen's Compensation: Appeal and Error.** On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record.
2. **Workmen's Compensation.** 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.
3. ———. A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
4. ———. Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which the question may be resolved.
5. ———. Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform services.
6. ———. Held, that the injury sustained by the plaintiff is not compensable under the Workmen's Compensation Act.

APPEAL from the district court for Hall County: WILLIAM F. MANASIL, JUDGE. *Reversed and remanded with directions.*

Luebs, Elson & Tracy, Richard A. Huebner, and *Irwin G. Manley,* for appellants.

Wellensiek & DeBacker, for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, and BROWER, JJ.

MESSMORE, J.

This is an appeal from an award in a workmen's compensation case in favor of Darrell McDuffee, brought against Seiler Surgical Company, Inc., a corporation, the employer, and Western Casualty & Surety Company, a

corporation, the compensation carrier, defendants. The plaintiff filed his petition against the defendants in the workmen's compensation court. A judge of said court dismissed the plaintiff's petition on the ground that the plaintiff failed to maintain the burden of proving the injuries he sustained in an accident which occurred on December 19, 1959, arose out of and in the course of his employment by the Seiler Surgical Company. Plaintiff perfected appeal direct to the district court. The district court found generally in favor of the plaintiff and against the defendants; and that the plaintiff suffered injuries caused by an accident arising out of and in the course of his employment. The court fixed the amount of compensation the plaintiff was to receive for injuries sustained by him, and benefits for medical and hospital expenses. Defendants filed a motion for new trial which was overruled. Defendants perfected appeal to this court.

The defendants assign as error that the decision of the trial court is not sustained by the evidence and is contrary to law.

There are certain well-established rules of law pertinent to this case.

"On any appeal to this court in a workmen's compensation case the cause will be here considered de novo upon the record. * * * The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment." Miller v. Livestock Buying Co., 157 Neb. 51, 58 N. W. 2d 596.

"A compensable injury within the provisions of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment. * * * Whether an accident arises out of and in the course of the employment must be determined by the facts of each case. There is no fixed formula by which

the question may be resolved." Wynia v. Hoesing, 167 Neb. 136, 91 N. W. 2d 404.

Section 48-151, R. R. S. 1943, provides in part: "(6) Without otherwise affecting either the meaning or the interpretation of the abridged clause, personal injuries arising out of and in the course of employment, it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen, and not to cover workmen who, on their own initiative, leave their line of duty or hours of employment for purposes of their own."

"The term 'arising out of the employment' in the Workmen's Compensation Act covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment." Seger v. Keating Implement Co., 157 Neb. 560, 60 N. W. 2d 598.

The plaintiff testified that he was employed by the Seiler Surgical Company on December 19, 1959. His duties required him to call on doctors and hospitals to sell them surgical supplies. On December 19, 1959, he lived in Hastings. His territory was southern Nebraska along Highway No. 30 from the Missouri River west as far as McCook, and included Central City, Fremont, Columbus, Grand Island, and Blair.

His employer's headquarters were in the Medical Arts Building, 111 South Seventeenth Street, Omaha. On occasions he was required to go to the headquarters of the company. The president of the company wanted the plaintiff to be in the store in Omaha on the 1st and

15th of the month, also, when he was going through Omaha or was within that area he was expected to stop at the store.

On Thursday December 17, 1959, he left Hastings and worked accounts in Sutton, York, and Seward, and then went to Fremont where he spent the night with his mother. On Friday morning, December 18, 1959, he called on accounts in Fremont, Wahoo, and Yutan, and then drove into Omaha to the store. He arrived at the store at about 2 or 2:30 p.m. He had some orders from doctors which he wrote up and left at the store. He obtained a purchase order from the store, and went to McKesson's store to pick up a gift, which was his personal business. He then drove back to Fremont and stayed overnight at his mother's home. On Saturday morning, December 19, 1959, he left Fremont, drove to the store in Omaha where he checked his mail file, waited on customers, talked to the president about the company selling its business and about his car allowance, and made out an expense voucher for the week. He also picked up some items to deliver to customers, to save the customers freight bills. On Saturday afternoon, he went to Fremont, arriving there about 4 p.m., or a little later. His personal things were at his mother's home in Fremont. He remembered that he did not have a spare tire. There was a service station 2 blocks from his mother's home, so he drove his car to the service station and purchased a used tire. He was unable to get the tire mounted at that time, and went back and stayed with his mother for awhile then returned to the service station to pick up his used tire. He testified that this occurred a little after 6, or more likely 6:30 p.m. He then started west on U. S. Highway 30. When he arrived at Columbus he stopped for coffee, then went to Central City. When he arrived at Central City he was tired, and stopped at a service station and had another cup of coffee. He left Central City, and when he was approximately 3½ miles east of Grand Island an accident

occurred between his car and a semi-truck. This accident happened about 10:30 p.m.

On cross-examination the plaintiff testified that on Friday he was in the McKesson store in Omaha around 3:30 p.m., and drove directly to Fremont and spent the night with his mother; that after he left the store about 1 p.m., on Saturday, he had nothing further to do for his employer; and that he had only to return home from Omaha when he left the store. He further testified on cross-examination that he had not intended to perform any duties for his employer in Fremont Saturday afternoon; that he did not make any solicitations or calls on any customers from the time he left Omaha until after the accident occurred; that he made no attempt to contact customers on Saturday afternoon, December 19, 1959; that his usual hours of service were Monday through Friday, and occasionally on Saturday morning; and that if he did not go in to the store he would call on customers in Hastings and generally finish around noon or the early afternoon. He further testified on cross-examination that one of the reasons for going back to Fremont was to see and visit with his aunt, and to get some eggs which his mother was furnishing him; that his regular work week was 5 days, Monday through Friday; and that he had not intended to deliver the table paper or acetone, which he had picked up for the use of certain of his customers, until the next Monday.

The Workmen's Compensation Act extends to and covers only workmen while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of injury, and during the hours of service as such workmen. See, § 48-151 (6), R. R. S. 1943; Pappas v. Yant Constr. Co., 121 Neb. 766, 238 N. W. 531; Hall v. Austin Western Road Machinery Co., 125 Neb. 390, 250 N. W. 258; Luke v. St. Paul Mercury Indemnity Co., 140 Neb. 557, 300 N. W. 577.

Considering the wording of the statute and the deci-

sions relating thereto, together with the facts in the instant case, we conclude that the plaintiff was not at the time of his injury engaged in, on or about the premises where his duties were being performed. He was not at any place where his service to his employer required his presence as a part of such service. The accident did not occur during any time when his service was required. The plaintiff had clearly left his employment and gone to a place where his duties did not require his presence. His departure was in no sense incidental to his employment.

It is well settled by the decisions of this court that, where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform service. See Luke v. St. Paul Mercury Indemnity Co., *supra,* and cases cited therein.

The judgment is reversed and the cause remanded with directions to dismiss the petition of the plaintiff, and to render judgment in favor of the defendants, the claim of the plaintiff not being compensable under the Workmen's Compensation Act.

REVERSED AND REMANDED WITH DIRECTIONS.

JOE DOUGHERTY ET AL., APPELLANTS, V. THE COMMONWEALTH COMPANY, A CORPORATION, APPELLEE.
109 N. W. 2d 409

Filed June 9, 1961. No. 34922.

1. **Usury.** By the terms of section 8-429, R. S. Supp., 1957, the Industrial Loan and Investment Company Act is violated if a loan is made repayable over a period exceeding 36 months.
2. ———. By the terms of section 8-419, R. R. S. 1943, it is provided that no industrial loan and investment company shall

induce or permit any person, nor husband and wife, jointly or severally, to become obligated, directly or contingently or both, under more than one contract at the same time for the purpose of obtaining a higher rate of charge than would be permitted if all of the obligations of such person or persons to such company were consolidated into one obligation.

3. ———. By section 8-432, R. R. S. 1943, a loan which is violative of the prohibitive terms of section 8-419, R. R. S. 1943, or section 8-429, R. S. Supp., 1957, is void and the lender has no right to collect and receive any principal, interest, or charges.

4. ———. By a violation of section 8-419, R. R. S. 1943, or section 8-429, R. S. Supp., 1957, the lender becomes obligated to return to the borrower the payments made.

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

Ewald D. Warnsholz, for appellants.

Ginsburg, Rosenberg & Ginsburg and *Norman M. Krivosha,* for appellee.

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

YEAGER, J.

This is an action by Joe Dougherty and Laverne Dougherty, who are husband and wife, plaintiffs and appellants, against The Commonwealth Company, a corporation, defendant and appellee, to have declared invalid a loan or loans in the amount of $6,000, evidenced by two promissory notes for $3,000 each, made by the defendant to plaintiffs on November 16, 1957; and to recover judgment for the payments made thereon with interest at the rate of 6 percent per annum and costs.

In the action the defendant filed an answer denying any right of recovery by the plaintiffs and a cross-petition the purpose of which was to seek foreclosure of mortgages given to secure the payment of the notes.

After issue was joined the plaintiffs moved for summary judgment in their favor. The defendant moved for summary judgment in its favor. A judgment

was rendered denying and overruling the motion of plaintiffs and dismissing their petition with prejudice. The motion of the defendant was sustained and a judgment was rendered in its favor for $3,518.04 with interest at the rate of 9 percent per annum from the date of the judgment. By the judgment foreclosure of mortgages which were given to secure the notes was decreed.

A motion for new trial was duly filed by plaintiffs. This motion was overruled. An appeal was duly taken by the plaintiffs. As grounds for reversal of the judgment on appeal the plaintiffs assert that the judgment is contrary to law, and that it is not sustained by sufficient evidence.

As has been indicated the parties presented this case to the district court for determination under the processes provided by the Summary Judgment Act of this state, or sections 25-1330 to 25-1336, R. R. S. 1943, and neither party makes any contention on this appeal that any of these processes were violated or disregarded. It appears to be accepted by the parties that the only question is that of whether or not the judgment rendered is supported by the record which was before the court.

To the extent necessary to state here, the record contained first a petition in which the plaintiffs alleged they were residents of Lancaster County, Nebraska; that the defendant was a Nebraska corporation licensed as an industrial loan and investment company subject to the industrial loan and investment laws of the state as set forth in sections 8-401 to 8-433, R. R. S. 1943, and section 8-429, R. S. Supp., 1957; that on November 16, 1957, the defendant loaned to plaintiffs $6,000 with principal and interest to be repaid in 60 monthly installments beginning December 16, 1957, and ending November 16, 1962; that the loan was evidenced by two promissory notes executed on November 16, 1957; that the defendant was not entitled to collect any principal or interest on the loan of $6,000 for the reason that it was

violative of the installment loan provisions and was usurious, and for the reason that the loan was divided into two promissory notes for the purpose of collecting rates of interest in excess of that permitted by section 8-418, R. S. Supp., 1957, in violation of section 8-419, R. R. S. 1943, and also in violation of section 8-429, R. S. Supp., 1957, which limits the loan period of an installment loan to 36 months, all of which is condemned as unlawful by section 8-432, R. R. S. 1943; and that the plaintiffs paid on the loan 26 monthly installments of $140 each amounting to a total of $3,640 for which they are entitled to have judgment with interest at 6 percent per annum from the date the installments were paid.

Appended to the petition are copies of two promissory notes dated November 16, 1957, payable to the defendant, the originals of which were signed by the plaintiffs. One note is for $3,000 payable in 36 monthly installments of $104 each. The rate of interest is 1½ percent a month on the unpaid balance on that part not in excess of $1,000, 1 percent a month on the balance in excess of $1,000 and not in excess of $3,000, and ¾ of 1 percent a month on any amount in excess of $3,000.

The other note was for $3,000 payable in installments over a period of 5 years. The first 36 installments were in the amount of $36. The balance was to be paid thereafter in 23 installments of $140 each with a final payment of the unpaid balance. This note was to bear interest at the rate of ¾ of 1 percent a month.

By the answer the defendant pleaded that two contracts of loan were entered into, one of which was for $3,000 to be repaid in 60 months, and the other was for $3,000 to be repaid in 36 monthly installments. It denied that the making of the two loans at the same time resulted in the making of more than one contract of loan for the purpose of obtaining a higher rate of charge than would be permitted if all of the obligations were consolidated in one obligation. It denied that the defendant ever intended to obtain a higher rate of charge than would

be permitted if all the obligations were consolidated into one obligation.

By its cross-petition the mortgages which were given to secure the notes were pleaded and it was further pleaded that the payments on the notes were delinquent, in consequence of which the defendant was entitled to have the mortgages foreclosed.

The plaintiffs filed a responsive pleading to the answer and cross-petition the contents of which do not require repetition here.

To support its position the defendant filed an affidavit made by Sumner E. Copple, president of the defendant, who will hereinafter be referred to as Copple. The affidavit contains nothing in its substance which departs from the allegations of fact contained in the answer and cross-petition. In it the transaction or transactions involved are designated as two rather than one loan.

The plaintiffs took the deposition of Copple. This deposition was before the court when the case was tried. In it, as to installment payments, Copple stated in substance that the statement in the note that the 23 installments were to be $140 each was a clerical error, and that it should have been $101.70 instead. This stands uncontradicted and for the purposes of this case his statement will be accepted as true.

In the deposition, wherein the only evidentiary characterization of the transaction was made, in response to a question Copple stated that the loan finally made was "Six thousand dollars." In response to a request that he explain why two notes and two mortgages were taken, he answered: "A- Yes; when Mr. Dougherty came in he said he wanted to borrow six thousand dollars. I already knew Joe, I told him that we'd make the loan, and we talked about the payments which were a little over two hundred dollars a month, in fact, we first started to draw the note that way, and he said he didn't believe he could make payments of over two hundred a

month, that the maximum that he could make would be $140. So I said, 'Well, we could divide the note and make one a second mortgage at nine percent we could take it any length of time we wanted to and work the payments around any way we wanted to as long as it was nine percent simple interest.'

"So he said, 'Well, that would be fine,' he didn't care about that just so he got it. I also told him that it would mean a reduction in our interest when we dropped from the maximum rates to three-quarters of a percent or nine percent, not of considerable, but we were willing to make the loan anyhow, and he said, 'All right,' and—."

In testimony relating to money due on an earlier loan than this transaction he characterized this transaction as single in the following words: "That was repaid when he completed the second loan of six thousand dollars, * * *." Then finally the deposition contains the following: "Q- Is it correct to say, Mr. Copple, that there was no split of this six thousand dollars so far as Mr. Dougherty's use or taking of the money is concerned, of course, he didn't take three thousand dollars separately for one purpose and three thousand dollars separately for another, did he? A- No; but he took the money at the same sitting. Q- It was handled as one six thousand dollar — A- One transaction. Q- In all respects, is that right? A- Yes."

The loan under the plan devised, as is clearly disclosed and without controversy, was a single installment loan for 60 months. This was clearly violative of the Industrial Loan and Investment Company Act which prohibits a loan thereunder in excess of 36 months. Section 8-429, R. S. Supp., 1957, which is controlling, contains the following: "Every loan made under this act shall be repayable within a period of thirty-six months or less in approximately equal or declining installments of principal and interest at approximately equal intervals."

The loan was also violative of the Industrial Loan

and Investment Company Act in that, as is apparent, in pretext and appearance two loans were made but in fact there was but one which was divided for the purpose of obtaining a higher rate of charge than would be permitted in the case of a single and legal loan. Section 8-419, R. R. S. 1943, which controls here, is as follows: "No industrial loan and investment company shall induce or permit any person, nor any husband and wife, jointly or severally, to become obligated, directly or contingently or both, under more than one contract of loan at the same time for the purpose of obtaining a higher rate of charge than would be permitted if all of the obligations of such person to such company were consolidated into one obligation."

By the following terms of section 8-432, R. R. S. 1943, these violations of section 8-419, R. R. S. 1943, and section 8-429, R. S. Supp., 1957, rendered the loan void and denied the right of the defendant to collect any principal, interest, or charges thereon: "If the industrial loan and investment company shall fail to comply with any of the provisions of sections 8-418 to 8-433, in the making or collection of any loan which is subject to said sections, the loan shall be void and the lender shall have no right to collect and receive any principal, interest or charges."

It is also true, in the light of the statute and the decisions of this court which are definitive of the rights of parties to an illegal installment loan, that the obligors are entitled to recover back all payments made on the loan.

In Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57, it was said: "The effect of such violation is to make such contract void and uncollectible and a lender should have nothing in such a situation, and the lender, or those to whom any payments have been made thereunder, must return the payments received." As to this and other statutory prohibitions of like import, see, Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122;

McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1; A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687; Jourdon v. Commonwealth Co., 169 Neb. 482, 100 N. W. 2d 84, on motion for rehearing, 170 Neb. 919, 104 N. W. 2d 681.

It is pointed out, and on the record correctly so, that this loan was handled in the manner indicated with full knowledge and acquiescence of the plaintiffs. This however can avail the defendant nothing. In Jourdon v. Commonwealth Co., 170 Neb. 919, 104 N. W. 2d 681, where a like justification was advanced without avail, this court said: "The statute requires the loan company to be unyielding to any entreaty of the borrower that the company violate this prohibition. If the proffered justification offered by appellee in this case is a valid one, the statute would be, for all practical purposes, ineffective." See, also, McNish v. General Credit Corp., *supra*.

In the light of these observations it becomes clear that the court erred in sustaining the motion of the defendant for summary judgment in its favor and in denying the motion of plaintiffs for summary judgment in their favor.

The judgment of the district court is therefore reversed and the cause remanded with directions to render judgment in favor of plaintiffs on their motion and to deny the motion of the defendant for summary judgment in its behalf.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER and BOSLAUGH, JJ., dissenting.

We do not agree with the holding in this case that the loan in question violated the provisions of the Industrial Loan and Investment Company Act.

Section 8-419, R. R. S. 1943, which prohibits the splitting of loans "for the purpose of obtaining a higher rate of charge," is not involved in this case because the second note bears interest only at the rate of 9 percent per annum. In Jourdon v. Commonwealth Co., 170 Neb.

919, 104 N. W. 2d 681, which involved a series of loans, each bearing interest at the maximum rate, the court said: "If appellee had desired a proper arrangement it could have provided for 9 percent interest on any note executed by appellant during the time a previous note of his was unpaid. The prohibition of the statute is not that there shall not be more than one loan during any period of time but it is that there shall not be charged 36 percent on the first $50 of unpaid principal and 18 percent on the next $500 of unpaid principal on more than one loan at the same time. § 8-418, R. R. S. 1943. There may be as many contracts of loan at the same time as the parties desire but the several loans when considered together must not violate section 8-419, R. R. S. 1943. * * * The statute does not prevent the making of more than one loan to a borrower at the same time. It does condemn charging maximum interest prescribed by section 8-418, R. R. S. 1943, on the unpaid principal of more than one loan made to a borrower and existing at the same time for the purpose of obtaining a higher rate of charge. The prohibition of the statute is that the loan company shall not permit any person to become obligated on more than one contract of loan at the same time if the purpose therefor is a higher charge than if there was only a single obligation." The requirement of section 8-419, R. R. S. 1943, is satisfied if the rate of charge on all outstanding contracts is no higher than would be permitted if all contracts were consolidated into one obligation.

Section 8-429, R. S. Supp., 1957, which requires loans to be repayable within 36 months, is by its terms applicable to loans "made under this act." This limitation was intended to apply only to that part of a loan which bears interest at a rate in excess of 9 percent per annum. This appears to be the holding of other courts dealing with the subject. Vann v. Accounts Supervision Co. (Fla.), 88 So. 2d 548, 58 A. L. R. 2d 1260. See Annotation, 58 A. L. R. 2d 1263. In the Vann case the court said:

"As to defense number (2), supra, Section 516.20 Fla. Stat. 1955, F. S. A., provides that 'No licensee shall enter into any contract for a loan for a period of longer than twenty-four months after making the loan.' Clearly, this provision was intended to limit the period during which the loan company could charge interest at the rate of 3½ percent per month on any one obligation; and since the note and mortgage here sued upon expressly provided that, after 24 months, the interest rate should be 'at maximum rate permitted by Florida law,' there was no violation of this section of the Act."

Corporations organized and licensed under the Industrial Loan and Investment Company Act have the powers conferred upon general corporations in addition to those specifically conferred upon industrial loan and investment companies. § 8-407, R. R. S. 1943. There is no limit upon the amount that may be loaned under the act. § 8-418, R. S. Supp., 1957.

The court has approved multiple contracts with one borrower if the maximum rates are not charged in more than one contract at the same time. The notes in question would have been valid if made as separate transactions at different times. We believe that they are also valid even though made at one time and as part of one transaction.

The judgment of the district court was correct and should have been affirmed.

MARY GARSKA, APPELLEE, V. AARON HARRIS ET AL., APPELLANTS.
109 N. W. 2d 529

Filed June 9, 1961. No. 34957.

1. **Witnesses. A consultation with a physician for some purpose other than the ultimate curative or alleviative treatment is not**

privileged, nor is a communication made at some time when the professional relation is not pending.

2. ———. Any privilege existing between the physician and the patient is a privilege of a personal nature and may be waived by the patient.

3. **Trial: Appeal and Error.** This court cannot determine whether counsel was guilty of misconduct while presenting his opening argument to a jury where the bill of exceptions does not contain all of such opening argument objected to.

4. **Trial.** Statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objections made thereto and the ruling thereon.

5. **Automobiles: Parent and Child.** Where the head of a family has purchased or maintains a car for the pleasure of his family, he is, under the so-called "family purpose" doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner.

6. **Parent and Child.** Where a son resides with his father he does not cease to be a member of the family merely by reason of the fact that he has arrived at his majority.

7. **Automobiles: Parent and Child.** The test is not whether the son is an adult or a minor, but whether he was using the car for a purpose for which the parent provided it, with authority, express or implied.

8. **Negligence: Evidence.** Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.

9. **Negligence: Pleading.** Contributory negligence is an affirmative defense, the burden of proving which is on the party pleading it.

10. **Trial: Damages.** 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.

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

Allan F. Black and *E. L. Vogeltanz*, for appellants.

Leo F. Clinch, for appellee.

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

MESSMORE, J.

This is an action at law brought by Mary Garska, plaintiff, against Aaron Harris and James Harris, defendants, in the district court for Garfield County. The purpose of the action was to recover damages for personal injuries sustained by the plaintiff and for damages to her automobile which she was driving when a pickup truck driven by James Harris struck the rear of her automobile, the pickup truck being owned by Aaron Harris. The jury returned a verdict finding in favor of the plaintiff and against the defendants, and awarded the plaintiff a verdict in the amount of $4,000. Judgment was entered on the verdict. The defendants each separately moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. Both of these motions were overruled. Defendants perfected appeal to this court.

For convenience we will refer to the parties as designated in the district court. Although James Harris is referred to in the record as Jimmy Harris, we will refer to him as James Harris in the opinion.

The plaintiff's petition charged the defendant James Harris with negligence in the following manner: That the said defendant negligently drove a pickup truck so that he could not stop the same within the range of his vision; that he negligently drove the pickup truck at a rate of speed in excess of a reasonable and careful rate of speed under the circumstances then existing; and that he negligently failed to keep a proper lookout as to the traffic preceding him upon the road.

The separate answer of James Harris alleged that the personal injuries to the plaintiff and damage to her automobile, if any, on October 30, 1958, were by virtue of the plaintiff's negligence in operating said automobile.

The separate answer of the defendant Aaron Harris

admitted that he was and still is the owner of a 1957 GMC pickup truck; that at the time of the accident his son James Harris was driving it; that the pickup truck was owned and maintained solely by him, purchased with his money for his personal use and for no other person's use; and that at the time of the accident the defendant James Harris and this defendant did not live together as a family and maintained no home as a family.

The defendants set forth several assignments of error, including Nos. 3, 4, 5, and 11 which are not argued in the defendants' brief.

Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, 1960, Rule 8a 2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned. See, Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672; Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482.

The defendants predicate error on misconduct of counsel for the plaintiff in his opening argument to the jury. In addition, defendants predicate error on the proposition that testimony of a doctor called as a witness for the plaintiff was a privileged communication, and consequently the evidence of such doctor was not admissible.

In 8 Wigmore on Evidence (3d Ed.), § 2382, p. 817, it is said: "The consultation with such a person must be had in his *professional character at the time.* A consultation, therefore, for some purpose other than that of ultimate curative or alleviative treatment is not privileged; nor is a communication made at some time when the professional relation is not pending."

It appears that the plaintiff called this doctor as a witness over the objections of the defendants, which objections were overruled. Any privilege existing between the physician and the patient is a privilege of a personal nature and may be waived by the patient.

As to misconduct of counsel, the bill of exceptions

fails to reveal any argument to the jury either at the opening of the plaintiff's case or at its closing.

This court clearly indicated in In re Estate of Inda, 146 Neb. 179, 19 N. W. 2d 37, that statements constituting alleged misconduct of counsel in argument to the jury must be taken by the court reporter at the trial, together with the objections made thereto and the court's ruling thereon.

In Melcher v. Murphy, 149 Neb. 541, 31 N. W. 2d 411, it was held that this court could not determine whether counsel was guilty of misconduct while presenting his argument to the jury where the bill of exceptions did not contain all of the argument objected to.

The two above assignments of error made by the defendants cannot be sustained.

The record discloses that the plaintiff is a housewife, 63 years of age. She did some housework and cleaning for her daughter and was paid what amounted to $8 a week, including milk, cream, and eggs. The plaintiff was involved in an accident which occurred on a county road half a mile south of Highway No. 11, an oiled road, and a mile and a half from her son-in-law's home. She was driving a 1949 Plymouth coupé at the time the accident occurred. Her automobile was in good mechanical condition, having been checked a few days prior to the accident by a member of the Nebraska Safety Patrol.

The plaintiff testified that when she got about a mile and a half north of her son-in-law's home she was driving about 30 miles an hour. She noticed her grandson, Robbie, who was walking toward her. He had a habit of doing this and stopping in front of her car. He was in the middle of the road. She applied her brakes and reduced her speed to about 15 miles an hour. When Robbie got within approximately 100 feet of her car, he started to flag her down. She was in the habit of taking him home from school. However, at this time she had other business which needed attention. She

further testified that she was paying attention to her driving and had her car under complete control so that if Robbie stopped in front of her she could stop the car; that she did not come to a complete stop; and that when Robbie could not flag her down and realized she was not going to stop and pick him up, he stepped more to the center of the road and then back, and the plaintiff's car passed Robbie. There was a black pickup truck going south, on the west side of the road. The plaintiff was going north. About that time something crashed into the back of the plaintiff's car. The impact threw the plaintiff's car over into the ditch on the right side of the road. Her car was proceeding under its own power and headed toward a telephone pole, but missed that and hit a tree. Her car went completely out of control and into the ditch on the other side of the road. The seat was broken off and she was unable to reach the brakes. She just hung onto the steering wheel. She managed to keep the car from being upset, and got it back onto the road. The gas tank was broken and gas was leaking out of it. She tried to open the door on her side of the car, but could not get it open. She did get the door on the opposite side of the car open with her left hand. As she got out of the car, she looked back and saw the pickup truck which had struck her car. She walked back to this pickup truck. Two men got out of the truck and stood by the side of it. She asked one of the men, the defendant James Harris, to please go and get her son-in-law, and told him where he lived. This defendant did so, and brought the son-in-law back.

The plaintiff's grandson testified that he was 13 years of age; that he remembered the accident; and that a Mrs. Sears stopped and offered him a ride. He got into the back of her pickup truck. She was going south on her side of the road. He further testified that his grandmother saw him; that she slowed her car down a little bit, but started off again; that a pickup truck came

from the south and struck the plaintiff's car in the rear and pushed it; and that the pickup truck he was riding in kept on going south. After Robbie returned home, the pickup truck driven by the defendant James Harris came to the house.

The plaintiff's son-in-law testified that James Harris drove into his yard and said he had run into the plaintiff; that the plaintiff stopped her car and parked it in the road; that there was quite a bit of dust at the place where the accident occurred; and that he was requested by the plaintiff to come and get this witness. This witness was driven to the scene of the accident where he saw the sheriff, Nate Smith who was with the defendant James Harris, and the plaintiff. He had some conversation with the plaintiff regarding the accident in the presence of James Harris and the sheriff. The plaintiff said she slowed down a little when she saw Robbie standing behind the Sears pickup truck, and proceeded down the road a little ways and then her car was struck in the rear by the pickup truck driven by James Harris. The sheriff asked James Harris if he had been drinking, and he said he had had a couple of beers. James Harris also said that the plaintiff was driving down the road and stopped. This witness further testified that there was some dust in that vicinity.

The sheriff testified that he was called to the scene of the accident October 30, 1958; and that the accident occurred at a point 2½ miles south and east of Burwell. When he arrived at the scene of the accident he saw the plaintiff, James Harris, the plaintiff's son-in-law, and Nate Smith; that the plaintiff's car was struck in the rear about the center of it; that the plaintiff's car was in its right lane of traffic, which would be the east side of the county road; that it was 474 feet from the point of impact to where the plaintiff's car was sitting when he got there; and that he found no skidmarks at the scene of the accident. This witness further testified that the Harris pickup truck had been moved, but

the plaintiff's car had not been moved; that the motor of plaintiff's car was running, and he shut it off; and that the plaintiff's car left the road, went into a borrow pit on the right side of the road over to the fence, then back onto the highway, crossed over to the shoulder of the road on the left side, and came back onto the road after traveling a little distance. The defendant James Harris told the sheriff that the plaintiff's car had stopped on the road in front of him and he did not see it because of the dust, and that there was a car coming from the opposite direction.

On cross-examination the sheriff testified that the road was a dirt road and very dusty; and that the damage to the Harris pickup truck was minor, mostly on the bumper. On redirect-examination the sheriff testified that the plaintiff's car traveled the distance it did due to the impact, because it would not have been possible for the plaintiff to have her foot on the gas pedal because the front seat of the car was torn loose from the floor and tilted back until the back of the front seat rested on the rear seat of the car, and the plaintiff would have been almost lying down in the car; and that the plaintiff's feet could not have touched the floor.

The plaintiff offered in evidence the depositions of the defendants as admissions against interest of the defendants.

The defendant James Harris testified that he was a single man and worked for himself most of the time; that when he was not working he stayed with his father; and that in October 1958, he had stayed 10 days with his father and left his clothes with his father. Sometimes when he was working he spent weekends with his father who lived in a one-room trailer house furnished with a bed and a davenport. This witness further testified that he worked wherever he could get a job, and stayed where he was working; and that he helped his father when his father needed him. On the day of the accident he was driving a 1957 GMC pickup truck.

He was staying with his father at that time. He left the trailer house about 2:30 p.m. This witness further testified that his father did not renew his driver's license when it expired; that this witness did not do all of the driving for his father; that when he was not there his father would hire someone to drive for him; that he would ask his father for the pickup truck and would ordinarily be granted permission to use it; that on the day of the accident he took the pickup truck without his father's permission and went to see about a job picking corn; and that this was the only time he took the pickup without his father's permission. He further testified that the accident happened shortly after 4 p.m.; that he told the sheriff that he had bumped the plaintiff's car; that he did not have a drink that day; that he was driving 30 miles an hour; that the plaintiff was not going any faster; that he did not notice the boy come out on the highway; that the road was dry and dusty; that the plaintiff came to a complete stop; that he did not have notice of the plaintiff showing up and did not know whether she slowed up or not; that he slowed up the pickup truck half a block behind the plaintiff; and that he was pretty close to the plaintiff when she stopped her car. He further testified that when the plaintiff stopped, the pickup was about 20 feet behind her car. He noticed the plaintiff slowing up when he was about 50 feet behind her car. He started to turn, but was unable to do so as there was another pickup truck coming from the north. He could not see this truck, which was driven by Mrs. Sears, all the way because of the dust. Plaintiff's car was ahead of him, slowing down. He knew Mrs. Sears was approaching from the opposite direction at a pretty fair rate of speed. Because of the dust which obscured the road, he was unable to see the plaintiff or Mrs. Sears, and could not tell exactly what the plaintiff did. This witness further testified at the time his deposition was taken that he had been working at a sale barn at Sargent and staying with his father

who had rented a house in Sargent. He further testified that he first saw Robbie at his father's house.

Aaron Harris was called as a witness in his own behalf by the defendants. He testified that he was a widower and lived at Sargent, Nebraska, and had lived in Taylor, Nebraska, in October 1958, in the main part of town in a house trailer which he owned; that James Harris stayed with him part of the time, and stayed wherever he worked at other times; and that James had been working for other people since he was 21 years of age. He further testified that he had no business together with his son James Harris; that he bought the trailer and paid for it with his own money, also that he bought the pickup truck; that James Harris did not have a car after October 30, 1958; that several people borrowed his pickup truck and used it to haul things; that when he went some place he would hire somebody to take him, but his son James most generally took him; that he did not have a driver's license; and that the trip made on October 30, 1958, by his son James was for James' own benefit, and with which he had nothing to do.

On cross-examination this witness testified that his son James had stayed with him off and on for the last 5 or 10 years; that James kept the clothes he was not using on a job in the trailer, and had his meals with this witness; that they both filled the pickup with gas; that this witness furnished most of the food; and that most of the time he and James went together in the pickup truck.

The defendants contend that the pickup truck driven by James Harris at the time of the accident was not a family-purpose car, citing Piechota v. Rapp, 148 Neb. 442, 27 N. W. 2d 682, wherein it is said: "We have followed the family purpose doctrine. In Linch v. Dobson, 108 Neb. 632, 188 N. W. 227, we held: 'Where the head of a family has purchased or maintains a car for the pleasure of his family, he is, under the so-called

"family purpose" doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner.' "

In Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628, this court held: "Where the car is kept for the use and pleasure of the family, and one member of the family is using it for his individual pleasure, or for one of the family purposes for which it is kept, it comes strictly within the reason of the rule that, in such use, the member of the family is acting as the agent, in furthering the purposes of the owner, as truly as though other members of the family were in the car with him, and that the owner can be held responsible for damages resulting from the negligent operation of the car while so used." It was said in the preceding case: "We do not think the fact that Harold had become of age is necessarily controlling."

In 5A Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 3113, p. 49, it is said: "* * * it has been held that a son or daughter residing with their parents do not cease to be members of the family merely by reason of the fact that they have arrived at their majority, * * *."

In 7-8 Huddy, Cyclopedia of Automobile Law (9th Ed.), § 125, p. 326, it is said: "The test is not whether the son is adult or minor, but whether he was using the car for a purpose for which the parent provided it, with authority, express or implied." See, also, Marshall v. Taylor, 168 Mo. App. 240, 153 S. W. 527; Linch v. Dobson, 108 Neb. 632, 188 N. W. 227; King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F 293.

In Hubert v. Harpe, 181 Ga. 168, 182 S. E. 167, the court said: "In the present case the father is not relieved from liability merely because the son was an

adult and was self-sustaining. It appears that the father kept and maintained an automobile for the comfort and pleasure of his family, including his wife and minor children, and that as a matter of custom he also permitted this adult son, who resided in the same home with him, to use and drive the automobile for the comfort and pleasure of the son, upon the same footing as the wife and minor children. * * * Then, by what principle of law can the mere matter of age determine the question of liability? The extent to which the automobile might be used for the comfort and pleasure of the family was a question to be settled by the father; and it was also a matter for his own determination as to whether he would include his adult son among the number whose comfort or pleasure he would promote by the use of such vehicle."

Under the facts in the instant case the jury was obligated to determine whether or not the pickup truck driven by the defendant James Harris at the time of the accident was or was not a family-purpose car, and whether or not James Harris, at the time, was a member of his father's family. These issues were properly submitted to the jury.

The next question presented by the defendants is whether or not the trial court, failing to instruct the jury on contributory negligence, committed prejudicial error.

This court has many times held that contributory negligence is an affirmative defense. See Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, wherein this court said, quoting with approval from Price v. King, 161 Neb. 123, 72 N. W. 2d 603: " 'Negligence must be proved by direct evidence or by facts from which such negligence can be reasonably inferred. In the absence of such proof, negligence cannot be presumed.' " See, also, Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N. W. 2d 470; Bailey v. Spindler, 161 Neb. 563, 74 N. W. 2d 344.

In Schrage v. Miller, 123 Neb. 266, 242 N. W. 649, this court said: "Contributory negligence is an affirmative defense, the burden of proving which is on the party pleading it."

The only witness presented by the defendants was Aaron Harris, who was not a witness to the accident, and whose testimony related to the family-purpose doctrine. The evidence was insufficient to sustain a finding of contributory negligence on the part of the plaintiff. The defendants' assignment of error is without merit.

The defendants next contend that the damages are excessive.

The plaintiff was treated by a doctor who testified that the plaintiff was complaining of pain in her right shoulder, back, and neck, and was very nervous and almost hysterical when he examined her at the hospital after the accident. She was treated by this doctor who X-rayed her and found that she had a severe sprain of her ligaments and bruises of the neck and back which he diagnosed as a cervical strain, or as is commonly termed a "whiplash injury." The plaintiff was placed in traction, given cortisone, and massage. She remained in the hospital 4 days. Traction was used after she left the hospital, and she was required to wear a rib harness. She returned to the doctor's office a number of times afterward, complaining of her neck, back, and right shoulder. The doctor testified that if, after 2 years, the plaintiff was still complaining of pain and injury in that area, he would expect her injury to be more or less permanent; that as a result of the injury, and as pain and tenderness in her back and neck muscles were still giving her trouble, the plaintiff would be nervous from the injury and pain and would require future medical attention and expense; and that the plaintiff had been his patient for a number of years prior to the accident and was in good physical condition and suffered no physical disabilities prior to the accident.

The plaintiff testified that she still has severe pain in

her back, neck, and arm, and is unable to do all her housework; that she has continuously been in pain; that she continued visiting her doctor after her release from the hospital; and that she had been treated and had medicine prescribed for her nerves. There was no evidence on the part of the defendants to contradict the foregoing evidence as to the nature and extent of the plaintiff's injuries.

It was stipulated that the repairs to the plaintiff's car amounted to $325.54, that the hospital charges were $55.05, the doctor bill $17, and drug expense $12.55. The plaintiff's doctor did not have his office records with him at the time he testified, and when questioned by the court as to whether he had any more charges for services rendered since the date of the accident, stated that the plaintiff came in for examinations and checkups for quite awhile after she left the hospital, and that he would have to check his office records for the amount.

"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. See, also, Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376.

This assignment of error cannot be sustained.

We find no error in the record prejudicial to the rights of the defendants, therefore the judgment of the trial court should be and is hereby affirmed.

AFFIRMED.

ALICE L. PEARSON, ADMINISTRATRIX OF THE ESTATE OF MAGNUS A. PEARSON, DECEASED, APPELLANT, V. CHARLES E. SCHULER ET AL., APPELLEES.

109 N. W. 2d 537

Filed June 9, 1961. No. 34958.

1. **Master and Servant: Independent Contractor.** The true test of a contractor would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.
2. ———: ———. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it.
3. **Trial.** Under section 25-1315.02, R. R. S. 1943, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict where no preliminary motion for a directed verdict has been made.
4. ———. Instructions must be construed together, and if, when construed as a whole they properly state the law, they are sufficient.
5. **Automobiles: Negligence.** Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the automobile or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident.
6. **Trial: Appeal and Error.** It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.

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

E. L. Vogeltanz, for appellant.

Leo F. Clinch, A. Paul Johnson, and *Baylor, Evnen, Baylor & Urbom*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

BROWER, J.

This is an action brought by Alice L. Pearson as administratrix of the estate of Magnus A. Pearson, appellant herein and plaintiff below, against Charles E. Schuler and George Mulligan, appellees and defendants below, for the wrongful death of the deceased Magnus A. Pearson. The parties will be designated as they were in the trial court.

The plaintiff's petition alleges the death of plaintiff's decedent on December 8, 1959, in a collision between a Ford automobile driven by one Dorsey and a Mack truck loaded with gravel driven by defendant Schuler through the negligence of said Schuler in driving into said Ford; in failing to slacken his speed; in failing to apply his brakes; in driving said truck to the left side of the road and off the highway; and in other specified acts of negligence. The petition made the defendant Mulligan a party, alleging that he was the employer of the defendant Schuler and that Schuler was, at the time of the accident, working for Mulligan who was responsible as employer for Schuler's acts.

The defendant Mulligan filed his separate answer denying all the allegations of the petition except the death of the decedent.

Defendant Schuler's answer was a general denial. It admitted, however, the collision between the Mack truck of the defendant and the Ford automobile in which the deceased was riding; and alleged that the proximate cause of the accident was the negligence of the driver of the Ford automobile in failing to maintain a proper lookout and failing to yield the right-of-way, and in driving while under the influence of intoxicating liquor; that the plaintiff's deceased was guilty of contributory negligence in failing to maintain a proper lookout and in riding with a driver whom he knew had been drinking and was under the influence of intoxicants; that deceased was under the influence of intoxicating liquor and failed to warn the driver of the danger; and that

all the occupants were engaged in a joint enterprise and that the negligence of the driver was imputed to the deceased.

The reply was a general denial.

At the conclusion of the plaintiff's evidence the defendant Mulligan moved for a directed verdict on the ground that the evidence showed that Schuler was not an employee of Mulligan but was a self-employed subcontractor. The motion was sustained and Mulligan was dismissed from the action.

The cause thereupon went to the jury on the issues between plaintiff and defendant Schuler. The jury found for the defendant Schuler and that plaintiff had no cause of action. Judgment was entered accordingly. Plaintiff filed a motion for new trial and upon the overruling thereof perfected an appeal to this court.

The collision which forms the basis of this action occurred about 3:40 p.m., on December 4, 1959. It happened about a half mile south of Burwell in Garfield County. At that point State Highway No. 91 runs east and west. It is intersected by a county highway from the south which is extended on the north by the Burwell spur. The spur and county highway form one road, running north and south at right angles to Highway No. 91. The weather was clear and dry and both highways were level for some distance. The plaintiff's decedent was riding in a Ford sedan owned and operated by Knight L. Dorsey. In the car also were Earl Drake and Edward Lee. They had come from Arcadia and were driving north on the county highway approaching its intersection with Highway No. 91. There was a stop sign at the junction of the state and county highways on the south side of Highway No. 91, stopping the traffic on the county highway. The defendant Schuler was driving a Mack truck in an easterly direction on the state highway approaching the same intersection from the west. He was pulling a semi-trailer loaded with gravel. The tractor-trailer gravel truck was about 40

feet long. This truck had been passed and was preceded by a car driven by one Howard A. Jones. He was traveling eastward also and was going about 45 miles an hour. Jones' car turned to the left or north on the Burwell spur and was about 2 blocks ahead of the truck when it turned. As the truck of defendant continued eastward the Dorsey car in which Pearson was riding came from the south towards the intersection. It stopped near the stop sign on the south side of Highway No. 91. The Dorsey car, however, when the truck was about 250 feet west of the intersection, started to move forward. According to his testimony, Schuler sounded the horn when his truck was about 250 feet west of the intersection. He says this was when he first saw the Dorsey car. It was a loud horn which attracted the attention of Jones who looked around as he thought it was a train whistle. He testified the horn sounded a long time. The Dorsey car proceeded forward. When the front of this car had moved north to the south edge of the blacktop on Highway No. 91, Schuler applied his brakes and swerved to the left. The truck was then about 75 feet west of the Dorsey car. The brakes apparently then took hold and were kept on until the accident. The Dorsey car came onto Highway No. 91 at around 4 miles an hour and gained momentum. When the collision occurred it had increased to 15 or 20 miles an hour. It did not turn but went straight north through the intersection. There is some testimony to the effect that it slowed down and then came on again, and other testimony that it continued to gain speed steadily. The truck continued to curve to its left. The collision occurred between 10 and 25 feet north of the north edge of the blacktop on Highway No. 91. The traveled portion of Highway No. 91 was 22 feet wide from one edge to the other. The truck left 87 feet of skidmarks which curved in an arc from the south half of the highway to the point of impact. The front of the truck collided with about the center of the Dorsey car. Schuler was thrown

forward and up and off the brakes. Pearson died December 8, 1959.

The occupants of the Dorsey car had come that afternoon from Arcadia, Nebraska. They were going to a cattle sale at Burwell. Earl Drake had purchased a pint of whiskey and a pint of peppermint schnapps which were taken along with them. Dorsey had had a bottle of beer before leaving. They mixed drinks while driving. They stopped in the country 8 or 9 miles out of Arcadia and mixed a drink. When taken to the hospital the doctor smelled liquor on the breath of both Pearson and Dorsey. The whiskey and schnapps bottles were found in the wreckage with the seals broken.

At the time of the accident Drake sat in the back seat of the car. He and Lee looked toward the east and said it was all right there. Then Drake said, "There comes a truck, Knight."

The testimony in regard to the relation between Mulligan and Schuler seems not to be subject to any disagreement. Mulligan owned a gravel pit and sold gravel to Garfield County and had done so from time to time for 5 years. The contract with the county was oral. There was a fixed price and the county obtained the gravel as it was needed. The defendant Mulligan filed claims for the gravel with the county. Schuler hauled the gravel. Mulligan paid him 6 cents a yard-mile one way. He was hauling from Mulligan's pit on that day to the "Zalud" road northeast of Burwell. The best way to get to this road was east on Highway No. 91 through this intersection. Schuler could work whenever he wanted to. It was Schuler's truck. He furnished all the maintenance and Mulligan had nothing to say about how he operated and paid no part of the expense of hauling. Mulligan did not deduct withholding tax or social security. He kept no accounts in which Schuler was designated as an employee on his books. Neither did he designate Schuler an employee on his federal income tax or other federal reports. He gave no

directions concerning the hauling of this gravel. The county would tell the trucker where to haul it.

Plaintiff assigns as an error the ruling of the trial court in sustaining the motion of defendant Mulligan for a directed verdict. The evidence just summarized in the preceding paragraph would seem to require that ruling. There was none to the contrary.

In Reeder v. Kimball Laundry, 129 Neb. 306, 261 N. W. 562, this court said: " 'The true test of a "contractor" would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. * * * The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it.' 1 Shearman and Redfield, Law of Negligence (6th ed.) 395, sec. 164." The cited case was one where it was sought to hold as an employee one who hauled coal from a car to bins at a certain rate per ton, and who worked when he chose and directed the manner of doing the work. The court held him to be an independent contractor. We think the essential facts were much like those before us.

In Snodgrass v. City of Holdrege, 166 Neb. 329, 89 N. W. 2d 66, it was said: " 'An independent contractor is generally distinguished from an employee as being a workman who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of the work.' " These are but examples of several cases where in similar situations we have held the relationship to be that of an independent contractor.

In the case before us we do not see how the court below could have held otherwise. There was no other distinctly different negligence attributed or claimed against Mulligan. He was merely alleged to have been liable as an employer. The proof in this clearly shows

otherwise and the court properly sustained the motion for a directed verdict. Hines v. Martel Telephone Co., 127 Neb. 398, 255 N. W. 233.

The plaintiff claims that the court erred in not sustaining the motion of the plaintiff for a judgment notwithstanding the verdict. However, the plaintiff at no time made any motion for a directed verdict in her favor. In Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405, we said: "Here it should be said that defendant made no prerequisite motion for directed verdict either at conclusion of plaintiff's evidence or at conclusion of all the evidence. In In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526, we held that: 'Under section 25-1315.02, R. R. S. 1943, a motion for directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict, and the trial court cannot, either upon its own motion or upon motion for judgment notwithstanding the verdict, set aside a verdict and enter a judgment notwithstanding the verdict, where no preliminary motion for a directed verdict has been made.'"

Under the circumstances, this assignment of error cannot be sustained.

A further assignment states that the court erred in giving instruction No. 5 in that the court failed to definitely define negligence, and the jury would have to assume that if decedent was guilty of any negligence, plaintiff could not recover. Instruction No. 5 is as follows: "The burden of proof is upon the plaintiff to establish, by a preponderance of the evidence, all of the material allegations of her amended petition.

"If the jury finds that the evidence bearing upon any one or more of the material allegations of the amended petition is evenly balanced or that it preponderates in favor of the defendant, then the plaintiff cannot recover and the jury should find for the defendant.

"If, however, the plaintiff has proven all of the material allegations of her amended petition, by a prepon-

derance of the evidence, and you further find that the plaintiff's decedent was not guilty of negligence which contributed to his injuries, then plaintiff will be entitled to recover such damages as she has shown, by a preponderance of the evidence, to have sustained by reason of the negligence of the defendant.

"If, however, you find, from a preponderance of the evidence that the plaintiff's decedent was guilty of negligence which contributed to his injuries, then plaintiff's right to recover will be governed by Instruction No. 6."

This instruction by its terms refers to instruction No. 6, which reads as follows: "If you find both parties were negligent, the plaintiff cannot recover if upon comparison of plaintiff's decedent's negligence with that of the defendant you find plaintiff's decedent's negligence was more than slight or the negligence of the defendant less than gross.

"If you find both parties were negligent, and that the negligence of the plaintiff's decedent was slight and the negligence of the defendant was gross in comparison, plaintiff may recover from defendant, but is then your duty to deduct from the whole amount of the damages, if any, sustained by decedent's next of kin such proportion thereof as the negligence chargeable to him bears to the entire negligence as shown by the evidence, and return a verdict for the balance only."

We have examined both instruction No. 5 and instruction No. 6, which are set out in full above. We can find no error in them. They would appear to state the law properly. By instruction No. 4 which we do not set out in full here, negligence, preponderance of the evidence, proximate cause, slight negligence, gross negligence, and contributory negligence were all defined and explained. We cannot find any error in those definitions or explanations either. Obviously every instruction cannot be complete on the whole subject dealt with. This court has held repeatedly that instructions must be con-

strued together, and if when construed as a whole they properly state the law, they are sufficient. Fridley v. Brush, 161 Neb. 318, 73 N. W. 2d 376.

Instructions Nos. 5 and 6, when taken together, fairly state the rule of comparative negligence as set out in section 25-1151, R. R. S. 1943. They explain the substance of this statute much clearer than instructions which have been approved by this court. Kelso v. Seward County, 117 Neb. 136, 219 N. W. 843; Patterson v. Kerr, 127 Neb. 73, 254 N. W. 704. The definitions of the different kinds of negligence appear proper. When construed together we can find no error in them.

Plaintiff also contends that the court erred "in giving instruction No. 7 and stating that Dorsey's negligence would preclude recovery by plaintiff."

The appellant in her brief cites cases the purport of which are that, generally speaking, the negligence of the driver is not imputed to the guest. This is the general rule. It however does not apply in this case because the trial court never instructed that the negligence of the driver (Dorsey) was imputed to the guest, in this case the plaintiff's intestate. Instruction No. 7 reads as follows: "If you find from a preponderance of the evidence in this case that Knight L. Dorsey the driver of the automobile in which plaintiff's decedent was riding, at the time of the collision, was negligent, and that such negligence on the part of Knight L. Dorsey was the *sole* proximate cause of the collision and resulting injuries to plaintiff's decedent, then your verdict will be in favor of the defendant Charles E. Schuler, no cause for action." (Emphasis ours.)

This instruction does not tell the jury that the negligence of Dorsey was imputed to the deceased Pearson. It does state that if it found Dorsey's negligence was the sole proximate cause of the collision and resulting injuries to the plaintiff's decedent, it should find for the defendant Schuler. That amounts to instructing that if Dorsey's negligence was the sole cause of the injury

then it should return a verdict for defendant. That Dorsey's negligence was not otherwise imputed to the plaintiff's deceased is made more clear by instruction No. 11 which reads in part as follows: "* * * if you find that the injuries to plaintiff's decedent were the proximate result of the negligence of Charles E. Schuler and the driver of the automobile Knight L. Dorsey, and that such injuries would not have occurred except for the negligence of each of said parties, it is no defense to this action for the defendant, Charles E. Schuler, to prove that the negligence of Knight L. Dorsey was a contributing cause to the injuries sustained by plaintiff's decedent."

The giving of instruction No. 7 complained of follows the decisions of this court. In Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466, we approved this rule as previously laid down in these words: "We said in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673: 'Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the car or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident.' "

This court in the cited case reversed the judgment of the trial court, assigning the failure to give an instruction on this law as one of the reasons. In the case now under consideration Dorsey, the driver of the automobile in which deceased was riding, entered a highway protected by stop signs. According to some of the evidence he slowed down thereafter and then again went on. Within approximately 250 feet a truck loaded with gravel was coming toward the intersection in which the east-west traffic was favored. For a considerable distance the truck driver blew a horn which according to independent witnesses was very loud. Defendant was entitled to have an instruction on this

phase of the law and the one given appears proper.

The question of the negligence of the defendant Schuler was likewise submitted to the jury on instructions not complained of. The jury found for the defendant and against the plaintiff. In Johnston v. Robertson, 171 Neb. 324, 106 N. W. 2d 192, it was said: "It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. See Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557."

The plaintiff makes certain assignments of error because of the exclusion by the trial court of certain proffered evidence concerning payments the decedent would have received under the social security law and the loss of certain rights and payments to the widow herself thereunder. In view, however, of the finding of the jury against the plaintiff we do not consider the assignments.

Plaintiff also makes assignments of error in general terms, pointing out nothing specifically. They merely complain of the jury's finding for the defendant or the court overruling motions for a new trial, and cannot be considered. Allsman v. Richmond, 55 Neb. 540, 75 N. W. 1094; Wieck v. Blessin, 165 Neb. 282, 85 N. W. 2d 628.

The issues were submitted to the jury as the trier of the facts. We find no error in the submission, and the judgment must be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MARVIN EUGENE GARDNER, APPELLANT, V. HERBERT KOTHE, DOING BUSINESS AS KOTHE CONSTRUCTION COMPANY, APPELLEE.

109 N. W. 2d 405

Filed June 9, 1961. No. 34996.

1. **Workmen's Compensation.** The primary test in determining whether the relationship of employer-employee exists is whether the alleged employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be done as well as the result which is to be accomplished.
2. ———. An independent contractor, generally, is one who contracts to do a piece of work according to his own methods and is not subject to the control of the other contracting party except as to the result of the work.
3. ———. An indispensable element to the creation of the relationship of an independent contractor is that the party must contract to do a specified piece of work for a specified price.
4. ———. The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist.
5. ———. A contractor who fails to require a subcontractor to carry compensation insurance is a statutory employer under section 48-116, R. R. S. 1943, and is jointly and severally liable with the subcontractor to the employees of the subcontractor.
6. ———. The immediate employer is not a necessary party to a proceeding to recover workmen's compensation brought by an employee against a statutory employer under section 48-116, R. R. S. 1943.

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

Gaines, Spittler, Neely, Otis & Moore, for appellant.

Tesar & Tesar and *James J. Fitzgerald*, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Nebraska Workmen's Compensation Act. The appellant, Marvin Eugene

Gardner, who was the plaintiff below, alleged that he was injured on April 22, 1960, while employed by the defendant, Herbert Kothe, the appellee.

The matter was tried to a single judge of the Nebraska Workmen's Compensation Court who dismissed the action. Upon rehearing before the full compensation court, the action was again dismissed. Upon appeal to the district court, the order of dismissal was affirmed. The plaintiff's motion for new trial was overruled and he then appealed to this court.

The plaintiff's assignments of error are, in substance, that the court erred in failing to award the plaintiff compensation and in holding that George L. Noble was a necessary party to the action.

There is no substantial conflict in the evidence in this case. The record shows that the defendant is a contractor engaged in building room additions and applying siding and roofing material to houses. The defendant subcontracts the labor required on certain jobs to a third party.

The defendant contracted to furnish the materials and labor necessary to install aluminum siding and make certain other improvements to a residence property in Omaha, Nebraska. The defendant then contracted with George L. Noble to apply the siding to this property. Noble was to be paid by the defendant at the rate of $12 per square. A "square" is 100 square feet. Noble and the plaintiff both testified that the plaintiff was employed by Noble as a siding applicator at the time the accident happened.

The plaintiff's theory of the case is that the defendant is liable as a statutory employer under section 48-116, R. R. S. 1943, because of his failure to require Noble to carry compensation insurance. The defendant's theory of the case is that the plaintiff was not an employee of Noble and that the plaintiff was an independent contractor, or a partner of Noble, or was engaged in a joint venture with Noble.

The defendant admits that he did not require Noble to carry compensation insurance and it is undisputed that both Noble and the defendant did not have compensation insurance. The case turns upon the question of what relationship existed between the plaintiff and Noble at the time the accident happened. The defendant is not liable to the plaintiff unless the plaintiff was an employee of Noble.

The primary test in determining whether the relationship of employer-employee exists is whether the alleged employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be done as well as the result which is to be accomplished. Williams v. City of Wymore, 138 Neb. 256, 292 N. W. 726. In the Williams case the court said: "The test usually invoked in this state is whether the alleged employer has the control of the workman and the details, mode and manner of doing the work."

In Shamburg v. Shamburg, 153 Neb. 495, 45 N. W. 2d 446, the court said: "The relation of employer and employee is the same relation that is familiar throughout the law under the name of master and servant, except that to be an employee, as distinguished from a servant generally, one must serve under a contract of hire. * * * Generally most courts agree that the main test is the right of control, and that right, in the actual exercise of that control, governs. * * * Other factors are looked to only to aid in determining whether such relationship existed in a given case."

An independent contractor, generally, is one who contracts to do a piece of work according to his own methods and is not subject to the control of the other contracting party except as to the result of the work. Schneider v. Village of Shickley, 156 Neb. 683, 57 N. W. 2d 527. In the Schneider case the court said: "One indispensable element to the creation of the relationship of an independent contractor is that the party must

contract to do a specified piece of work for a specified price."

The evidence in this case is that Noble had been performing carpenter work and other similar work for the defendant for a number of years. The plaintiff had worked on two other jobs or contracts for Noble before the job on which he was injured. Noble asked the plaintiff to help him on a job on North Fortieth Street. The plaintiff came to work on the second day. Noble agreed to pay the plaintiff "The going rate, the same as anybody else," which was $12 a square. The next job on which the plaintiff worked for Noble was on South Thirty-fourth Street, across the street from where the accident happened. On each job Noble paid the plaintiff for the work that the plaintiff did. There is no evidence that the plaintiff had any control over the manner in which the work was to be done, on which job he was to work, or when the work would be done. What evidence there is indicates that the plaintiff was subject to the control and supervision of Noble in the performance of the work.

There is no evidence that the plaintiff agreed to perform a specified piece of work for a specified price. The evidence is that Noble asked the plaintiff to come to work and help Noble finish the job. Noble agreed to pay the plaintiff for the work that he would do.

The defendant points out that the plaintiff was to be paid upon a piece-rate basis; that his rate was the same as the contract price between Noble and the defendant; and that Noble did not deduct withholding taxes or social security from the amounts paid to the plaintiff. These are facts which bear upon the issue and must be considered, but we do not consider them to be controlling when considered with the evidence as a whole.

The payment of wages on a piece-rate basis is not inconsistent with the status of an employee. Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d

810. The fact that Noble did not deduct withholding taxes or social security from the amounts paid to plaintiff is evidence that tends to negative a finding that the plaintiff was an employee but it is not conclusive.

The fact that the plaintiff received the same rate as Noble did under the contract with the defendant is explained, at least in part, by the fact that it was the going rate for the work the plaintiff performed. The defendant argues that this shows that plaintiff was a partner, or engaged in a joint venture, with Noble, but this contention is not supported by the evidence. The evidence is that the plaintiff had no right to share in any profits that might result from Noble's contract with the defendant. The absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. Soulek v. City of Omaha, 140 Neb. 151, 299 N. W. 368.

Noble also employed a helper, James D. Mabe, who piled material, picked up scraps, and did generally whatever Noble told him to do. Mabe was working on the job when the plaintiff was injured. Mabe was paid by Noble and the plaintiff was not liable for any of the wages paid to Mabe. There is no evidence that the plaintiff was liable for any other expense incident to the job. Noble did not deduct withholding taxes or social security from the amounts he paid to Mabe.

Upon a review of the evidence de novo, we hold that the evidence establishes that the plaintiff was an employee of George L. Noble at the time the accident happened. This conforms to the finding of the compensation court upon rehearing upon this issue.

The compensation court held that the plaintiff could not recover compensation from the defendant in this proceeding because the plaintiff had failed to make George L. Noble a party. The only authority cited by the defendant on this issue is Keith v. Wilson, 165 Neb. 58, 84 N. W. 2d 192. In the Keith case an employee was injured while cutting and stacking hay. The immediate

employer, who was exempt from the provisions of the act, had entered into a contract with the lessee of a ranch who had elected to come under the act. The opinion held the lessee liable to the injured employee under section 48-116, R. R. S. 1943, but the immediate employer not liable. The Keith case is not directly in point insofar as the issue raised in this case is concerned because both the lessee of the ranch and the immediate employer were party defendants. However, the court noted that the liability of a contracter under section 48-116, R. R. S. 1943, if it exists, is not dependent upon imputation but upon the clear and specific terms of the statute which defines and declares the liability.

The liability of the defendant in this case under section 48-116, R. R. S. 1943, is joint and several with Noble. All parties who may be liable are not necessary parties to the litigation if their liability is joint and several. Noble was not a necessary party to this proceeding.

The findings of the district court are not supported by the evidence as disclosed by the record. The plaintiff is entitled to recover workmen's compensation from the defendant in accordance with the provisions of the act.

The plaintiff's wages were such that he is entitled to receive compensation at the maximum rate provided by the act, $37 per week. The plaintiff was temporarily totally disabled for a period of 4 weeks, but can recover compensation for only 3 weeks of temporary total disability. He is entitled to recover medical and hospital expense in the amount of $322.75. He is entitled to compensation for 30 weeks for loss of the second finger and 20 weeks for loss of the third finger, all of which is now due.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in favor of the plaintiff and against the defendant in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ELVIN E. HILLS ET AL., APPELLEES, V. EARLE M. BURNETT, SR., DOING BUSINESS AS BURNETT'S HOME TRAILER SALES, ET AL., APPELLEES, IMPLEADED WITH THE MICHIGAN NATIONAL BANK, A CORPORATION, APPELLANT.
109 N. W. 2d 739

Filed June 16, 1961. No. 34923.

1. **Statutes.** Where a statute is amended or reenacted in different language, it will be presumed that the language was intentionally changed for the purpose of effecting a change in the law itself.
2. ———. In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place, in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute.
3. **Banks and Banking: Actions.** In general, questions as to jurisdiction and venue in actions against national banks are dependent on rules of general application in civil actions and are not controlled by the character of the bank as a national corporation.
4. ———: ———. Under the federal statutes, so far as civil actions by or against national banks are concerned, the state and the federal courts have concurrent jurisdiction, and questions as to state or federal jurisdiction in any particular case or the jurisdiction of particular state courts are governed ordinarily by the same considerations as govern with respect to any other action, the character of the bank as a national corporation having no bearing on the question.
5. ———: ———. As regards the venue of actions brought against national banks, such statutes are held to be permissive rather than mandatory, are applicable to transitory rather than local actions, and do not apply to cases wherein a national bank has become a joint party as an incident to the enforcement of an equitable or legal right.
6. **Corporations: Process.** Where a foreign corporation has business transactions in this state with citizens and residents of the state, out of which arise accounts or claims against the corporation, such accounts or claims may be enforced in the courts of this state if jurisdiction can be obtained by legal service of process.
7. **Usury.** It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such.

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

Frank B. Morrison, Healey, Wilson & Barlow, and *Patrick W. Healey,* for appellant.

Nelson, Harding & Acklie and *Donald E. Leonard,* for appellees Hills et al.

William F. Matschullat and *Charles W. Phillips,* for appellees Burnett et al.

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

SIMMONS, C. J.

This is an action in which plaintiffs seek to have a conditional sales contract and a promissory note declared null and void and released of record; to require defendants to deliver to plaintiffs a certificate of title to a mobile home involved; to restrain and enjoin defendants from attempting to collect on the loan; and to recover judgment for payments made.

The trial court found generally for the plaintiffs, decreed generally in accord with their petition, and rendered judgment against the Michigan National Bank for payments made to it in the sum of $369.44.

The plaintiffs are husband and wife and will be referred to herein as such except on occasion the husband will be referred to as Elvin. The defendants are corporations and individuals, who will be later named herein. The Michigan National Bank, a Michigan corporation, is the sole appellant. It will be referred to herein as the Bank.

The Bank by argument here presents the following contentions: (1) It is not a foreign corporation within the meaning of section 21-1201, R. S. Supp., 1959, as defined in section 21-1202, R. R. S. 1943, and hence not subject to service as provided therein; (2) that as a national banking association established in the State

of Michigan, it can only be sued in the district where established or in the state or municipal courts in the county where it is located; (3) that the transaction involved here did not involve usury; and (4) that if it did, the penalty applicable is a recovery back of twice the amount of interest paid and a forfeiture of all interest not yet paid. These contentions will be discussed in detail in the order stated.

We affirm the judgment of the trial court.

Section 21-1201, R. S. Supp., 1959, provides for service upon a foreign corporation. It is conceded that the service was properly made if the Bank is such a "foreign corporation" as defined in such act. The question is one of legislative intent. Section 21-1202, R. R. S. 1943, as it was when the service here had was made, is as follows: " 'Foreign corporations,' as the term is used in section 21-1201, shall embrace and include all corporations organized under the laws of any foreign government, of any other state than the State of Nebraska, and of any territory thereof, including the District of Columbia."

The contention of the Bank is that the government of the United States is not a "foreign government," as used in the act. If that be true, then it follows that the Legislature intended to include as a foreign corporation those organized under any government other than the government of the United States and the State of Nebraska; to exclude those organized under the laws of any territorial government of the United States; to include all others organized under territorial laws anywhere in the world; and to include corporations organized under the laws of the District of Columbia, although the District of Columbia is exclusively under the control of the government of the United States.

A study of the history of the act and its predecessor negatives any such irrational conclusion.

The Legislature in 1907 passed an independent act providing for service of process upon foreign corpora-

tions. Laws 1907, c. 32, p. 162. It provided in section 6 that: "This act shall be construed to be cumulative and shall in no way limit or restrict any method of obtaining service upon the corporations mentioned in this act now authorized by law but shall be in addition thereto."

The 1907 act defined a foreign corporation as "* * * every * * * corporation * * * organized or incorporated under the laws of any government *than the government of the United States,* or the laws of any state other than this state, except insurance companies, and except railroad companies, * * *." Laws 1907, c. 32, § 1, p. 162. (Emphasis supplied.) It appears clear that there was a legislative intent to except corporations organized under the laws of the government of the United States.

In 1909 the Legislature repealed the 1907 act and adopted a new act in its entirety and again provided that its provisions were cumulative as it had before. Laws 1909, c. 28, p. 206.

It defined a foreign corporation substantially as now defined in section 21-1202, R. R. S. 1943. Notably it left out any exception to corporations organized under the laws of the United States and added thereto the provision including territories and the District of Columbia.

In Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487, L. R. A. 1916E 593, the rule is stated that: "Where a statute is amended or re-enacted in different language, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. On the contrary, it will be presumed that the language was intentionally changed for the purpose of effecting a change in the law itself."

In Hurley v. Brotherhood of R. R. Trainmen, 147 Neb. 781, 25 N. W. 2d 29, we reaffirmed this rule: " 'In considering an amendatory or substituted statute, it is proper to consider the provisions of the law which was repealed in connection with the law which takes its place,

in order to ascertain the legislative intent, and all provisions of the original statute which are not carried forward into or repeated in the new law are annulled by the repealing statute.'"

It is clear that the exemption of the government of the United States from the 1909 act shows a clear legislative intent to include corporations organized under laws of the government of the United States within the classification of foreign corporations and makes them amenable to service of process under section 21-1201, R. S. Supp., 1959.

This conclusion is reinforced by definitions found in the general corporation act passed in 1941. Laws 1941, c. 41, § 1, p. 158. It defines as follows: "* * * (1) 'domestic corporation' means a corporation organized under the laws of this state; (2) 'foreign corporation' includes every corporation not organized under the laws of this state; * * *."

Section 21-1201, R. R. S. 1943, was amended in 1955 (Laws 1955, c. 62, § 2, p. 197), prior to the service here involved and subsequent to the definitions above set out, was included in the general corporation act, and provided in certain contingencies for service upon the Secretary of State.

We find no merit to the Bank's assignment of error above discussed.

Title 12 U. S. C. A., § 94, p. 442, provides: "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The Bank contends that the trial court was without jurisdiction of the subject matter under the above provision. It contends that the proper venue of an action or proceeding against a national banking association

under the above statute is in the United States District Courts within the district or the state courts of the county or city where the bank is located. Stated otherwise, while asserting the right to transact business anywhere, it insists it can claim sanctuary from suit except in the restricted area defined by statute.

The Bank furnishes here an extended analysis of many decisions which it asserts sustain its claim of sanctuary under the above statute.

We do not deem it necessary to here analyze these decisions.

In 7 Am. Jur., Banks, § 820, p. 591, is stated the following rule: "The National Bank Act provides that actions and proceedings against any association under that act may be had in any Circuit, District or Territorial Court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. A majority of the state courts have held that these provisions do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. * * * The minority rule is that a national bank may not be sued without its consent outside the county or city in which it is located. Even under this view, however, the exemption of national banks from suit in other than the county or city in which such associations are located is deemed to be a personal privilege prescribed for the convenience of such institutions and to prevent the interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts."

The same rules are stated in Annotation, 86 A. L. R. 47, and following.

The rule is stated in 9 C. J. S., Banks and Banking, § 726, p. 1280, that: "In general, questions as to jurdisdic-

tion and venue in actions against national banks are dependent on rules of general application in civil actions and are not controlled by the character of the bank as a national corporation.

"Under the federal statutes, so far as civil actions by or against national banks are concerned, the state and the federal courts have concurrent jurisdiction, and questions as to state or federal jurisdiction in any particular case or the jurisdiction of particular state courts are governed ordinarily by the same considerations as govern with respect to any other action, the character of the bank as a national corporation having no bearing on the question. Moreover, the effect of federal statutes providing that actions against national banks may be had, as regards federal courts, in the district where the particular bank is established, or, as regards state courts, in the state, county, or city where the bank is located, has been held primarily to confer jurisdiction on the courts specified. As regards the venue of actions brought against national banks, such statutes are held to be permissive rather than mandatory, are applicable to transitory rather than local actions, and do not apply to cases wherein a national bank has become a joint party as an incident to the enforcement of an equitable or legal right. There are, nevertheless, cases which hold that, under the provisions of the federal statutes in question, in order to maintain actions against national banks, such actions must be brought in the place where the bank is located or the district where the bank is established, depending on whether the particular action is brought in a state or a federal court."

A wealth of cases is cited under Title 12 U. S. C. A., § 94, p. 445.

The Bank here admits that it has been doing business in Nebraska. The evidence shows that it has over the years purchased between three and four million dollars worth of paper, similar to that here involved, from one or more of the defendants or their corporations. It has

not complied with our laws in so doing.

The cause of action upon which plaintiffs sue arose in this state. Some of the defendants are residents of this state. Most of them were personally served in this state. The action is one that seeks to enforce provisions of state laws.

The conditional sales contract here involved provides that: "It is the intention of the parties hereto that all matters relating to the execution, interpretation, validity and performance of this contract shall be governed by the laws of the state in which the Buyer now resides, which is the state indicated below." The contract shows that the buyer was a resident of Nebraska.

The reason given in some of the cases relied on by the Bank for construing the permissive "may" of Title 12 U. S. C. A., § 94, p. 442, as mandatory as being necessary to prevent the interruption of the Bank's business by having its books and records sent to distant places, has little if any application here. In fact the Bank's witness testified that it repeatedly sent representatives into this state to enforce collection of contracts such as are involved here.

In Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co., 49 Neb. 537, 68 N. W. 929, we held that: "Where a foreign corporation has business transactions in this state with citizens and residents of the state, out of which arise accounts or claims against the corporation, such accounts or claims may be enforced in the courts of this state if jurisdiction can be obtained by legal service of process."

In discussing this matter we said: "* * * it may be said that the company, plaintiff in error, was an Iowa corporation; that the evidence adduced at the hearing on the objections to the jurisdiction of the court, although conflicting, was amply sufficient to sustain the finding that the contract, from which arose the claim involved herein, was a Nebraska contract, a business transaction of the foreign corporation, within this state, and fur-

ther, that it was engaged in other and further acts in this state, directly within its province as a corporation. By so doing it brought itself within the state and subject to the jurisdiction of the courts of Nebraska, and subject to their process, at least in actions growing out of such affairs. By the transactions of the corporation, including the one out of which arose the claim on which this action is based, the corporation was sufficiently engaged in business in this state to be amenable to the jurisdiction of its courts and subject to the process thereof when legally served, at least in an action for the recovery of the account, the result of such business."

We have followed that rule as late as Pitzer v. Stifel, Nicolaus & Co., 143 Neb. 394, 9 N. W. 2d 495.

We see no reason why, nor do we conceive that the Congress intended, that a national bank should be permitted to go into a state not of its location, transact business, seek the protection and benefit of its laws, and then be granted full immunity from suit except in the small sanctuary as defined in Title 12 U. S. C. A., § 94, p. 442.

We follow the majority rule and the plain import of our own decisions, and hold that the Bank is subject to suit in Nebraska under the conditions existing here. Any other decision would be a patent injustice.

The Bank next contends that the sale here involved was a good faith time sale and valid.

It becomes necessary now to state the facts somewhat in detail as we find them to be without substantial dispute in the record.

Plaintiff Elvin E. Hills was a young man stationed at the airbase near Lincoln, Nebraska. His wife was a student in a beautician school.

The defendants Burnett, father and son, controlled two corporations and at times did business under names not the same as the names of the corporations. It is sufficient to say that the son handled the sales at a place of business on one of the highways near or within the

city of Lincoln under the name of Tad's Home Trailer Sales. Mr. Burnett, Sr., operated out of a downtown office and handled the sale of paper taken in payment at the sales lot. Such at least was the way this transaction was handled.

Tad's Home Trailer Sales advertised trailers or mobile homes for rent. Plaintiff Elvin went to the lot to look at rentable trailers. He was told that at that time it did not have trailers for rent but did have used and new trailers for sale. Elvin looked at them. He found one which he thought suited his needs and was quoted a cash price of $3,995, plus $5 for a credit check. He was asked how much he could pay down and responded "about two hundred dollars." The salesman responded that he thought that would be sufficient to put him in possession of the trailer. He asked about the payment of the balance and was told that would be financed at the normal bank rate of 6 percent. Elvin then went downtown, got his wife, and she examined the trailer and approved the purchase. Elvin then made by check a payment of $200 to Tad's Trailer Sales, and signed in blank what he understood to be a "credit reference" but which was in fact a conditional sales contract. Elvin was told that if he desired to do so before the contract was completed, the $200 would be returned to him. Up to this point it seems perfectly clear that no mention was made of other than a cash price.

These events occurred at or before the noon hour. Mr. Burnett, Jr., endorsed and cashed the check that afternoon.

About 5 p.m. plaintiffs returned to the sales lot. They were told that their credit report was favorable. They were required to wait until a clerk in the office prepared the necessary papers.

Finally they were presented with a series of papers to which they were told in effect to "sign here."

In the order in which offered in evidence they were as follows: Exhibit A is a "Conditional Sales Contract."

The blanks were filled in on a typewriter. This showed (1) a "Cash Selling Price" of $4,000; (2) insurance, $250; (3) a "Down Payment" of $1,200 (this will be explained later herein); (4) unpaid balance of purchase price, $3,050; (5) finance charge, $915; (6) a "Deferred" balance of $3,965; and (7) payable in 60 equal installments of $66.10 a month. This figured up to $3,966 instead of $3,965. Here we point out that none of the defendants was licensed to engage in business under the Installment Loan Act, sections 45-114 to 45-158, R. R. S. 1943.

Exhibit B is the insurance policy written through the agency of Mr. Burnett, Sr. It shows the purchase price to be $4,000 with loss payable to the Bank.

Exhibit C is the promissory note for $3,965, payable to Burnett's Home Trailer Sales at the Bank's place of business in Michigan.

We noted that we would explain the $1,200 down-payment recited above. Of that sum $200 was paid by the check above referred to. The balance was a promissory note payable on demand to Mr. Burnett, Sr., with interest at the rate of 6% per annum and at 9% after maturity. No mention had been made of this $1,000 note until the evening session. Incidentally there is in evidence a letter dated November 3, 1959, from the trustee of "Tad's Enterprises, Inc." for the payment of this $1,000 note. As noted above this note was payable to Mr. Burnett, Sr., "or order." It shows no endorsement.

Exhibit E is a "Statement of Delivery" directed to the Bank. It recites a "purchase price" of $4,000, a "Cash" payment of $1,200, and a recital that the plaintiffs were to pay 60 monthly installments of $66.10. It is signed only by Elvin. On the basis of this instrument alone, it can be calculated that the plaintiffs were to pay a total of $3,966 on a $2,800 debt.

Exhibit G is defined in the form as an "Irrevocable Application to Purchase." Plaintiff Elvin testified that he signed such an instrument in blank. The exhibit shows typewritten entries including "Total purchase

price to be paid" of $4,000 and other entries similar to those above recited in the conditional sales contract.

Exhibit L is a "Michigan National Bank Customer's Statement" signed by the plaintiffs and giving credit references. Description of the "article" purchased recites the "Cash Delivered Price" of $4,000, and the other figures involved in the conditional sales contract by which a "Deferred Balance" of $3,965 is shown payable at $66.10 per month for 60 months. The evidence is that this exhibit is one which was submitted to the Bank and considered by it in making the purchase of these contracts. It is on a form submitted to dealers and required by the Bank. Likewise the "Statement of Delivery," exhibit E, is on a form submitted by the Bank and required by it. Likewise the promissory note for $3,965 is on a form prepared by the Bank and furnished to its dealers.

Exhibit M is a carbon copy typewritten form which recites that Elvin had been offered a time sales price of $5,165 and a cash price of $4,000 and had rejected the cash sale price. Here it appears that Burnett's office force was careful to have Elvin fill in the blanks by himself, although it is patent that he wrote in things such as the remainder was payable "to Michigan National Bank" and a description of the trailer by serial number, etc. On all the other forms a clerk of the seller filled in all blanks on the typewriter. The above is the only reference we find in the record to a time sales price being quoted. We see in it nothing but a subterfuge to meet the time sale-cash sale rule.

The evidence is that the conditional sales contract, the promissory note for $3,965, the promissory note for $1,000, the customer's statement, and the election not to purchase for cash were all typed in the late afternoon before plaintiffs were called in to sign.

The plaintiffs were called in to sign and refused. Plaintiff Elvin complained that he had not been told about any $1,000 side note to Mr. Burnett. He asked for

the return of the $200 he had paid and it was refused. He then called his noncommissioned officer superior at the base, who had recommended the Burnett place to him, and he came to the sales lot. The friend recommended that he and his wife sign the papers, which he and his wife did.

It is the above transaction that we are asked to approve as a good faith time price sale after an "opportunity" to choose between a cash price and a time price.

After the plaintiffs refused to sign the papers and asked for a return of their deposit and that request was refused, their "choice" lay between losing $200 of their money or submitting to the demands of the defendant Burnett.

In McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1, we held that: "In cases of this character courts will look through the form to the substance of the transaction in order to determine whether there was a bona fide time sale or a loan."

Particular reference may be made to our holding in the McNish case about a borrower in chains. See, also, Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57.

In McNish v. General Credit Corp., *supra,* we held that: "A truck dealer may in good faith sell a truck on time for a price in excess of the cash price without tainting the transaction with usury, even though the difference in the two prices may exceed lawful interest for a loan. * * * A time sale made in good faith at a price in excess of a cash price, which time price is arrived at by schedules furnished by a finance company which solicits contracts so entered into between a purchaser and a dealer, may not be regarded as being tainted with usury, even though the difference exceeds the lawful interest for a loan. * * * In order to have the foregoing principles apply it must appear that the buyer actually was informed of and had the opportunity to choose between a time sale price and a cash sale price.

It is not enough to merely show that the instruments signed evidencing the indebtedness refer to a time price or time differential when, in fact, the buyer was never quoted a time sale price as such."

These rules were followed again in Robb v. Central Credit Corp., *supra*, wherein we added: "It is not a time sale if a car dealer, in selling a car, actually agrees with the buyer that he will finance the balance of the cash purchase price agreed upon, and does so, even though at the time he informs the buyer of the amount he will be required to pay and the terms thereof. Such a transaction would be a loan to finance the balance of the cash purchase price and, if payable in installments, must meet the requirements of the statutes relating thereto. And the fact that the buyer knew the terms and provisions of such loan at the time it was made and voluntarily entered into it would not have the effect of waiving the illegality of any provision thereof, if such provision was actually in violation of any of the inhibitory provisions of the installment loan statute. See State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55."

We find no merit in the contention of the Bank above examined.

Finally the Bank contends that even if we hold against its other contentions that under the provisions of Title 12 U. S. C. A., § 86, p. 319, the penalty is the loss of all interest to accrue and the recovery against it of twice the interest paid.

In its original brief here the contention is advanced in this language: "* * * if the transaction is considered a direct loan from the bank rather than a time sale, so as to hold the bank to have participated in a scheme, device or artifice to take usury, then it is error to impose a penalty greater than that provided by the controlling federal statute—forfeiture of all interest due and recovery of twice the interest paid."

In its reply brief it states its position in this lan-

guage: "If the Court strike down this transaction, it apparently must be done on the basis of a holding that the transaction amounted to a 'direct loan' from the bank to the purchasers. It is, of course, to The Michigan National Bank that the note is made payable, and the purchase statement contemplates that the time balance to be paid to The Michigan National Bank. This is, so the Bank contends, merely the manner in which the vendor's interest in the transaction is assigned and taken over by The Michigan National Bank.

"If, however, it should be held to be a direct loan, then it is plain that the penalties provided by 12 U. S. C. Section 86 are exclusive."

Implicit in these contentions is the premise that the note was "made payable" to the Bank and that the purchase statement contemplates that the time balance be paid to the Bank.

This is exactly contrary to the record. The note for $3,965 is made payable to Burnett's Home Trailer Sales at the office of the Bank in Grand Rapids, Michigan.

The Bank's witness here very explicitly stated that the Bank did not purchase the note and contract here involved until it had examined the same with the supporting papers. The premise upon which this argument rests is not in accord with this record.

The Bank here does not seem to recognize that this contract and promissory note were void from the inception of their delivery to Burnett. The sale of them to the Bank by Burnett does not and cannot breathe validity into them. The statutes of this state and our repeated decisions so provide.

We need cite only some of the latter decisions: Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19; Thompson v. Commercial Credit Equipment Corp., 169 Neb. 377, 99 N. W. 2d 761.

Any other rule would open a wide door for the complete defeat of the Installment Loan Act and the public policy it serves. Any person, licensed or nonlicensed,

could then avoid the inhibitions and prohibitions of the act by the simple device of selling the void securities to a national bank.

The judgment of the district court is affirmed.

AFFIRMED.

EARL T. ROBERTSON ET AL., APPELLEES, V. EARLE M. BURNETT, SR., DOING BUSINESS AS BURNETT'S HOME TRAILER SALES, ET AL., APPELLEES, IMPLEADED WITH THE MICHIGAN NATIONAL BANK, A MICHIGAN CORPORATION, APPELLANT.
109 N. W. 2d 716

Filed June 16, 1961. No. 34924.

1. **Corporations: Process.** Section 21-1201, R. S. Supp., 1959, provides for service of process on the Secretary of State of this state when a foreign corporation is doing business within the state.
2. ———: ———. Section 21-1202, R. R. S. 1943, defines foreign corporations as follows: " 'Foreign corporations,' as the term is used in section 21-1201, shall embrace and include all corporations organized under the laws of any foreign government, of any other state than the State of Nebraska, and of any territory thereof, including the District of Columbia."
3. **Banks and Banking: Corporations.** A national banking association organized under the laws of the United States doing business within this state is a foreign corporation within the contemplation of the language appearing in section 21-1202, R. R. S. 1943.
4. **Banks and Banking: Actions.** The National Bank Act provides that actions and proceedings against any association under that act may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.
5. ———: ———. This court adopts the majority rule which is that these provisions do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought.
6. ———: ———. The provision of the National Bank Act re-

lates to transitory actions only, and not to such actions as are by law local in their character, and national banks are not exempted from the ordinary rules of law affecting the locality of actions founded on local things.

7. **Usury.** The permissive provisions of sections 45-114 to 45-158, R. R. S. 1943, apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such entire indebtedness void and uncollectible.

8. ———. A loan made by a nonlicensee under the Installment Loan Act which is not secured by a real estate mortgage and is not due or payable within the period of 36 months as provided for in section 45-138, R. R. S. 1943, is violative of said section and void.

9. ———. Section 45-137, R. R. S. 1943, provides for the maximum amounts of interest rates to be charged on loans under the Installment Loan Act, and when the charge exceeds the maximum legal amount which can be charged under such section, the loan is rendered void by section 45-155, R. R. S. 1943.

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

Frank B. Morrison, Healey, Wilson & Barlow, and *Patrick W. Healey,* for appellant.

Barney, Carter & Buchholz, for appellees Robertson et al.

William F. Matschullat and *Charles W. Phillips,* for appellees Burnett et al.

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

MESSMORE, J.

This is an action brought by Earl T. Robertson and Harriett Robertson, husband and wife, plaintiffs, against Earle M. Burnett, Sr., doing business as Burnett's Home Trailer Sales; the Michigan National Bank, a Michigan corporation organized under the laws of the United States; Drive-In Realty Company, a Nebraska corporation; and Earle M. Burnett, Jr., defendants. The action

involved the purchase of a house trailer by the plaintiffs, the signing of a promissory note by them, also the giving of a conditional sales contract and a chattel mortgage by the plaintiffs. The purpose of the action was to recover judgment from the defendants, and each of them, in the amount of $563.10 with interest at 6 percent per annum; that the note, conditional sales contract, and chattel mortgage be declared void; and that the defendants be ordered to deliver to the plaintiffs a certificate of title to the house trailer free and clear of encumbrances.

The trial court found generally in favor of the plaintiffs and against the defendants, and that it had jurisdiction of the parties and the subject matter of the action. The trial court rendered judgment that the action of the plaintiffs against the defendants Drive-In Realty Company and Earle M. Burnett, Jr., and each of them, be dismissed with prejudice; that the promissory note of Earl T. Robertson and Harriett Robertson payable to the order of Burnett's Home Trailer Sales, dated January 4, 1958, in the amount of $3,378.60 be declared void and uncollectible; that the Michigan National Bank be ordered to deliver to the plaintiffs, Earl T. Robertson and Harriett Robertson, certificate of title to a Ventoura house trailer free and clear of encumbrance; and that the defendants Earle M. Burnett, Sr., and the Michigan National Bank pay to the plaintiffs Robertson the sum of $630.40 and interest thereon at the rate of 6 percent per annum, and costs of the action.

The Michigan National Bank filed a motion for new trial, reserving its objections to jurisdiction and venue, and, from the overruling thereof and the judgment, the bank has perfected this appeal.

The Michigan National Bank entered its special appearance objecting to the jurisdiction of the court over this defendant and for no other purpose for the following reasons: (1) The Michigan National Bank is organized and exists under and by virtue of laws of the

United States and not the laws of any state; (2) no lawful summons was served upon this defendant; (3) any pretended process served upon this defendant was without lawful authority; (4) this defendant is not and never has been engaged in business in the State of Nebraska; and (5) this court has no jurisdiction over the person of this defendant.

By stipulation in the record, the facts are as follows. Earl T. Robertson is 47 years of age, and Harriett Robertson is 46 years of age. They live in Lincoln, where Earl T. Robertson is employed as a laborer earning $3,400 annually. They have resided in the house trailer involved in this case in Lancaster County, Nebraska, at all times since delivery of the trailer to them.

Earle M. Burnett, Sr., does business as Burnett's Home Trailer Sales. He is a resident of Lincoln, and his principal place of business at all times involved was 318 Sharp Building, Lincoln.

The Michigan National Bank is a national banking corporation, organized and existing under and by virtue of the laws of the United States. Its principal place of business is in Grand Rapids, Michigan. It is established in the State of Michigan, and has no place of business outside of the State of Michigan.

The Drive-In Realty Company is a Nebraska corporation, and at all times involved was doing business under the trade name of Tad's Home Trailer Sales. It had its principal place of business at Tenth and Cornhusker Highway in Lincoln. Earle M. Burnett, Sr., and Earle M. Burnett, Jr., at all times involved herein were officers and stockholders of the Drive-In Realty Company. Earle M. Burnett, Jr., at all times involved, was an employee and manager of Tad's Home Trailer Sales at Tenth and Cornhusker Highway.

On November 5, 1957, Earle M. Burnett, Sr., purchased from the Ventoura Company, a corporation, a certain Ventoura mobile home. On December 7, 1957, a new certificate of title was issued in the name of Tad's Home

Trailer Sales, reciting acquisition of title from Burnett's Home Trailer Sales on November 20, 1957. This new title noted a lien in the amount of $6,000 held by State Securities Company, Lincoln, Nebraska.

In December 1957, on two occasions the Robertsons went to Tad's Home Trailer Sales lot and looked at the Ventoura trailer, among others, being shown through the lot by Earle M. Burnett, Jr., and one of his employees. The latter offered to sell the Ventoura trailer to the Robertsons. On January 4, 1958, the Robertsons returned to the lot where again the trailer was shown to them, and again it was offered for sale to them. The Robertsons do not know or remember whether or not more than one price was offered. Tad's Home Trailer Sales offered to accept property of the Robertsons in trade, at a value the amount of which the Robertsons do not remember. Earl M. Burnett, Sr., was called, and came down to assist with preparation of the closing papers. He prepared an application to purchase and other documents in connection with the transaction. The other documents included a note payable to Burnett's Home Trailer Sales at the office of the Michigan National Bank, Grand Rapids, Michigan, in the amount of $3,378.60; a conditional sales contract; and a Michigan National Bank customer's statement. Also executed by the Robertsons on the same date was the purchase statement.

The trailer was delivered to the plaintiffs on January 20, 1958, and the plaintiff Earl T. Robertson signed the statement of delivery. Plaintiffs received the Michigan National Bank payment book prior to February 20, 1958.

On February 10, 1958, title to the trailer was transferred from Tad's Home Trailer Sales to Burnett's Home Trailer Sales, and the trailer was then free of record lien. On March 28, 1958, a new title was taken out in the name of Earl Robertson or Harriett Robertson, with rights of survivorship, noting a lien of the Michigan National Bank in the amount of $3,378.60. Certificate of

title was at no time delivered to either of the Robertsons, and at time of trial was in possession of the Michigan National Bank.

The plaintiffs offered in evidence requests for admissions directed to Earle M. Burnett, Sr., and defendants' answer to the requests admitting that the figure of $728.60, which appears at line "E" of the conditional sales contract, was the product of independent computation from various sources of financial information, was independently computed, and Burnett, Sr., was unaware of whether the figure coincided with the wishes of the purchaser of the contract, the defendant Michigan National Bank; that Earle M. Burnett, Sr., could not admit or deny that the Michigan National Bank financed him in the purchase of the Ventoura trailer from the manufacturer without clarification of the sense in which the request used the term "financed"; and that some printed forms for Michigan National Bank customer's statement, note, and conditional sales contract had been furnished Earle M. Burnett, Sr., on request.

The plaintiffs offered written interrogatories submitted to the Michigan National Bank, and the answers to those interrogatories, stating that the bank had no interest in the Ventoura trailer on or prior to January 4, 1958; that the bank had never financed the house trailers marketed by Tad's Trailer Sales; that the bank, on or about April 1, 1958, acquired the Nebraska certificate of title to the Ventoura trailer, listing Earl Robertson or Harriett Robertson as owners, with rights of survivorship; that the bank had in the past engaged in financing mobile homes located in Nebraska, and the parties with whom the bank was doing business, and the date of commencement and termination was set out, including Burnett's Home Trailer Sales from July 1956 to March 1959; that the bank had never owned real property in Nebraska; that the bank held lien interests and title under its right to repossess, in certain mobile homes in the State of Nebraska, arising out of the bank's

position as an assignee of the vendor's interest in retail installment sales contracts; and that the bank had owned certain mobile homes which were in the possession of trailer sales companies under wholesale floor-plan trust receipt agreements.

The plaintiffs also offered request for admissions served on defendants Earle M. Burnett, Sr., Drive-In Realty Company, and Earle M. Burnett, Jr., and the answers of those defendants thereto, admitting the execution and genuineness of the note, conditional sales contract, and statement of delivery, and stating that those defendants could neither admit nor deny the genuineness of the purported payment record or the Michigan National Bank customer's statement.

It was further established by stipulation that the Robertsons made ten payments of $56.31 each, ending November 1958, to the Michigan National Bank at Grand Rapids, Michigan; that none of the defendants were licensed pursuant to sections 45-114 to 45-158, R. R. S. 1943; and that all answers to requests for admissions and written interrogatories were true, and all documents in the record were true and correct copies.

The defendant Michigan National Bank is a national banking association organized under the laws of the United States. This defendant contends that it is not organized "under laws of any foreign government," and service of process on the Secretary of State of the State of Nebraska does not confer jurisdiction over such national bank. In this connection, the bank cites section 21-1201, R. S. Supp., 1959. This section deals with foreign corporations, and provides for service upon the Secretary of State when a foreign corporation is doing business within this state.

The defendant bank contends that service of process upon the Secretary of State is authorized only with respect to "Every foreign corporation, as hereinafter defined." The definition of a foreign corporation appears in section 21-1202, R. R. S. 1943, which reads as follows:

" 'Foreign corporations,' as the term is used in section 21-1201, shall embrace and include all corporations organized under the laws of any foreign government, of any other state than the State of Nebraska, and of any territory thereof, including the District of Columbia." The bank further asserts that, therefore, being a national banking association organized under the laws of the United States, and particularly Title 12 of the United States Code, it can be properly served under Chapter 21 of the Nebraska statutes only if the United States is a "foreign government" within the meaning of section 21-1202, R. R. S. 1943.

In 28 U. S. C. A., § 1348, p. 241, it is provided: "The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

"All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located."

The last paragraph of the above statute indicates that the defendant bank is deemed a citizen of the State of Michigan and therefore it is a corporation "of any other state than the State of Nebraska," and also within the contemplation of this definition the bank is a corporation "of any foreign government."

Referring to section 21-1202, R. R. S. 1943, as stated in the plaintiff's brief, the key to the interpretation lies in the question of whether "territory *thereof*" refers back to "state" or to "foreign government." As states of the United States do not have territories, the reference must be to "foreign government." As one of the

territories is the District of Columbia and as the District of Columbia is a "territory" of the United States, it necessarily follows as used in section 21-1202, R. R. S. 1943, that foreign government includes the United States. From the foregoing, it is apparent that the bank is a foreign corporation within the contemplation of section 21-1202, R. R. S. 1943, and under the facts adduced was doing business in this state.

We conclude that the defendant bank's assignment of error is without merit.

The defendant bank contends that the proper venue of an action or proceeding against a national banking association organized under the laws of the United States is in the district, county, or city where the bank is located, citing 12 U. S. C. A., § 94, p. 442.

In 12 U. S. C. A., § 94, p. 442, it is provided: "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The defendant bank cites numerous cases relating to venue which have been considered. However, we believe the following to be applicable to the instant case.

In DeCock v. O'Connell, 188 Minn. 228, 246 N. W. 885, 86 A. L. R. 41, the court held: "A national bank may be sued in any county where the venue would properly lie if such bank were a state institution." The court said further: "* * * we believe that it was the purpose of Congress to permit suits to be brought against national banking associations as if they were organized under the state law in so far as actions over which state courts have jurisdiction are concerned, and that matters of venue within the state are to be controlled as if national banking associations were in fact citizens of the state." See, also, Levitan v. Houghton Nat. Bank, 174 Mich. 566, 140 N. W. 1019.

As stated in 7 Am. Jur., Banks, § 820, p. 591: "The National Bank Act provides that actions and proceedings against any association under that act may be had in any Circuit, District or Territorial Court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. A majority of the state courts have held that these provisions do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. The view has also been taken that the foregoing provision of the National Bank Act relates to transitory actions only, and not to such actions as are by law local in their character, and national banks are not exempted from the ordinary rules of law affecting the locality of actions founded on local things." See, also, Casey v. Adams, 102 U. S. 66, 26 L. Ed. 52; Annotation, 86 A. L. R. 47. This court follows the majority rule as hereinbefore set forth.

The instant action was a local action, not a transitory action. See, § 25-404, R. R. S. 1943; § 45-154, R. R. S. 1943.

The trial court found that it had jurisdiction of the person and the subject matter of the action, and it could only do so if the bank were doing business in this state, and the evidence clearly shows that the bank was doing business in this state.

We conclude that the jurisdiction and venue lie properly in the court where the cause was tried.

The bank next contends that the penalty applicable to a national bank for taking, receiving, reserving, or charging an excessive rate of interest is as provided for in 12 U. S. C. A., § 86, p. 319. This section is as follows: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of

the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: * * *."

In the instant case the parties agreed that the law of Nebraska should apply. The conditional sales contract provides: "9. It is the intention of the parties hereto that all matters relating to the execution, interpretation, validity and performance of this contract shall be governed by the laws of the state in which the Buyer now resides, which is the state indicated below. * * * Residence of Buyer * * * Omaha, Nebraska." It is apparent from the instrument above mentioned that the defendant is bound by its contract. Consequently, all matters relating to the execution, interpretation, validity, and performance of the contract are governed by the laws of this state. Section 45-154, R. R. S. 1943, applies, and not 12 U. S. C. A., § 86, p. 319.

The question arises whether the transaction here involved is a loan or a time sale. If it is a loan, the entire indebtedness is void and uncollectible even though the lender is not licensed pursuant to the provisions of sections 45-114 to 45-158, R. R. S. 1943.

As stated in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215: "The permissive provisions of sections 45-114 to 45-158, R. R. S. 1943, apply to licensees, but every inhibitory provision contained therein applies alike to licensees and nonlicensees and the officers and employees of either or both, and the violation thereof by such persons in connection with any indebtedness, however acquired by them, renders such entire indebtedness void and uncollectible."

The application to purchase the mobile home is in substance as follows: Description of coach, Name Ven-

tura; price $6,895; total purchase price to be paid by purchaser and to be received by seller $6,895; down payment $4,637.50; cash on delivery, nil; balance to be financed $2,257.50. This is the only document showing the sale by Tad's Home Trailer Sales to the plaintiffs.

In Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57, this court said: "It is not a time sale if a car dealer, in selling a car, actually agrees with the buyer that he will finance the balance of the cash purchase price agreed upon, and does so, even though at the time he informs the buyer of the amount he will be required to pay and the terms thereof. Such a transaction would be a loan to finance the balance of the cash purchase price and, if payable in installments, must meet the requirements of the statutes relating thereto. And the fact that the buyer knew the terms and provisions of such loan at the time it was made and voluntarily entered into it would not have the effect of waiving the illegality of any provision thereof, if such provision was actually in violation of any of the inhibitory provisions of the installment loan statute. See State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55."

"The installment loan statutes include all persons or parties violating any of the inhibitory provisions thereof whether they be licensees or nonlicensees." State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. See, also, Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19.

Where this document evidences an intent to make a loan, the note establishes that the loan was made, as does the conditional sales contract. The benefits of these documents ran to Burnett's Home Trailer Sales, not to Tad's Home Trailer Sales.

The conditional sales contract contained the following: "Statement of Transaction

A	Cash Selling Price (Including Taxes, etc.)	$6,895.00

B	Insurance	$ 392.50	$7,287.50
C	Down Payment:		
	Cash	$ .20	
	Trade-in Allowance	$4,637.30	$4,637.50
D	Unpaid Balance of Purchase Price		$2,650.00
E	Finance Charge		$ 728.60
F	Deferred Balance		$3,378.60"

Plaintiffs were to pay the deferred balance of $3,378.60 in 60 equal monthly installments of $56.31.

The loan involved in the instant case violates the Nebraska Installment Loan Act.

Section 45-138, subsection (3), R. R. S. 1943, provides in part: "No licensee shall enter into any contract of loan, referred to in subsection (1) or (2) of this section, under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than thirty-six calendar months from the date of making such contract, referred to in subsection (1) or (2) of this section, if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower, * * *. Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan."

In A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687, this court said: "A loan made by a licensee under the installment loan law which is not secured by a real estate mortgage and is not due or payable within the period of 21 months as provided for in section 45-138, R. R. S. 1943, is violative of said section and void." This case was decided under the prior act. As will be obvious, the present act provides for 36 months instead of 21 months. See, also, State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55; State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

Section 45-137, R. R. S. 1943, provides for the maxi-

mum amounts of interest rates to be charged on loans under the Installment Loan Act, and the charge of $728.60 exceeds the maximum legal amount which can be charged under such section of the statutes. This loan is rendered void by section 45-155, R. R. S. 1943, which provides: "Violation of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible." This court so held in State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55, and State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215.

We conclude that this loan was void from its inception, and the assignment of Burnett's Home Trailer Sales to a third party such as the Michigan National Bank does not breathe life back into the void instrument. We further conclude that the judgment rendered by the trial court should be affirmed.

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

AFFIRMED.

IN RE APPLICATION OF HERMAN WALKER ET AL., FOR A WRIT OF HABEAS CORPUS.

HERMAN WALKER ET AL., APPELLEES, V. WALTER GEHRING ET AL., APPELLANTS.

109 N. W. 2d 724

Filed June 16, 1961. No. 34939.

1. **Guardian and Ward: Parent and Child.** The appointment of a guardian by a county court is not conclusive as against the parents' right to the custody of their children, unless it appears that they had notice of the proceeding and that the question of their competency and suitability was adjudicated.
2. **Parent and Child.** The habitation or residence of a minor child, as contemplated by section 38-102, R. R. S. 1943, is by operation of law determined and fixed by that of the parents, unless the parents have voluntarily surrendered such right.

3. ———. The statute declares, and nature demands, that the right to custody of children be in the parents, unless the parents are unfit to perform the duties imposed by the relation of parent and child or have in some manner forfeited that right.
4. **Habeas Corpus: Parent and Child.** Habeas corpus may properly be used in custody cases, and such proceedings are governed by considerations of expediency and equity.

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

Leonard Dunker, for appellants.

Walker, Luckey & Hunter, for appellees.

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

SPENCER, J.

In this case Herman Walker and Margaret Walker, who will hereinafter be referred to as parents, seek the custody of their children, Helen E. Walker, John H. Walker, and Mary M. Walker, by habeas corpus against Walter Gehring, a resident of Columbus, Platte County, Nebraska.

At the time of trial, Helen E. Walker was 19 years of age; John H. Walker was 17 years of age; and Mary M. Walker was 14 years of age. The trial court found Helen E. Walker to be emancipated, and awarded immediate custody of the other two children, John H. Walker and Mary M. Walker, to the parents. Respondent, Walter Gehring, and the three children filed this appeal.

The bill of exceptions, of 1,119 pages exclusive of exhibits, details a fantastic tale of interference by outsiders to prevent the parents from directing or guiding the education and religious training of their children. It will serve no useful purpose to detail or summarize this testimony.

As we interpret the facts, we find that the parents are residents of Adams County, Colorado, where they have extensive land holdings. The children had been permitted to attend school in Columbus, Nebraska, on the

suggestion of a former minister who had a church at that place. This church was an unaffiliated one, recognizing no doctrine other than that taught by its minister. The parents fully supported the children in Columbus until they returned them to Colorado. Shortly after the parents returned the children to Colorado they disappeared, Mary from home, John from Randall Prep School at Denver, Colorado, and Helen from the Colorado State College at Greeley, Colorado.

If the testimony of the children is to be believed, they were concealed in two farm homes in Kansas and Oklahoma for several months. They further testified that they consulted with their attorney, Leonard Dunker, in Lincoln, Nebraska, sometime previous to March 19, 1960, and then returned to their hideout. Sometime in May 1960, they again came to Nebraska, going to the home of Walter Gehring in Columbus. On May 24, 1960, Walter Gehring filed a petition, together with the nominations of the three minors, in the county court of Platte County, for his appointment as their guardian. The parents were not served with process or notice of the hearing in this guardianship proceeding, but learned of it, and on June 8, 1960, the date set for hearing, filed objections to the jurisdiction of the court. These objections were sustained on the same day, and the guardianship action was dismissed. Walter Gehring filed an appeal bond June 27, 1960.

This habeas corpus action was filed in the district court for Platte County, Nebraska, on the 7th day of June, 1960. Service was obtained on Walter Gehring on the same date, which was 1 day prior to the filing of the objections in the guardianship proceeding in the county court. The children were actually taken into custody by the sheriff of Platte County on June 8, 1960.

Walter Gehring and the three minor children filed a motion for security for costs on June 22, 1960, and at that time arrangements were made with counsel for a trial of the cause on June 27. On June 23, 1960, Walter

Gehring and the three minor children filed a motion to strike certain portions of the petition. On June 27, 1960, Walter Gehring and the children filed a plea in abatement alleging that the issues and the parties in the guardianship action and the habeas corpus action were the same. The pleadings described above were all filed by Leonard Dunker for Walter Gehring and the three minor children as "THEIR ATTORNEY." On June 27, 1960, the court sustained the motion for security for costs and security was immediately deposited. The motion to strike was then argued and overruled. The plea in abatement was then heard, argued, and overruled.

Walter Gehring then filed his return in which he alleged that the children were residents and inhabitants of Platte County, Nebraska, and that they were voluntarily living in his home; and denied that he was exercising any restraint either on his own behalf or that of anyone else. This action was filed by the parents against Walter Gehring. His return would indicate that he made no claim to the custody of the children, and judgment should have been entered for the parents. It is to be noted, however, that Walter Gehring, in the "Statement of Case" in his brief filed in this court, states: "This is a civil law action by application for Writ of Habeas Corpus instituted by Herman Walker and Margaret Walker, father and mother of Helen E. Walker, daughter born November 11, 1940, John H. Walker, born November 1, 1942 and Mary M. Walker, born November 7, 1945, all minors now over 14 years of age, against Walter Gehring, a resident of Columbus, Platte County, Nebraska, *who had actual custody of said minor children, for the restoration of custody of said minors to plaintiffs (T3). Writs were also served upon the three minors.*" (Italics supplied.)

It is contended that the plea in abatement should have been sustained. With this we cannot agree. Ignoring other points, including the fact that the parents had

never been served with process in the guardianship proceeding, and no attempt was made to serve them, we have many times said that a guardian as such has no conclusive right to the custody of children. A case directly in point is In re Application of Thomsen, 1 Neb. (Unoff.) 751, 95 N. W. 805, which was a habeas corpus action by a parent against a guardian. This case called attention to what is now section 38-107, R. R. S. 1943, which provides that the parents are natural guardians for their children, and what is now section 38-108, R. R. S. 1943, which provides when the guardian shall have custody, and stated: "These provisions make it clear that the guardian appointed under section 2, chapter 34, Compiled Statutes is entitled to custody of the ward's person *only* in case the parents are both dead or both incompetent or unsuitable." (Italics supplied.) This case is cited with approval in later opinions, including Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. N. S. 171, and Steward v. Elliott, 113 Neb. 421, 203 N. W. 580.

We find that the minors were residents of Colorado and not Nebraska at the time the guardianship proceedings were filed. We call attention to In re Guardianship of Peterson, 119 Neb. 511, 229 N. W. 885, in which we said: "The habitation or residence of a minor child, as contemplated by section 1577, Comp. St. 1922 (which is now section 38-102, R. R. S. 1943), is by operation of law determined and fixed by that of the parent legally entitled to the custody and control of said child, unless said parent has voluntarily surrendered such right."

The statute declares, and nature demands, that the right to custody of children be in the parents, unless the parents are unfit to perform the duties imposed by the relation of parent and child or have in some manner forfeited that right. Lung v. Frandsen, 155 Neb. 255, 51 N. W. 2d 623.

There is no allegation of unfitness of the parents or forfeiture by them in the return of the respondent, Walter Gehring. We fully agree with the trial court

that there is no proof in this record that the parents are unfit or unsuitable to have custody of their children, or that they have forfeited or voluntarily surrendered the custody or control of the children or abandoned them. The evidence is conclusive that the parents have at all times been ready, able, willing, and desirous of providing a proper home for the children and of providing for their education, care, training, and support.

The return of the respondent, Walter Gehring, states that the children are living in his home on a voluntary basis. Certainly his return does not attempt to show any right to custody, although his brief does state he had actual custody at the time the action was commenced. In any event, we call attention to the case of Tavlinsky v. Ringling Bros. Circus, 113 Neb. 632, 204 N. W. 388, where a minor child ran away from home and secured employment. In that case we said: "Parents have a right to the care, custody, service and companionship of their minor children, and, when they are wrongfully deprived thereof by another, they have a right of action therefor, even in a case where the child has sought the employment."

The parents at the time of the filing of the petition herein were clearly entitled to the immediate custody of their children. Walter Gehring was apparently claiming custody. A habeas corpus action was a proper remedy.

In In re Application of Reed, 152 Neb. 819, 43 N. W. 2d 161, we said habeas corpus may properly be used in custody cases, and such proceedings are governed by considerations of expediency and equity and should not be bound by technical rules of practice.

In Hanson v. Hanson, 150 Neb. 337, 34 N. W. 2d 388, we said in effect that after the court's jurisdiction has been invoked by a habeas corpus petition seeking custody of the child, the child is a ward of the court and its welfare lies in the hands of the court.

There can be no question but that the parents were en-

titled to the immediate custody of their children when this action was filed. We are completely in accord with the findings of the trial court in every particular. We therefore affirm the judgment of the trial court.

AFFIRMED.

SCHOOL DISTRICT NO. 54 OF DOUGLAS COUNTY, NEBRASKA, EX REL. DENNIS P. HOGAN, JR., APPELLANT AND CROSS-APPELLEE, V. SAM J. HOWELL, TREASURER OF THE CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, APPELLEE AND CROSS-APPELLEE, SCHOOL DISTRICT NO. 54 OF DOUGLAS COUNTY, NEBRASKA, INTERVENER-APPELLEE AND CROSS-APPELLEE, SCHOOL DISTRICT OF OMAHA, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, INTERVENER-APPELLEE AND CROSS-APPELLANT, SCHOOL DISTRICT NO. 66 OF DOUGLAS COUNTY, NEBRASKA, INTERVENER-APPELLANT AND CROSS-APPELLEE.

110 N. W. 2d 52

Filed June 16, 1961. No. 34977.

1. **Constitutional Law: Penalties.** The Constitution of the State of Nebraska has provided since 1875 that all fines, penalties, and license money arising under the rules, bylaws, or ordinances of cities, villages, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively, and shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue.
2. **Fines: Penalties.** Since 1913 there has been no statutory or legally established formula for the division and distribution of funds collected on account of fines, penalties, and license money where parts of cities, villages, precincts, or other municipal subdivisions less than a county are situated in more than one school district.
3. **Statutes.** On the adoption of a code or revision by the Legislature, all laws of a general or permanent nature which previously existed but which were omitted therefrom cease to be law, except as it may be otherwise provided in the code or revision or in the act adopting it.
4. **Fines: Penalties.** In order to reasonably and equitably comply

with the constitutional mandate it is required that a division of fines, penalties, and license money shall be made in proportion to the number of persons of school age residing in the areas of the school districts which are within the municipal subdivision according to the school census taken last before apportionment of funds.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Reversed and remanded with directions.*

McGowan & Troia, Ross & O'Connor, Clayton H. Shrout, and *Wells, Martin, Lane, Baird & Pedersen,* for appellants.

W. Ross King and *Seymour L. Smith,* for appellee School Dist. of Omaha.

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, and *Benjamin M. Wall,* for appellee Howell.

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

YEAGER, J.

This is an action by School District No. 54 of Douglas County, Nebraska, ex rel. Dennis P. Hogan, Jr., plaintiff and appellant herein, against Sam J. Howell, Treasurer of the City of Omaha, Douglas County, Nebraska, for an accounting of all fines, penalties, and license money on hand arising under the ordinances of the city of Omaha, Douglas County, Nebraska, and for judgment against the defendant for one-third of that amount and the costs of suit. School District No. 54 ex rel. Dennis P. Hogan, Jr., is the named plaintiff. School District No. 54 as such entered the case by petition of intervention and prayed for the same relief as the plaintiff. There is no contention that their interests are adverse.

In the action School District No. 66 of Douglas County, Nebraska, filed a petition of intervention in which it prayed for the same character of relief as did the plain-

tiff, and for a like division of funds. It is an intervener and an appellant herein and will be referred to as District No. 66.

The School District of Omaha filed a petition of intervention and answers to the petitions of Districts Nos. 54 and 66, and prayed for an accounting of the fines, penalties, and license money in the hands of the defendant or to be received by him, and for judgment for the full amount. This intervener will be referred to as the Omaha District.

The defendant filed an answer concerning which it is necessary to say only that he denied the allegations of the plaintiff and the petitions of intervention. It is interpolated here that at the conclusion of the trial he was in the position of a stakeholder ready to respond to whatever judgment should be rendered with regard to the funds in controversy.

Other pleadings were filed but nothing is required as to them except to say that issue was joined and the case tried on the question of what party or parties were entitled to the distribution of the funds to which reference has been made which were collected by the defendant under the ordinances of the city of Omaha, Douglas County, Nebraska.

The case was tried to the court and a judgment was rendered by which the defendant was commanded to pay over and credit to the Omaha District all money on hand and to be collected in the future.

The defendant filed a motion for new trial as did the plaintiff, District No. 54, and District No. 66. These motions were overruled. From the judgment and order overruling the motions for new trial the plaintiff and District No. 66 have appealed.

Hereinafter, for convenience, the plaintiff School District No. 54 ex rel. Dennis P. Hogan, Jr., and intervener School District No. 54 will be referred to as one party, District No. 54, as the interests are the same. In view of the joinder of the plaintiff and District No. 54 for the

further purposes of this opinion District No. 54 and District No. 66 will be treated as appellants and the Omaha District as appellee.

The basic matter to be determined in this case is the proper method for disposition and distribution of fines, penalties, and license money now in the hands and in the future to come into the hands of the treasurer of the city of Omaha, Douglas County, Nebraska, under the rules, bylaws, and ordinances of the city of Omaha.

Article VII, section 5, of the Constitution of the State of Nebraska, contains the following provision: "* * * all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, * * *." There is other substance in the section but it is of no significance in the matter before the court. It is further pointed out specifically that the section of which this is a part has been amended but the amendment has no effect upon this provision. The provision has existed unchanged since the adoption of the Constitution of 1875.

The parties appear to be in accord that proper disposition and distribution must be in accordance with the terms of and a proper application by the court of the provision quoted. The terms are not in doubt. By clear statement as applied to the situation presented these funds are to be appropriated to the use and support of the common schools in the city of Omaha. There is nothing however in this provision or any other constitutional provision which provides a formula for disposition and distribution in a case where there is more than one school district in the municipal subdivision.

The record in this case discloses factually that the city of Omaha is a metropolitan city and that there are three

school districts which are in part within and in part without the city limits. One of these is the Omaha District, a Class V district. The other two are District No. 54 and District No. 66, Class III districts. A description of the respective areas of the districts is not deemed of importance for the purposes of this opinion.

Districts Nos. 54 and 66 contend that a proper application of the constitutional provision quoted requires that the funds in question be distributed in equal parts, or one-third to each of the three districts.

On the other hand the Omaha District contends that it is entitled to all of the funds and that the other two districts are entitled to none.

There was never any statutory formula for division and distribution from 1875 and before 1895. Districts Nos. 54 and 66 do not contend that there was. They do not contend now that it is controlled by statute. They base their contention on precedents which they say are contained in the opinions in the following cases: City of Hastings v. Thorne, 8 Neb. 160; State ex rel. Primmer v. Brodboll, 28 Neb. 254, 44 N. W. 186; State ex rel. School Dist. No. 11 v. White, 29 Neb. 288, 45 N. W. 631; Guthrie v. State ex rel. School Dist. No. 7, 47 Neb. 819, 66 N. W. 853.

The first of these cases has no significant bearing on the matters involved herein. The other three, for the time when the decisions were rendered therein and for a period thereafter, contained precedents for the division and distribution insisted upon by Districts Nos. 54 and 66.

The decision in State ex rel. Primmer v. Brodboll, *supra*, was rendered in 1889. In that case three school districts were involved. They were all in part in the village of Lindsay, Nebraska. The schoolhouses of all three were outside the limits of the village. Whether or not additional area was outside is not disclosed. In the opinion it was said: "There is no provision of statute in such case for dividing the license moneys among the schools

in proportion to the number of scholars from each school district, nor to make the division in proportion to the extent of the territory of each. It should therefore be applied equally among the districts, and it is so ordered."

The case of State ex rel. School Dist. No. 11 v. White, *supra,* a case decided in 1890, had reference to a situation in the village of South Sioux City, Nebraska, wherein there were four school districts in part inside and in part on the outside of the village limits. By the opinion what was said in State ex rel. Primmer v. Brodboll, *supra,* as to division of funds was approved, and in addition it was said: "When received by the village treasurer it becomes his duty at once to pay the same over to the treasurer of the school district, and if, as in this case, there are parts of more than one school district within the limits of the village, to divide the same equally between the districts."

In Guthrie v. State ex rel. School Dist. No. 7, *supra,* a case decided by this court on April 7, 1896, the holding of the two cases previously discussed was approved. It is pointed out however that this case was based on a cause of action arising May 12, 1893. The importance of this will appear later herein.

Thus, as Districts Nos. 54 and 66 contend, these cases established a recognizable and recognized precedent for the division and distribution of funds where more than one school district was in whole or in part within the limits of a city or village.

That precedent was removed and disappeared in 1895. That removal and disappearance has been recognized by the decisions of this court. In 1895 the Legislature enacted Chapter 63, page 232, with an emergency clause. Section 1 of the act was as follows: "That in cities and villages whose corporate limite (limits) form, in whole or in part, more than one school district all money derived from fines penalties, and licenses shall be apportioned to these several districts in proportion to the

number of persons of school age residing in each district, included in whole or in part in said corporate limits, according to the school census taken last before any such apportionment."

In King v. State ex rel. School Dist. No. 1, 50 Neb. 66, 69 N. W. 307, a case decided December 16, 1896, this court recognized the existence and validity of the statute and, by clear reference to the cases containing the precedent for which Districts Nos. 54 and 66 contend, said: "This change in the statute necessitated the method of apportionment indicated by the language of the alternative writ, and with this modification the language of the opinions referred to is applicable to the case under consideration."

In Kas v. State ex rel. School Dist. No. 1, 63 Neb. 581, 88 N. W. 776, the provision of the statute was approved by the following language: "The language of the section in question is susceptible of but one meaning, namely, that where portions of more than one district are included in the corporate limits of a municipality, license moneys accruing therein are to be distributed among said districts in proportion to the number of persons of school age in the whole of each district, as disclosed by the last school census, * * *." In this case it was specifically held that the act was constitutional.

The holding in Kas v. State ex rel. School Dist. No. 1, *supra,* was approved in State ex rel. School Dist. v. Sams, 71 Neb. 669, 99 N. W. 544, in the manner following: "The first reason urged for holding it invalid is disposed of in the case of Kas v. State, 63 Neb 581, where the identical question was raised. The decision in that case sustaining the statute is satisfactory, and we adhere to the ruling without further argument."

In case it should be urged that Guthrie v. State ex rel. School Dist. No. 7, *supra,* contains an existing precedent which supports the position of Districts Nos. 54 and 66, it is pointed out again that the cause of action involved accrued long before the enactment of the statute, and

of course the rule prior thereto controlled the disposition of the case, and the case had no controlling significance after the statute was enacted.

This statute continued in force and effect until the adoption of the Nebraska statutory revision of 1913. It appeared last as section 10384, Cobbey's Ann. St. 1911, and as section 5852, Comp. St. 1911. It was not repealed directly by any act of the Legislature. It was omitted from the Revised Statutes of Nebraska, 1913. Research has not disclosed the reason for this omission. After the adoption of the revision of 1913 it was no longer recognizable as existing law of the state. The rule which causes this to be true is stated in 82 C. J. S., Statutes, § 274, p. 456, as follows: "On the adoption of a code or revision by the legislature, all laws of a general or permanent nature which previously existed but which were omitted therefrom cease to be law, except as it may be otherwise provided in the code or revision or in the act adopting it."

The history of the creation of the commission for revision and the adoption of the revision does not contain any exception to this rule. See, Laws 1911, c. 166, p. 540; Laws 1913, c. 3, p. 57; Laws 1913, c. 241, p. 753.

Since 1913 there has been no constitutional or statutory provision which prescribes a formula for division and distribution of funds of the character involved in this action. It follows that there has been no declared basis therefor except, if it may be regarded as an exception, the precedent contained in the decisions cited herein which interpreted and applied the statute enacted in 1895. Whether or not this precedent was followed in practice after 1913 is not disclosed by the record.

The courts are therefore presented with the question of whether there should be a re-establishment of the precedent existing prior to 1895, or a pursuance of the statute and the precedent obtaining from 1895 to 1913, or a declaration of a new method.

As an observation, it does not appear that a new method should be adopted unless it is apparent that for good reason the other two should be rejected.

It is apparent that there are and were objections to the formula as it existed prior to 1895. This is evidenced by the act of the Legislature, the obvious and unmistakable intent and purpose of which was to destroy the then existing formula and precedent. Coupled with this is the fact that in that formula distribution had no relation to quantitative benefits based on population or territorial area.

The formula after 1895 and until 1913 was created by affirmative action of the Legislature. It was approved as constitutional and as a proper exercise of the legislative prerogative by this court. That approval has never been withdrawn by later action of the court, or subsequent affirmative declaration of the Legislature.

This plan is supported by some elements of precedent as that term is defined in law. See 21 C. J. S., Courts, § 186, p. 297. The precedent has never been specifically destroyed. As a controlling precedent it was destroyed by the apparently unexplainable omission of the statutory provision from the 1913 revision of the statutes.

If the precedents after 1895 are to be rejected as in anywise controlling then return must be had to the situation as it existed after the adoption of the Constitution of 1875, and to an original interpretation and application of the constitutional provision under consideration. This would necessitate the declaration of a new and independent formula for the division of these funds. No formula would be proper which would not respond to the particular language of the provision, and also produce an equitable result.

The provision in clear terms, as applied to this case, requires that the funds shall be appropriated to the exclusive use of the common schools of District No. 54, District No. 66, and the Omaha District in the city of Omaha. There is no room for doubt as to this.

On the question of equity, the provision reasonably contemplates that the funds shall be distributed without partiality and discrimination to these schools. No one in this case has given expression to a contrary view.

If equity is to obtain in distribution and the constitutional dictation is to be regarded then it must follow that apportionment has no relation to the total area of each of the districts as such, but only to the areas which are within the city of Omaha. Also the funds must be divided under a formula which must exact a reasonable extension and apportionment of benefits to the body of people, the common school pupils, to whom the Constitution says they belong.

An apportionment which appears to meet these requirements, and is hereby exacted by this opinion, is a formula and plan which requires a division in proportion to the number of persons of school age residing in the areas of three districts which are within the city of Omaha, according to the school census taken last before the apportionment of funds.

On the appeal it is urged that in addition to the matters which have been considered herein the matter of distribution of funds obtained by bond forfeitures was presented and should have been decided. The district court by its judgment decided that the matter was not presented and accordingly specifically held that the question was not being decided. That then is an issue on which there has been no decision. There having been no decision the matter will not be considered in this action on appeal.

The assignments of error presented by the briefs on appeal have not been specifically mentioned herein but it is deemed that the observations herein contained respond sufficiently to all of them.

There is a cross-appeal herein but from an analysis of the record in the light of the issues under consideration the matters presented by it have no bearing upon that

which is presented for determination. It is therefore not discussed.

The judgment of the district court is reversed and the cause remanded with directions to require accounting in accordance with this opinion, and on such accounting to render judgment in favor of the respective parties also in conformity with this opinion. Each party shall pay its or his own costs.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIS BAER, APPELLEE, V. OTTO SCHAAP, DOING BUSINESS AS SPEEDWAY SCAFFOLD COMPANY, APPELLANT, IMPLEADED WITH PARSONS CONSTRUCTION CO., A CORPORATION, APPELLEE.

109 N. W. 2d 724

Filed June 23, 1961. No. 34497.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. See 168 Neb. 578, 97 N. W. 2d 207, and 171 Neb. 347, 106 N. W. 2d 468, for former opinions.

Webb, Kelley, Green & Byam, for appellant.

Rice & Adams and *Schrempp & Lathrop,* for appellee Baer.

O'Dowd & Swift and *Crossman, Barton & Quinlan,* for appellee Parsons Constr. Co.

PER CURIAM.

The opinion in Baer v. Schaap appearing in 168 Neb. 578, 97 N. W. 2d 207, was set aside in the opinion of Baer v. Schaap, 171 Neb. 347, 106 N. W. 2d 468. Reargument was ordered by this court on the latter opinion. During the pendency of time for reargument, the parties filed a stipulation in this court for dismissal of the action, which was allowed, and the appeal was dismissed.

LADDIE G. PRUCHA, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, ET AL., APPELLANTS.
110 N. W. 2d 75

Filed June 23, 1961. No. 34960.

1. **Pleading.** 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.
2. ———. In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof.
3. **Statutes.** The general rule is that all persons are presumed to know and are bound to take notice of general public laws of the country or state where they reside as well as the legal effect of their acts.
4. **Automobiles: Intoxicating Liquors.** By statute, any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his blood or urine for the purpose of determining the amount of alcoholic content in his body fluid.
5. ———: ———. By statute, the test shall be administered at the direction of a law enforcement officer whenever the person has been arrested for any offense involving operating a motor vehicle while under the influence of alcoholic liquor in violation of a statute or a city or village ordinance when the arresting officer has reasonable grounds to believe that before his arrest the person was driving while under the influence of alcoholic liquor.
6. ———: ———. By statute, the person so arrested or taken into custody may choose whether the test so required shall be a chemical test of his blood or urine.
7. ———: ———. By statute, if a person so arrested shall refuse to submit to the test provided for, it shall not be given, and the arresting officer shall make a sworn report to the Director of Motor Vehicles stating that he had reasonable grounds to believe that the person was operating or in actual physical control of a motor vehicle upon a public highway while he was under the influence of alcoholic liquor, and the facts upon which such belief was based, that such person was placed under arrest, and that he refused to submit to the test.
8. ———: ———. By statute, upon receipt of the officer's report of such refusal, the Director of Motor Vehicles shall notify such person of a date for hearing before him as to the reasonableness of the refusal to submit to the test. Notice of hearing shall be served by the director by mailing it to such person

by certified or registered mail to the last-known address of such person at least 10 days before the hearing.

9. ———: ———. By statute, after granting the person an opportunity to be heard on such issue, if it is not shown to the Director of Motor Vehicles that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license of such person for a period of 1 year from the date of such order.
10. ———: ———. By statute, if the Director of Motor Vehicles revokes the operator's license, he shall reduce his order of revocation to writing, and shall notify the person in writing of the revocation.
11. ———: ———. By statute, any person who feels himself aggrieved because of such revocation may appeal therefrom to the district court for the county where the alleged events occurred for which he was arrested, in the manner prescribed in section 60-420, R. R. S. 1943.
12. ———: ———. Where a person who refused to submit to a blood test at the time he was arrested and charged with driving while under the influence of alcoholic liquor was not convicted of such charge, subsequent revocation of his driver's license under another law was not precluded by such fact.
13. **Automobiles: Licenses.** A license to operate an automobile upon the highways of the state is a privilege and not a property right, and the power given the Director of Motor Vehicles to suspend such operating privilege is an administrative and not a judicial function.
14. ———: ———. A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law.
15. **Automobiles: Intoxicating Liquors.** The essence of the "implied consent law" is that by driving a motor vehicle on the public highway, the operator consents to the taking of a chemical test to determine the alcoholic content of his body fluid. By the act of driving his car, he has waived his constitutional privilege of self-incrimination, which has always been considered to be a privilege of a solely personal nature which may be waived.
16. **Evidence.** The privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence.

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

Clarence A. H. Meyer, Attorney General, and *Cecil S. Brubaker,* for appellants.

James E. Abboud, Jr., and *James J. Fitzgerald*, for appellee.

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

MESSMORE, J.

Laddie G. Prucha, plaintiff, perfected an appeal from an order of the Director of Motor Vehicles entered on June 13, 1960, revoking the motor vehicle operator's license of the plaintiff for failure to submit to a chemical test of his blood or urine under the provisions of sections 39-727.03 to 39-727.12, R. S. Supp., 1959. The plaintiff's petition on appeal was filed in the district court for Sarpy County on June 27, 1960, and a stay of the order of revocation was entered by that court on the same day. The defendants, Department of Motor Vehicles, State of Nebraska, and Alvin N. Scissors, Director of Motor Vehicles of the State of Nebraska, the latter hereinafter referred to as the director, filed a general demurrer to the plaintiff's petition on July 22, 1960, on the ground that the petition failed to allege facts sufficient to constitute a cause of action against such defendants. On September 2, 1960, the trial court overruled the defendants' demurrer. On October 14, 1960, the defendants filed notice of their election to stand on their demurrer. On November 4, 1960, default judgment was rendered against the defendants by the trial court, and an order was entered setting aside the order of the director revoking the motor vehicle operator's license of the plaintiff. The defendants appealed to this court.

The plaintiff's petition had attached to it the transcript from the Department of Motor Vehicles of Nebraska, including the Safety Patrol intoxication report dated May 2, 1960, which recited the plaintiff's name; the number of his driver's license; the number of his automobile license; his address; the date of his arrest, April 18, 1960, at 10:10 p.m.; the place of arrest; and the

reasons for believing the person arrested was under the influence of intoxicating liquor while driving an automobile.

At the time of his arrest, the plaintiff was asked if he would submit to a fluid or blood test for the purpose of determining the alcoholic content in his system, and he refused to take the test.

On May 12, 1960, the director notified the plaintiff by mail of a hearing to be held before the director on June 6, 1960, at which time the plaintiff should show cause why his driver's license should not be revoked. By telegram directed to the plaintiff, this hearing was reset for June 10, 1960. Thereafter, on June 13, 1960, an order of the director was entered revoking the motor vehicle operator's license of the plaintiff for a period of 1 year from the date of June 10, 1960, for failure to show cause why such license should not be revoked as a result of his failure to submit to a test as provided for in sections 39-727.03 to 39-727.12, R. S. Supp., 1959. Notice of this order was sent to the plaintiff by letter the same day. The plaintiff perfected his appeal to the district court for Sarpy County from the order of the director revoking his driver's license under the provisions of section 39-727.11, R. S. Supp., 1959, and section 60-420, R. R. S. 1943.

The plaintiff's petition, insofar as necessary to be considered here, is as follows: "That the defendants' decision to revoke the plaintiff's license in accordance with the afore-mentioned statute was arbitrary and capricious and in violation of the State Constitution of the State of Nebraska for the following reasons, to-wit: 1. That plaintiff was not fully advised of the consequences of failure to comply with said statute. 2. That plaintiff complained of a heart condition which prevented him from taking any blood tests. 3. That he was not convicted of the offense of operating a motor vehicle under the influence in the original court. 4. This statute violates the Due Process Clause (Section 3), and the Giving

Evidence Against Oneself Clause (Section 12), both from the Bill of Rights, Constitution, State of Nebraska, 1875."

The plaintiff prayed for an order staying the revocation of his driver's license pending a final determination of the review by the district court, and for decree permanently setting aside and declaring null and void the order of June 10, 1960, revoking his driver's license.

"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." Gerard v. Steinbock, 169 Neb. 828, 101 N. W. 2d 194.

In passing on a demurrer to a petition, the court will consider an exhibit attached thereto and made a part thereof. See Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150.

In the instant case the plaintiff attached the transcript heretofore mentioned to his petition and made it a part of his petition, therefore, it is also to be considered in passing on the demurrer.

The plaintiff raises the question that the defendants are limited to the assignment of error set forth in their brief, citing rule 8a 2 (4) of this court, and decisions in accord with this rule.

The defendants' assignment of error is that the trial court erred in overruling the defendants' demurrer to the plaintiff's petition. This assignment of error specifically relates to the matters raised in the plaintiff's petition in the trial court. The plaintiff's contention is without merit.

The plaintiff also contends that the overruling of the defendants' demurrer is not a final order, that it is an interlocutory order and therefore not an appealable order.

In Hadden v. Aitken, 156 Neb. 215, 55 N. W. 2d 620, 35 A. L. R. 2d 1003, the defendants demurred to the petition and, upon the demurrer being overruled, elected to stand thereon. The court thereupon entered judgment

for the plaintiff wherein it directed the defendants, and each of them, to suspend the order of October 30, 1951. This case related to the suspension of a motor vehicle operator's license to drive an automobile. The court also ordered that the license, registration certificate, and license plates of the plaintiff "be and remain" in full force and effect and that plaintiff have all the privileges evidenced thereby. The defendants appealed from this judgment.

In the instant case a like situation appears. Apparently the plaintiff failed to note that a default judgment had been entered against the defendants.

The plaintiff is in accord with the defendants' proposition of law in substance as follows.

"All persons are presumed to know the general public laws of the state or country where they reside, and the legal effect of their acts." 31 C. J. S., Evidence, § 132, p. 751.

The general rule is that all persons are presumed to know and are bound to take notice of general public laws of the country or state where they reside as well as the legal effect of their acts. See, 20 Am. Jur., Evidence, § 211, p. 208; Anderson v. MacDuff, 208 Misc. 271, 143 N. Y. S. 2d 257; People v. Kovacik, 205 Misc. 275, 128 N. Y. S. 2d 492.

The language of the statute is clear and there is nothing on its face that requires the police officer to go any further than request the motorist to submit to the test. When the words of the statute are plain, clear, and distinct there is no occasion to resort to other means of interpretation to restrict or extend the meaning. The petitioner is presumed to know the law and he should acquaint himself, at least, with those laws which would affect him. See Anderson v. MacDuff, *supra*.

The allegation of the plaintiff that he was not fully advised of the consequences of his failure to comply with the statutes does not state facts sufficient to constitute a cause of action.

The law here involved is commonly referred to as the "implied consent law."

Section 39-727.03, R. S. Supp., 1959, provides: "Any person who operates or has in his actual physical control a motor vehicle upon a public highway in this state shall be deemed to have given his consent to submit to a chemical test of his blood or urine for the purpose of determining the amount of alcoholic content in his body fluid. The test shall be administered at the direction of a law enforcement officer whenever the person has been arrested for any offense involving operating a motor vehicle under the influence of alcoholic liquor in violation of a statute or a city or village ordinance when the arresting officer has reasonable grounds to believe that before his arrest the person was driving while under the influence of alcoholic liquor."

Section 39-727.04, R. S. Supp., 1959, provides in part: "The person so arrested or taken into custody may choose whether the test so required shall be a chemical test of his blood or urine."

Section 39-727.08, R. S. Supp., 1959, provides: "If a person so arrested shall refuse to submit to the test provided for in section 39-727.03, it shall not be given, and the arresting officer shall make a sworn report to the Director of Motor Vehicles stating that he had reasonable grounds to believe that the person was operating or in actual physical control of a motor vehicle upon a public highway while he was under the influence of alcoholic liquor, and the facts upon which such belief was based, that such person was placed under arrest, and that he refused to submit to the test."

Section 39-727.09, R. S. Supp., 1959, provides in part: "Upon receipt of the officer's report of such refusal, the Director of Motor Vehicles shall notify such person of a date for hearing before him as to the reasonableness of the refusal to submit to the test. The notice of hearing shall be served by the director by mailing it to such person by certified or registered mail to the last-known

residence address of such person, * * * at least ten days before the hearing. After granting the person an opportunity to be heard on such issue, if it is not shown to the director that such refusal to submit to such chemical test was reasonable, the director shall summarily revoke the motor vehicle operator's license * * * of such person, for a period of one year from the date of such order."

Section 39-727.10, R. S. Supp., 1959, provides in part: "If the Director of Motor Vehicles revokes the operator's license * * * under the provisions of sections 39-727.03 to 39-727.12, he shall reduce his order of revocation to writing, and shall notify the person in writing of the revocation."

Section 39-727.11, R. S. Supp., 1959, provides in part: "Any person who feels himself aggrieved because of such revocation may appeal therefrom to the district court of the county where the alleged events occurred for which he was arrested, in the manner prescribed in section 60-420."

Apparently, from the second allegation of the plaintiff's petition he claims that the revocation of his license was arbitrary and capricious and in violation of the Constitution of the State of Nebraska because the plaintiff complained of a heart condition which prevented him from taking any blood tests, therefore his refusal to do so was reasonable.

We have set forth the provisions of section 39-727.03, R. S. Supp., 1959. The mere fact that the plaintiff complained of something does not allege such fact to be so, and was not a pleading of the ultimate fact that such condition would prevent the taking of the test. As shown by the above-cited sections of the statute, there was an alternative method for the testing of the alcoholic content of the body fluid, by testing the urine.

The allegation that the plaintiff complained of a heart condition which prevented him from taking a blood test, implying that that was a reasonable excuse for not taking the test, is an allegation of a conclusion which is

erroneous under the terms of the statute.

The plaintiff in his petition alleges that the revocation of his driver's license was arbitrary and capricious because he was not convicted of an offense of operating a motor vehicle under the influence in the original court. The fact of acquittal of a criminal charge of operating a motor vehicle while under the influence of alcoholic liquor does not have any bearing upon a proceeding before the director for the revocation of a driver's license under the provisions of law separate and distinct from criminal statutes.

As stated in Anderson v. MacDuff, *supra,* where a person who refused to submit to a blood test at the time he was arrested and charged with driving while intoxicated was acquitted upon trial of that charge, subsequent revocation of his driver's license under another law providing for licensing penalty was not precluded by the prior acquittal. The court further said that operation of a motor vehicle on the highways is a privilege and the Legislature may prescribe sanctions and conditions on which that privilege is exercised, and may even deny that privilege, once acquired, in order to prevent unsafe driving on the highways. The order of Commissioner of Motor Vehicles, revoking driver's license of petitioner because of his refusal to submit to blood test at time he was arrested for driving while intoxicated, was not arbitrary or capricious. See, also, People v. Kovacik, *supra;* Combes v. Kelly, 2 Misc. 2d 491, 152 N. Y. S. 2d 934; People v. Butts, 21 Misc. 2d 799, 201 N. Y. S. 2d 926.

Article I, section 3, of the Constitution of this state provides: "No person shall be deprived of life, liberty, or property, without due process of law."

A license to operate an automobile upon the highways of the state is a privilege and not a property right, and the power given the director to suspend such operating privilege is an administrative and not a judicial function. See Hadden v. Aitken, *supra.*

A license is a privilege and does not create property

in any legal or constitutional sense. As stated in Smith v. State, 124 Neb. 587, 247 N. W. 421: "A license to operate a motor vehicle is issued, not as a contract, but as a mere privilege, with the understanding that such license may be revoked for due cause by the proper authorities."

"A license to operate an automobile is not property, but a mere privilege, the suspension of which does not deprive the licensee of his property without due process of law." 5 Am. Jur., Automobiles, § 157, p. 593. See, also, Commonwealth v. Funk, 323 Pa. 390, 186 A. 65; Sullins v. Butler, 175 Tenn. 468, 135 S. W. 2d 930; Garford Trucking, Inc. v. Hoffman, 114 N. J. Law 522, 177 A. 882; Rawson v. Department of Licenses, 15 Wash. 2d 364, 130 P. 2d 876; Schutt v. MacDuff, 205 Misc. 43, 127 N. Y. S. 2d 116.

The plaintiff's petition fails to state a cause of action wherein he is denied due process of law.

Article I, section 12, of the Constitution of this state provides: "No person shall be compelled, in any criminal case, to give evidence against himself, * * *."

The essence of the "implied consent law" is that by driving a motor vehicle on the public highway, the operator consents to the taking of a chemical test to determine the alcoholic content of his body fluid. By the act of driving his car, he has waived his constitutional privilege of self-incrimination, which has always been considered to be a privilege of a solely personal nature which may be waived. See Schutt v. MacDuff, *supra.*

In United States v. Nesmith, 121 F. Supp. 758, it was held that the constitutional privilege against self-incrimination is restricted to oral testimony and does not preclude use of one's body or secretions thereof and their chemical analyses as evidence. The court said: "The Supreme Court, in an opinion by Mr. Justice Holmes, in Holt v. United States, 218 U. S. 245, 252, 31 S. Ct. 2, 6, 54 L. Ed. 1021, definitively ruled that the privilege is restricted to oral testimony and does not preclude

the use of one's body as evidence. * * * The objection was raised that this course was a violation of the provision (the privilege against self-incrimination). Mr. Justice Holmes, after referring to this objection as an extravagant extension of the Fifth Amendment, made the following comment: 'But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.' " See Swingle v. United States, 151 F. 2d 512. The court further said: "The law is clear, therefore, that the privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence. The conclusion is inevitable that it does not bar the use of secretions of the defendant's body and the introduction of their chemical analysis in evidence."

In State v. Smith, 47 Del. 334, 91 A. 2d 188, it was held that the sole effect of protection offered by constitutional provision that in criminal prosecution the accused shall not be compelled to give evidence against himself is to prohibit employment of legal process to extract from lips of accused an admission of his guilt which will take place of other evidence, and compulsory examinations of accused persons beyond the field of oral examination, or equivalent thereof, either before or upon their trial do not violate the privilege.

In State v. Berg, 76 Ariz. 96, 259 P. 2d 261, the court held: "Constitutional provision against compelling any person to give evidence against himself in any criminal case is directed primarily against testimonial compulsion, that is, the extraction from a person's own lips of an admission of his guilt, and privilege protects person from any disclosure sought by legal process against him as a witness, * * *." See Annotation, 25 A. L. R. 2d 1409, for cases holding similar to those cited above.

The allegation of the plaintiff that the statutes vio-

lated the self-incrimination clause of the state Constitution is a conclusion of law. In the light of the authorities heretofore cited, such an allegation is erroneous.

We conclude that the allegations of the plaintiff's petition are insufficient to constitute a cause of action against the defendants, and the trial court erred in overruling the defendants' demurrer.

We reverse the judgment and dismiss the action.

REVERSED AND DISMISSED.

GUCKEEN FARMERS ELEVATOR COMPANY, A CORPORATION, APPELLANT, V. SOUTH SOO GRAIN COMPANY, A CORPORATION, APPELLEE.
109 N. W. 2d 728

Filed June 23, 1961. No. 34963.

1. **Sales.** The essential thing in the passing of a title to personal property is that the vendor and the vendee intend that the title shall pass, and not what induced them to have that intention.
2. **Election of Remedies.** One who has been induced by fraud to part with title to his property has his remedy either in an action because of the fraud and deceit, or he may rescind the contract and recover back the property while title still remains in the fraudulent vendee, but he cannot recover it when title has passed to a bona fide purchaser for value.
3. **Sales.** When property is sold and delivered to a fraudulent vendee an innocent purchaser of the property from the fraudulent vendee will take good title.
4. ———. If after seller delivers possession to the buyer pursuant to a sale induced by the buyer's fraud the property has passed into the hands of a bona fide purchaser for value, the right of the original seller to recover the property is lost.

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

Putnam, Spencer & Willette and *Joseph E. Marsh,* for appellant.

S. W. McKinley, Jr., and *Richard L. Jandt,* for appellee.

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

SIMMONS, C. J.

This is an action for conversion of grain. The plaintiff is a corporation organized and doing business in Minnesota. The defendant is a corporation organized and doing business in Nebraska. The above parties herein will be referred to as plaintiff and defendant.

One Harold W. Striemer was an individual engaged in the business of buying and selling grain from a location in the State of Minnesota. He will be referred to herein as Striemer.

The action was tried to the court without a jury. The court rendered judgment for the defendant. We affirm.

The facts of the case are not in serious dispute. Striemer's business was that of buying grain, trucking it to another destination, and selling it. These facts were known to the plaintiff and defendant. Several days before May 26, 1958, Striemer arranged to buy corn of the plaintiff. Between May 23, 1958, and May 29, 1958, Striemer bought 13 loads of grain from the plaintiff. Whether it was all sold to the defendant does not appear. This action involves seven truckloads of corn.

The method of doing business was for Striemer to send a signed check with payee and amount in blank to the plaintiff, the load of corn was delivered, and the price to be paid and the payee were filled in. The corn was then taken to defendant, delivered, and Striemer was paid for it. Plaintiff also delivered to each truck-driver a sales slip showing the amount paid, which in each instance was the amount of the check.

The checks for the seven loads of corn here involved were protested for insufficient funds.

Plaintiff and another grain company then at least as early as June 3, 1958, filed complaints with the Railroad and Warehouse Commission of Minnesota for the amount due and owing them "for the purchase price of grain."

Others joined in the proceedings so that when the matter was concluded on September 22, 1958, there was a finding that the total amount of checks not paid was $46,293.69. Striemer's bond, which they obviously sought to reach, was $7,500. The commission prorated that amount. Plaintiff received therefrom $1,553.10.

In the meantime on June 20, 1958, plaintiff notified defendant that its purchase amounted to a conversion and demanded the value of the amount of corn delivered to it.

Upon defendant's refusal to pay, plaintiff brought suit for the value of the amount of corn represented by seven checks. It does not purport to give credit to the defendant or in its pleadings mention the pro rata amount received by it in the proceedings before the commission.

The Minnesota statute is pleaded and admitted. It provides in part: "(1) Subject to the provisions of this chapter, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell." M. S. A., § 512.23.

It will be noted that it is substantially the same as our section 69-423, R. R. S. 1943.

The plaintiff takes the position that the sale of the corn, so far as the passing of title was concerned, was conditional and that hence title did not pass to Striemer except in the event the checks were paid.

It is quite apparent that plaintiff treated the transaction as one passing title and that it so intended. In Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281, we held: "* * * when property is obtained from its owner by fraud, and the facts show a sale by the owner to the fraudulent vendee, an innocent purchaser of the property from the fraudulent vendee will take good title. The inquiry is: Did the owner intend to transfer the owner-

ship as well as the possession of the property? If he did, there was a contract of sale. The essential thing in the passing of title to personal property is that the vendor and the vendee intend that the title shall pass, and not what induced them to have that intention. But one who has been induced by fraud to part with title to his property has his remedy either in an action because of the fraud and deceit, or he may rescind the contract and recover back the property while title still remains in the fraudulent vendee, but he cannot recover it when title has passed to a *bona fide* purchaser for value."

Plaintiff immediately recognized the fact that a sale had been made. Within 4 days of the last transaction it was proceeding to collect on Striemer's bond. It accepted the funds available to it for payment on the purchase price.

Plaintiff clearly treated Striemer as the purchaser of the grain and considered that title passed to him.

As was held by the court in a like case in Smith v. Norman Motors Co., 84 Ga. App. 186, 65 S. E. 2d 699: Plaintiff cannot take the inconsistent position of treating Striemer as a purchaser and recover on his bond and at the same time recover in conversion from the defendant on the theory that title had not passed to Striemer and hence not to defendant.

We construed this act in Sullivan Co. v. Larson, 149 Neb. 97, 30 N. W. 2d 460, and held: "When property is sold and delivered to a fraudulent vendee an innocent purchaser of the property from the fraudulent vendee will take good title." See, also, Sullivan Co. v. Wells, 89 F. Supp. 317.

We hold that plaintiff by its conduct has precluded it from denying the authority of Striemer to sell. It is clear that it sold the corn to Striemer knowing that he intended its resale. It was stipulated that defendant paid Striemer for the corn at the time of delivery to it.

Our statute provides: "Where the seller of goods has a voidable title thereto, but his title has not been avoided

at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title." § 69-424, R. R. S. 1943.

Construing this statute, we have held: "* * * if after seller delivers possession to the buyer pursuant to a sale induced by the buyer's fraud the property has passed into the hands of a bona fide purchaser for value, the right of the original seller to recover the property is lost." Terry Bros. & Meves v. National Auto Ins. Co., 160 Neb. 110, 69 N. W. 2d 361.

We find no merit in plaintiff's cause.

The judgment of the district court is affirmed.

AFFIRMED.

SAMUEL N. WOLF ET AL., APPELLEES, V. TASTEE FREEZ CORPORATION OF AMERICA ET AL., APPELLANTS.
109 N. W. 2d 733

Filed June 23, 1961. No. 34976.

1. **Contracts.** The power to create a contract by acceptance of an offer terminates at the time specified in the offer.
2. **Notice.** Under a provision specifically designating the time within which notice must be given, time is of the essence, and such provision is to be strictly construed.
3. **Landlord and Tenant.** It is well settled that the lessor may waive the requirement in a lease of notice by the lessee of renewal at or within a certain time.
4. **Contracts.** While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration.
5. **Landlord and Tenant.** Where a lease contains a provision for extension or renewal on terms specified therein, the lessee holds for the extended term under the original lease and not under the notice of intention to renew, and the statute of frauds does not apply to the notice.
6. **Trial: Judgments.** In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.

7. ———: ———. **A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.**

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Reversed and remanded.*

Shotwell, Marchetti & Samson, for appellants.

Beber & Richards and *Seymour L. Smith,* for appellees.

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

SPENCER, J.

This is an action for forcible detention. Plaintiffs' motion for summary judgment was sustained. Defendants appeal. The plaintiffs and appellees, hereinafter referred to as plaintiffs, are Samuel N. Wolf and Morris Shapiro. The defendants and appellants are Tastee Freez Corporation of America and Paul J. Rayer. They will hereinafter be referred to as defendants.

Defendants insist that a genuine issue of fact exists in connection with the asserted waiver by plaintiffs of the precise exercise of an option to extend a lease. Plaintiffs maintain there is no issue of fact and the questions involved herein are: First, whether the option in the lease was properly exercised; second, whether there is any evidence of waiver of a written notice; and third, whether an oral waiver would be violative of the statute of frauds.

The defendant Tastee Freez Corporation of America, on February 19, 1954, leased certain property in Douglas County from one Buras for a term of 5 years, ending April 1, 1959. Plaintiffs acquired the property by purchase from Buras on January 16, 1956, and became the owners and lessors. The lease contained a provision to the effect that it could be extended for a further 5-year period and an additional 5-year period at the end of the

second period upon the same terms and conditions, upon the lessee giving lessor notice in writing of its intention so to extend "given ninety (90) days prior to the expiration of the term hereof."

On December 30, 1958, the defendant, Tastee Freez Corporation, executed a written notice to plaintiffs of its intention to extend the lease for the term of 5 years. This notice was served upon the plaintiffs on January 2, 1959, or at best 89 days prior to the expiration of the lease. The lessors' agreement to renew is an executory contract, and until the lessee has exercised it in some affirmative way, the lessor cannot be held for the additional term. That the acceptance of an offer must be made within the time specified in the offer is a general rule of law. In Restatement, Contracts, § 40 (1), p. 47, it is said: "The power to create a contract by acceptance of an offer terminates at the time specified in the offer, * * *." We believe that under a provision specifically designating the time within which notice must be given, that time is of the essence, and such provision is to be strictly construed. See 32 Am. Jur., Landlord and Tenant, § 978, p. 821. We hold that the notice was served too late and that the option expired, unless the provision for a 90-day written notice was waived, as suggested by the defendants.

This action was originally filed in the municipal court of the city of Omaha on April 7, 1959. On May 1, 1959, that court found the defendants not guilty and dismissed the complaint. Plaintiffs perfected an appeal to the district court for Douglas County. Issues were joined by the filing of a plea of not guilty on June 26, 1959. On April 1, 1960, plaintiffs filed a motion for summary judgment, supported by affidavits. Defendants filed their resistance, supported by the affidavit of Joe Fite. On May 19, 1960, the motion for summary judgment was overruled. On May 27, 1960, plaintiffs filed what is designated as a motion for rehearing on the motion for summary judgment. On October 27, 1960, this

motion for rehearing was submitted to the district court, and on November 23, 1960, the district court sustained the motion and vacated the order of May 19, 1960, overruling the motion for summary judgment. On November 25, 1960, the court sustained the motion for summary judgment and entered an order and judgment for restitution.

The only evidence in resistance offered by the defendants is the affidavit of Joe Fite, which, excluding the caption and the jurat, is as follows:

"JOE FITE being first duly sworn upon oath desposes and says as follows:

"I.

"That he is a resident of the City of Des Moines, Iowa and an employee of Tastee Freez of Southwestern, Iowa, and operates a territory assigned to him by the defendant Tastee Freez Corporation of America; that on several occasions during the summer and fall of the year 1958, I had several discussions with Samuel N. Wolf and Morris Shapiro with reference to the desires of said named plaintiff to carry out an arrangement whereby Tastee Freez Corporation of America would give up its lease on the premises described as:

> "All of Lot 7, except the West 7 feet thereof which was taken for the widening of 72nd Street, Block 5, Cederhold, an Addition to the City of Omaha, Douglas County, Nebraska, and commonly known as 215 South 72nd Street, Omaha, Nebraska,

prior to the opening of the business operated by the defendant Tastee Freez Corporation of America and Paul J. Rayer in the spring of 1959.

"II.

"That to the best recollection of this affaint on or about the 14th day of December, 1958, Morris Shapiro called this affiant at his office in Des Moines by long distance and requested that this affiant come to Omaha to talk with said Morris Shapiro and Samuel N. Wolf to ascertain if some arrangements could be made on the

Tastee Freez lease on the above described premises in order that Tastee Freez would not remain in occupancy of said premises the second five year period provided in said lease.

"III.

"That pursuant to the telephone conference aforesaid this affiant on Saturday, December 20, 1958 did come to Omaha, Nebraska, from his home in Des Moines, Iowa and on or about 3:00 P. M. on said date, this affiant met in the office of said Morris Shapiro with both plaintiffs herein, Shapiro and Wolf and discussed the matter of the defendants continuing to hold the above described premises for the additional five year period as provided in the lease.

"IV.

"That during the course of the conference, the plaintiff proposed that in consideration of the defendant giving up the lease that they, the plaintiffs would build another store for the defendants, possibly on Dodge Street not very far from their present location.

"V.

"That this affiant informed Messrs. Wolf and Shapiro that even if a new store were constructed that this affiant would not be interested as it was problematical what success might be expected in a new location and that the only inducement for giving up the lease would be an out right cash payment.

"VI.

"That in the course of the discussion this affiant suggested that if Messrs. Wolf and Shapiro would make an offer to pay the sum of $10,000.00 he would take the matter up with Mr. Rayer and the home office of the defendant in Chicago and recommend that a settlement be made on that basis.

"VII.

"That when affiant made this proposal Mr. Wolf informed this affiant that before they would pay that kind

of money that Tastee Freez could remain there forever before such payment would be made.

"VIII.

"That this affiant told Messrs. Wolf and Shapiro that he was satisfied with the location and that he felt that a good amount of money could be made there in the next ten years; that Mr. Shapiro then asked this affiant to keep negotiations open *and further advised this affiant that since this affiant had expressed his intention to extend the lease another five years that there was no necessity to jump to any hasty conclusion as the store would not be open until the Spring of 1959* and in event that the defendants should consider the proposition, that Messrs. Wolf and Shapiro would give the defendants the present Tastee Freez Building which could be moved or salvaged and some additional cash consideration, but not $10,000.00, *and that the defendants would have until Spring to decide whether to extend the lease or work out a settlement.* (Italics supplied.)

"IX.

"That the conference concluded by this affiant stating that unless a cash offer of $10,000.00 could be submitted by him in consideration of giving up the lease, * * * the defendant intended to stay for both five year periods as provided by the lease and that this affiant would so notify his Chicago office.

"Further affiant says not."

Plaintiffs question the authority of Fite to represent the defendants. Suffice it to say that all their dealings with the defendants were through Fite, and that they themselves called him to Omaha to discuss the matter on behalf of defendants. For the purpose of the present motion, we will hold this to be sufficient.

The first question is, may a lessor waive a provision in a lease providing that notice of the exercise of an option to extend the lease must be given within a stipulated time? There are no Nebraska cases relating directly to the extension or renewal of leases.

In 32 Am. Jur., Landlord and Tenant, § 980, p. 823, we find the following: "It is well settled that the lessor may waive the requirement in a lease of notice by the lessee of renewal at or within a certain time."

For cases from other jurisdictions to this effect, see Fuchs v. Peterson, 315 Ill. 370, 146 N. E. 556; McAllister v. Northern Oil Co., Inc., 115 Vt. 465, 64 A. 2d 31; Dries v. Trenton Oil Co., Inc., 17 N. J. Super. 591, 86 A. 2d 427; Achtar v. Posner, 189 Md. 559, 56 A. 2d 797; Khourie Bros. v. Jonakin, 222 Ky. 277, 300 S. W. 612.

Plaintiffs contend there is no consideration for the claimed waiver. In Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, we said: "While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration."

The cases of Ketcham v. Oil Field Supply Co., 99 Okl. 201, 226 P. 93, and McCue v. Collins (Tex. Civ. App.), 208 S. W. 2d 652, on this point hold that no consideration is required to support a waiver of written notice or an intention to renew. The waiver is simply the voluntary relinquishment of a known right and a matter of the intention of the party asserted to have made the same.

Plaintiffs further contend that an oral waiver is barred by the statute of frauds. They cite the case of Thostesen v. Doxsee, 77 Neb. 536, 110 N. W. 319. This case involved a written lease for a year. During the term, the parties orally agreed that one of the lessees could have the land on the same terms for another year. This is a different contract with different parties, is not in any way analogous to the instant situation, and clearly violates the statute of frauds.

Plaintiffs quote extensively from Beller v. Robinson, 50 Mich. 264, 15 N. W. 448, which does support their position. This seems to be a very minority rule, and if the case of Darling v. Hoban, 53 Mich. 599, 19 N. W. 545, does not in effect overrule it, at least it seriously impugns the doctrine. In the Darling case, there was a written

agreement between two parties whereby one was to erect a building on the land of the second, and occupy the same at a yearly rental for 5 years, with the election in the second party to take the improvements at their cost price or to renew the lease for a further 5-year term. The Michigan court in the Darling case held that no written notice was required to avoid the statute of frauds because all the details were contained within the original lease.

The general rule, as we find it, is that in situations like the instant case the lessee holds for the extended term under the original lease and not under the notice of intention to renew. Therefore, the statute of frauds does not apply to the notice. See, Ketcham v. Oil Field Supply Co., *supra;* McClelland v. Rush, 150 Pa. 57, 24 A. 354; Marckres Bros. v. Perry Gas Works, 189 Iowa 1204, 179 N. W. 538; Economy Stores, Inc. v. Moran, 178 Miss. 62, 172 So. 865.

In Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259, we said: "In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.

"A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered."

In Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614, we held: "The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to discover if any real issue of fact exists. * * * In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the summary judgment act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The evidence offered in support of the motion is for the purpose of showing that no issue of fact exists, not to try issues on pleadings, depositions, admissions, and affi-

davits which constitute only a part of the evidence available on a trial on the merits. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled."

We must now consider whether there is any evidence of conduct such that a jury could find that the plaintiffs waived the provision in question. As stated above, we do not decide the fact issue, but, viewing the evidence most favorably for the party opposing the motion for summary judgment, decide whether any real issue of fact exists.

Paragraph VIII of Fite's affidavit infers that oral notice to extend the lease had been given. This, with the part of the last sentence of that paragraph, "that the defendants would have until Spring to decide whether to extend the lease," could suggest a waiver by conduct if not in words. It is true that the paragraph could be so construed as to be consistent with plaintiffs' position. This, however, makes it a disputed question of fact for the jury.

Plaintiffs urge that defendants were not relying on a waiver because they did attempt to comply with the provisions for the written notice and were 1 day too late. In view of the fact that the conference covered by the affidavit was December 20, 1958, and the Tastee Freez Corporation's home office was in Chicago, there might be some explanation. In any event, we hold this is an element to be considered by the jury. It is not enough, as a matter of law, to show nonreliance on a waiver sufficient to sustain a summary judgment. We must say that there are inferences apparent in the evidence before the court which, if resolved favorably for the defendants, would sustain a judgment for them, and therefore the motion for summary judgment must be overruled.

For reasons given above, the order of the district court in sustaining the motion for summary judgment and

the entry of judgment in accordance therewith are reversed and the cause is remanded.

REVERSED AND REMANDED.

PAUL E. RHODES, APPELLANT, V. MAURICE SIGLER, APPELLEE.
109 N. W. 2d 731

Filed June 23, 1961. No. 35029.

1. **Habeas Corpus.** It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated.
2. ———. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts.
3. **Appeal and Error: Habeas Corpus.** If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus.
4. **Habeas Corpus.** The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose.

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

Paul E. Rhodes, W. H. Kirwin, and *Clayton H. Shrout,* for appellant.

Clarence A. H. Meyer, Attorney General, and *Cecil S. Brubaker,* for appellee.

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

SIMMONS, C. J.

This is a habeas corpus action. Relator is being held in custody at the penitentiary. The respondent is the warden of the penitentiary. The trial court denied re-

lease from custody of the relator. He appeals. We affirm the judgment of the trial court.

The relator is a defendant in a felony case pending in the district court for Morrill County. Following a series of actions and conduct in the courts of and for Morrill County, the district court there found relator guilty of contempt of court and sentenced him to confinement in the Nebraska State Penitentiary for a period of 9 months at hard labor, Sundays and holidays excepted, and to pay a fine of $2,500 and costs.

Relator then filed a petition in error and a transcript of the proceedings in this court. In that case on motion of the relator we suspended the execution of the judgment and directed the district court for Morrill County to admit the relator to bail. This order was issued December 23, 1960.

In the meantime on November 25, 1960, the clerk of the district court for Morrill County had issued an order to the sheriff of Morrill County to execute the sentence and order of the court. On January 23, 1961, the sheriff delivered the relator to the penitentiary where he is now held.

Relator here argues that he was tried for contempt in his absence and that no order was issued for the arrest of the relator by the trial court. He contends that the order of commitment was unauthorized and that he is being held under a sentence of the trial court which has been suspended by this court.

The district court for Lancaster County issued an order to show cause. Hearing was had on the question of whether a writ should be issued. The issuance of the writ was denied. This is an appeal from that denial.

Relator apparently has elected not to ask to be admitted to bail. His petition in error here presented questions which arose prior to his delivery to the penitentiary.

The jurisdiction of the cause is in this court in the error proceedings from Morrill County. The trial court

properly refused to issue a writ under the rules stated in McFarland v. State, *ante* p. 251, 109 N. W. 2d 397: It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts.

We need not determine here whether the issuance of the order of commitment on November 25, 1960, was regular or irregular. As to that the rule is: If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus. In re Application of Cole, 103 Neb. 802, 174 N. W. 509.

We think it clear that from the 21st of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action.

It appears from this showing that the sheriff had full authority under the provisions of section 29-1001, R. R. S. 1943, to hold relator in a "secure and convenient place of confinement." If there is error in the determination it is a matter to be corrected in an error proceeding and not in habeas corpus. It has long been the rule that: The writ of habeas corpus is not a writ for the

correction of errors, and will not be allowed to be used for that purpose. In re Application of Cole, *supra*.

The judgment of the district court for Lancaster County is affirmed.

AFFIRMED.

JOHN V. HANCOCK, DOING BUSINESS AS JOHN HANCOCK CONSTRUCTION COMPANY, APPELLEE, V. LESLIE PARKS, APPELLANT.

110 N. W. 2d 69

Filed June 30, 1961. No. 34952.

1. **Appeal and Error.** For an error at law occurring at the trial to be considered by this court, the alleged error must be properly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal.
2. **Trial.** A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence.
3. **Appeal and Error.** The function of this court, in determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts.
4. ———. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
5. **Trial: Appeal and Error.** It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.
6. **Trial.** Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined.
7. **Work and Labor: Quantum Meruit.** An action based on quan-

tum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof.

8. ———: ———. There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.

9. **Work and Labor: Payment.** In a proceeding to recover for services rendered, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense to be established by the person claiming payment was made.

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

Lyle B. Gill, for appellant.

William G. Line, for appellee.

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

MESSMORE, J.

The plaintiff, John V. Hancock, doing business as John Hancock Construction Company, brought this action at law in the district court for Dodge County against Leslie Parks, defendant, seeking to recover on quantum meruit for the reasonable value of services rendered to the defendant. The jury returned a verdict finding in favor of the plaintiff and against the defendant, and assessed the amount of plaintiff's recovery in the sum of $1,000. Judgment was rendered on the verdict. The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. This motion was overruled. Defendant perfected appeal to this court.

The plaintiff's petition, insofar as necessary to consider, alleged that at the special instance and request of the defendant, the plaintiff furnished services for the defendant commencing on August 26, 1958, using a caterpillar tractor and operator through September 4, 1958, a motor patrol and operator on September 12 and 13, 1958, and a caterpillar tractor and operator on October 17 and 18, and November 21, 1958; that the total

amount of services rendered amounted to $1,179; that this sum represented the reasonable and agreed value of the said services; that despite repeated demands for payment thereof more than 90 days prior to the institution of this action, no part of said sum had been paid except the sum of $100 on January 12, 1959, leaving a balance due of $1,079 which the plaintiff voluntarily reduced to $1,000; and that the plaintiff sought to recover no more than $1,000 with interest at 6 percent from February 22, 1959. The plaintiff also asked for attorney's fee to be taxed as costs by virtue of section 25-1801, R. R. S. 1943, and costs of suit.

The defendant, in his answer, alleged that he entered into a written contract with the plaintiff on June 16, 1958; that on June 28, 1958, he paid the plaintiff $1,000 on the contract; that on July 25, 1958, he paid the plaintiff $1,000 on the contract; that on January 12, 1959, he paid the plaintiff $500; that the items of work alleged to have been performed by the plaintiff relate to work to be performed under the written contract dated June 16, 1958; that the plaintiff failed to carry out the terms of the written contract and the plaintiff's neglect in doing so caused the defendant to employ other persons to complete the work as provided for in the contract; that nevertheless on January 12, 1959, defendant delivered to plaintiff his check in the sum of $500, mentioned above, which the plaintiff accepted and cashed; and that the plaintiff accepted and received said check in full satisfaction and discharge of any and all liability of the defendant to the plaintiff. The defendant's answer denied all allegations of the plaintiff's petition not admitted.

The plaintiff's reply admitted the written contract dated June 16, 1958, and the payments made thereunder; and denied that the work done by the plaintiff related to work under the written contract. The plaintiff denied that he failed to carry out the terms of the written contract, and denied that the check for $500 dated Janu-

ary 12, 1959, was in full satisfaction of the defendant's liability to the plaintiff. Other allegations of the defendant's answer were denied generally.

The record discloses that the plaintiff is in the contracting business; that between August 10 and 15, 1958, at the defendant's request, he went to see the defendant; and that the defendant wanted the plaintiff to do some work for him to make the water on the defendant's land go to the north before it went east, and to put in more dirt. The evidence further discloses that starting on August 26, 1958, to and including November 21, 1958, the plaintiff furnished a caterpillar tractor and operator, and a motor patrol and operator, working for the defendant a designated number of hours for a total amount of $1,179. The plaintiff testified that he was paid $100; and that he was reducing the balance of $1,079 to $1,000. The plaintiff further testified that he obtained dirt from a new cut-off ditch on the north side of the defendant's property, and hauled the dirt 3,000 to 4,000 feet; that there were between 1,500 and 2,000 cubic yards of dirt hauled; that he did other work for the defendant under a contract; that the defendant was going to build a trailer court on his land; that the plaintiff did the work called for under that written contract and was paid for it; and that this work was completed sometime in the first 10 days of July 1958.

On cross-examination the plaintiff testified that the job which was commenced in August was a "fill" job, to fill the area so the water would run to the western slope, to make it go west; that the dirt was put on the east side of the defendant's property line, which made the water flow west and north to the cut-off ditch; and that there was no discussion as to how long the job would take or what the cost would be.

A written contract dated June 16, 1958, which was admitted and designated exhibit No. 3, reads in part as follows: "John Hancock Const. Co. agrees to do the following work for the sum total of $2400.00. Dirt to be

hauled from the new ditch North 1/4th mile and East only. 1. Fill old creek bed with a slope to East of approx. 2′ from West rock road to East side of creek bed. 2. Fill front of building site .8 below pavement with slope of 1′ east and slope of 3′ North on West of East property line. 3. Grade to North property line from county road to approx. 250′ East. 4. Grade to be on person property only. 5. Finish fill areas. Payment to be made on day of completion." This contract was signed by the plaintiff and defendant.

The plaintiff further testified on cross-examination that he submitted the first bill to the defendant September 19, 1958, by handing it to him; that the defendant said that he did not have the money at that time; that he asked the defendant several times to pay the bill; and that he delivered a bill to the defendant around November 5, 1958, and asked the defendant if he could pay the bill. The defendant told the plaintiff that he did not have his Standard Oil loan through, and that when he got $500 for the old house he sold he would give that amount to the plaintiff.

The plaintiff's wife testified that she assisted the plaintiff in his business by taking care of the books and preparing the bills for the jobs the plaintiff was doing. She prepared the bills covering the period from August 26, 1958, until the completion of the work. This witness further testified that the timesheets of their employees are turned over to her, and show the work done for the defendant.

The testimony of a witness for the plaintiff who operates the machinery necessary to do the work corroborated the plaintiff's evidence relating to the work done by him from August 26, 1958, to and including the date of finishing the work.

The defendant testified to the physical characteristics of his property in June 1958; that at that time old Rawhide Creek was blocked off west of his property to the road, and new Rawhide Creek was built to bring fill

into the old creek; that the old creek came across the north end of the property approximately 50 feet to the east side then turned almost south, then turned again to the east; that the land from the north at that time drained into the old creek, and the other end of the property drained into the county road and came back around the creek; that regardless of the written contract or the plaintiff's alleged oral contract, there was some work done on his land after the plaintiff finished his work, because the defendant had to have some other dirt brought in which did not change the elevations except up on the land; and that there was no change in the layout of the tract. The defendant further testified that he had his first conversation with the plaintiff about doing some filling work on his land approximately the first of June 1958, and the plaintiff inspected the premises. The defendant further testified that at the time the work was being done under the written contract, he was living on the premises and had occasion to see the work done; that in September 1958, the plaintiff came on the land with a motor patrol to scrape or to level down some gumbo pieces he had dumped on the land; and that the plaintiff did not bring in any dirt to be put on the land in September, or after September 1958. The defendant denied that he ever received any bill from the plaintiff for any work done other than that which was agreed to in the written contract, and stated that he did pay the plaintiff $100 for taking out a tree. The defendant further testified that in August he called the plaintiff and asked him when he was going to get back to finish filling the creek. The plaintiff was working at the high school and said as soon as he finished that work he would come back and finish filling up the creek. The defendant further testified that no contract was ever discussed, for the reason that the plaintiff had contracted under the written contract to fill the old creek bed and it was the understanding that what he was to do after he was called in August 1958,

was to be a part of the old contract. Defendant also testified that during the month of December, he had no discussion with the plaintiff about anything, nor did he in August, October, or November 1958.

The defendant testified that on September 1, 1958, which was Labor Day, he did not see the plaintiff or his employee Goree do any work. A neighbor testified that all that day she saw no one working on the defendant's property. A witness testified that he hauled dirt for the defendant on September 2, 3, and 4, and did not see the plaintiff or his employee.

Another witness testified that he hauled dirt for the defendant on September 18, 1958, and leveled some gumbo piles on the defendant's land; that what he hauled was sandy dirt, and what was piled up was gumbo; and that there was no slope from west to east on the east side in September, instead there was deep water.

The record shows that the defendant repeatedly denied that he told the plaintiff he was waiting for a loan to come through, or that he borrowed any money in January 1959. Defendant did admit that on January 29, 1959, he borrowed $50,000, and that he borrowed $11,000 in October 1958.

The defendant assigns as error (1) that the trial court erred in overruling his motion at the conclusion of all of the testimony for a directed verdict on the ground that there was insufficient evidence to support a verdict in the plaintiff's favor; (2) that the trial court erred in refusing to allow defendant's attorney to cross-examine the plaintiff and Roy Goree about what work was done on the land under the written contract; (3) that the trial court erred in refusing to allow defendant's attorney to examine defendant about the work that was done under the written contract; (4) that the trial court erred in instructing the jury that the burden of proof was upon the defendant to show that any work performed by the plaintiff was performed under the June

16, 1958, contract; (5) that the trial court erred in failing to instruct the jury that the burden of proof was on the plaintiff to prove by clear and convincing evidence that the terms of the written contract were fulfilled or the work accepted by the defendant on July 7, 8, or 10, 1958; and (6) that the trial court erred in denying the defendant's motion for judgment notwithstanding the verdict or for a new trial.

The plaintiff asserts that the defendant's assignments of error Nos. 2, 3, and 5 are not reviewable for the reason that such matters were not called to the attention of the trial court in the defendant's motion for new trial.

In Robinson v. Meyer, 165 Neb. 706, 87 N. W. 2d 231, this court said: "For an error at law occurring at the trial to be considered by this court, the alleged error must be properly presented to the trial court and properly preserved, otherwise the defendant is ordinarily precluded from raising it on appeal."

It is a fundamental rule that an issue not presented and ruled on by the trial court will not be considered on appeal. Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227; Reller v. Ankeny, 160 Neb. 47, 68 N. W. 2d 686.

In Robinson v. Meyer, *supra,* the court went on to say: "Assignments of error * * * (enumerating them) assert that the trial court erred in instructing the jury with reference to certain issues in the case. No instructions are specified as being erroneous in the motion for a new trial * * *. This court has repeatedly held that instructions not objected to in a motion for a new trial will not be reviewed in this court. Being a court of review, this court will consider on appeal such alleged errors as are properly preserved and submitted to this court. * * * This court has consistently held that errors of law occurring at the trial and not made grounds of a motion for a new trial will not be considered on appeal. * * * In State ex rel. Spillman v. Citizens State Bank, 115 Neb. 271, 212 N. W. 616, we said: 'In order

that "error of law occurring at the trial" may be considered by this court, it is necessary, under our uniform holding, that the district court's attention must have been called to the same by way of a motion for a new trial.' By failing to object to and preserve any error with respect thereto, the defendant is ordinarily precluded from raising it for the first time on appeal. As early as Creighton v. Newton, 5 Neb. 100, this court said: 'The rule is well settled that "before a party is entitled to be heard in this court, he must have exhausted his remedy in the court below." If he is dissatisfied with the verdict or judgment, he must by motion present the questions of law fairly and fully to the court below, * * *.'"

No such course has been taken by the defendant in the court below relating to the assignments of error heretofore mentioned. See, also, Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863; Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312; J. R. Watkins Co. v. Sorenson, 166 Neb. 364, 88 N. W. 2d 902.

Under the above authorities, the contention of the plaintiff is well taken.

The defendant, at the conclusion of the plaintiff's evidence, moved the court to direct a verdict in favor of the defendant for the reason that the plaintiff's evidence was insufficient to support a verdict. The same motion was made by the defendant at the close of all of the evidence.

A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence. See Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655.

In Johnston v. Robertson, 171 Neb. 324, 106 N. W. 2d 192, this court said: "The function of this court, in

determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts. * * * It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. * * * It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. * * * Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined."

In Bosle v. Luebs, 169 Neb. 186, 98 N. W. 2d 795, this court said: "An action based on quantum meruit for labor and materials furnished is grounded upon an implied promise to pay the reasonable value thereof." See, also, Umberger v. Sankey, 154 Neb. 881, 50 N. W. 2d 346.

In Sorensen Constr. Co. v. Broyhill, 165 Neb. 397, 85 N. W. 2d 898, it was said: "There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced."

As said in In re Munro's Estate, 296 Mich. 80, 295 N. W. 567: "In proceeding to recover for personal services rendered decedent, plaintiff is not required to show nonpayment therefor since payment is an affirmative defense to be established by the executor."

The burden was not on the plaintiff to prove nonpayment of the obligation, and the burden of proving payment was an issue to be proved by the defendant in the trial of this case. See, Ashland Land & Live-Stock Co. v. May, 51 Neb. 474, 71 N. W. 67; Burke v. Munger, 138

Neb. 74, 292 N. W. 53; Washington v. Beselin, 141 Neb. 638, 4 N. W. 2d 753; Bosle v. Luebs, *supra*. The foregoing authorities relate to quantum meruit as applied to the facts in the instant case.

The plaintiff raises the proposition that by section 25-1801, R. R. S. 1943, he is entitled to have an attorney's fee allowed to be taxed as costs in this action. This statute deals with "Costs; interest; attorney's fees; recovery; claims of one thousand dollars or less."

The record shows that the plaintiff's wife prepared the following bills to be presented to the defendant. A bill dated September 19, 1958, for work done by the plaintiff for the defendant from August 26 to September 13, 1958, in the amount of $1,498; a bill dated November 1, 1958, for work done by the plaintiff for the defendant in the amount of $1,564; and another bill dated November 1, 1958, by mistake, which should have been dated December 1, 1958, for work done by the plaintiff for the defendant in the amount of $1,579.

The mere fact that the plaintiff pleaded in his petition that he reduced the amount owing by the defendant to him from $1,079 to $1,000, and testified to such fact, is not controlling.

Section 25-1801, R. R. S. 1943, provides in part: "Any person, * * * having a claim, which amounts to one thousand dollars or less, against any person, * * * for (1) services rendered, (2) labor done, (3) material furnished, * * * may present the same to such person, * * * for payment in any county where suit may be instituted for the collection of the same. If, at the expiration of ninety days after the presentation of such claim, the same has not been paid or satisfied, he may institute suit thereon in the proper court. If he shall establish his claim and secure judgment thereon, he shall be entitled to recover the full amount of such judgment and all costs of suit thereon, and, in addition thereto, interest on the amount of the claim at the rate of six per cent per annum from the date of presentation thereof,

and, if he has an attorney employed in the case, an amount for attorney fees as provided in this section."

In the light of the record, the plaintiff's claim for attorney's fee does not come within section 25-1801, R. R. S. 1943, and the plaintiff is not entitled to have an attorney's fee taxed as costs in his favor.

We deem it unnecessary to determine any other assignment of error set forth by the defendant.

We find no prejudicial error in the record, and affirm the judgment of the district court.

AFFIRMED.

STEPHENSON SCHOOL SUPPLY CO., A PARTNERSHIP, APPELLANT, V. THE COUNTY OF LANCASTER ET AL., APPELLEES. UNIVERSITY PUBLISHING COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. THE COUNTY OF LANCASTER ET AL., APPELLEES.

110 N. W. 2d 41

Filed June 30, 1961. Nos. 34968, 34969.

1. **Statutes.** A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable.
2. ———. No presumption arises from changes of this character that the revisors or the Legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears.
3. **Taxation.** The Legislature intended by transferring book accounts to Class A in section 77-701, R. R. S. 1943, to include therein those accounts, demands, claims, and credits which are not usually evidenced by written acknowledgment.
4. ———. In listing book accounts for taxation under said section the taxpayer cannot deduct therefrom his accounts payable or debts owed by him to others.
5. ———. The doctrine of immunity from taxation has been said not to be undergoing a process of expansion; rather, the more recent cases indicate a tendency to restrict more sharply than ever the various exemptions which arise out of the doctrine.

6. ———. Statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute.
7. ———. Open accounts of a governmental subdivision of the state not bearing interest and not liquidated in the hands of a creditor of the subdivision are not exempt from taxation.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed.*

Cline, Williams, Wright, Johnson, Oldfather & Thompson and *Charles E. Wright,* for appellants.

Paul L. Douglas, William D. Blue, and *Bernard Wishnow,* for appellees.

Fraser, Wenstrand, Stryker, Marshall & Veach and *Tracy J. Peycke, amici curiae.*

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

BROWER, J.

These two cases were consolidated for trial in the district court by agreement of the parties and, by like stipulation in this court, were briefed and tried together. They involve the same two questions. The first is whether in listing book accounts for taxation under sections 77-701 to 77-732, R. R. S. 1943, a taxpayer may deduct therefrom the amount of its accounts payable, and secondly, whether book accounts owed by the state or its subdivisions and, particularly in these cases, school districts organized and existing under the laws of the State of Nebraska are exempt from taxation.

Both of these cases were tried under stipulations as to the facts and there is no dispute in regard to them.

In the Stephenson Company case the stipulated facts are that on March 1, 1959, the company's book accounts showed accounts receivable of $68,258, which included $62,000 owing to the company from various school districts organized as public corporate bodies under the

laws of the State of Nebraska. On the same date the company's liabilities as reflected by its books showed accounts payable in the sum of $38,563. The company listed its accounts receivable, after deducting $62,000 owed by various school districts so organized, at $6,258 as the actual valuation of its book accounts subject to taxation on its 1959 personal property tax return. The Lancaster County assessor raised the valuation to $68,-255, by adding back and including in such sum the entire value of the company's accounts receivable from said school districts. Notice was given to plaintiff on May 8, 1959. On May 26, 1959, the company filed written complaint with the Lancaster County board of equalization objecting to the valuation placed on its book accounts, claiming the accounts with school districts exempt and also stating that the company had neglected to deduct its accounts payable in the sum of $38,-563 from its accounts receivable; that since filing its tax schedule it was informed and believed this should have been done; and that both the accounts receivable owed by the school districts and the accounts payable should have been deducted, leaving the value of its book accounts subject to tax at zero.

The stipulation in the University Company case sets out its book accounts as of March 1, 1959, in the same manner. The book accounts, being in the amount of $103,100 of which sum $98,010 were owed by such public school districts of the State of Nebraska, and its books likewise showed accounts payable in the sum of $25,470. Its original return for the year 1959 listed its book accounts after deducting the school accounts at the sum of $5,093. The assessor likewise increased the value thereof to the sum of $103,100 by adding back the accounts receivable from the school districts. Timely notice was thereupon given to the University Company and the company filed objections which claimed both the school district accounts and the accounts payable should

be deducted, leaving its book accounts subject to taxation also at zero.

After hearing the board of equalization voted that no change be made in the assessment in either case. Each company thereupon perfected an appeal to the district court and upon trial thereof the court found that the assessments of the board in both cases were proper and entered judgment in each case dismissing the appeal. Motions for new trial were overruled and plaintiffs have perfected appeals to this court and, pursuant to stipulation, have consolidated them for briefing and argument.

A brief of counsel for Peter Kiewit Sons', Inc., which has similar pending questions, was filed as amici curiae.

We will first take up the question in regard to whether or not the plaintiff companies may deduct from their book accounts their accounts payable as claimed.

In order to understand the present law it will be necessary for us to review the history of taxation of intangibles and particularly accounts receivable under the designations of "credits," "gross credits," or "book accounts," hereinafter discussed.

The Constitution of 1875 in Article IX, section 1, in regard to taxation, so far as here material, reads as follows: "The Legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises the value to be ascertained in such manner as the legislature shall direct, * * *."

The revenue law of 1879, Laws 1879, pp. 273 to 349, contains the following. Section 4 provides in part as follows: "Personal property shall be valued as follows: * * * Second. Every credit for a certain sum, payable either in money or labor, shall be valued at a fair cash value for the sum so payable; * * *." Section 7, so far as here material, reads as follows: "Personal property shall be listed in the manner following: * * * Second.

He shall also list all moneys and other personal property invested, loaned, or otherwise controlled by him as the agent or attorney, or on account of any other person or persons, company, or corporation whatsoever, and all moneys deposited, subject to his order, check, or draft, and *credits due from or owing by any person or persons, body corporate or politic, whether in or out of the county.*" Section 27 provides in part as follows: "*In making up the amount of credits which any person is required to list for himself, or for any other person, company or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing by such person, company or corporation, to any other person, company, or corporation, for a consideration received; * * *.*" (Emphasis ours.)

It is quite evident from the inspection of section 27 above set out that the credits of the taxpayer should under that act be reduced by the debts of the taxpayer. It was patently so by its express provision. This act remained practically unchanged until the year 1903 when the Legislature passed a new general revenue law which reenacted section 7, Laws of 1879, which in the 1903 act was Laws 1903, c. 73, § 28, p. 394. At the same time, however, section 27 of the revenue act of 1879, being then section 4308, Compiled Statutes for 1901, was repealed. Thereafter there was no statutory provision expressly authorizing the deductions of "debits" from "credits," as they were then termed.

Following the passage of this act came questions concerning what was meant by the word "credits" without any provision giving express permission for deducting debits. This court in a series of cases cited by all parties hereto held that under the 1903 act "credits" meant "net credits" and the taxpayer could still deduct his debts from his gross credits. State ex rel. Breckenridge v. Fleming, 70 Neb. 523, 97 N. W. 1063; Lancaster County v. McDonald, 73 Neb. 453, 103 N. W. 78; Critchfield v. Nance County, 77 Neb. 807, 110 N. W. 538; Oleson v.

Cuming County, 81 Neb. 209, 115 N. W. 783, Scandinavian Mutual Aid Assn. v. Kearney County, 81 Neb. 468, 116 N. W. 155, on rehearing, 81 Neb. 473, 118 N. W. 333; Nye-Schneider-Fowler Co. v. Boone County, 102 Neb. 742, 169 N. W. 436. In all of the foregoing cases, except Critchfield v. Nance County, *supra*, the deduction of debits from credits was allowed. In that case only, however, an owner of a bank deposit was held not entitled to deduct a note of the taxpayer in another bank. This was on the theory that it was not just a "credit" as mentioned in the act, but a "bank deposit," required by the statute to be listed in special terms and as to which no authority to deduct had ever been given.

This continued to be the law until 1921 when a statute making extensive changes in the revenue act was passed, including the following taken from Laws 1921, c. 133, art. VIII, § 1, p. 582. "Moneys, *gross credits*, including corporation shares or stocks, United States legal tender notes, and other notes and securities of the United States payable on demand, notes (other than notes secured by mortgages on real estate situate in this state), accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind (other than notes secured by mortgages on real estate situate in this state), securities, debentures, bonds, (other than those of the United States or of this state or governmental subdivision of this state), annuities, and all other demands for labor or other valuable thing, whether due or to become due, and all other intangible property, except as herein otherwise provided, shall be separately listed and shall be taxed on the basis of twenty-five per cent of the mill rate levied upon tangible property where said intangible property is assessed, the same to be assessed and collected where the owner resides." (Emphasis ours.)

This it is noted was passed shortly after the effective date of the constitutional amendments of 1920 which, among other things, provided for a different method of

taxing intangibles. It is clear from this act what the Legislature meant by the words "gross credits." Particularly is this true when one refers to the cases cited which construed the 1903 act where a great deal of the discussion was whether "credits" in the previous act meant "gross" or "net" credits. We are not cited to any cases thereafter which held that one's debts could be subtracted from one's "credits" for assessment purposes and there appears to be no ruling thereon by this court. We believe the meaning of the legislation was so clear that no litigation followed.

This section seems to have clearly provided for listing and taxation of "gross credits, including * * * demands for labor or other valuable thing, whether due or to become due, and all other intangible property, except as herein otherwise provided, * * *."

Though changed in form it was not changed in substance in any respect affecting credits prior to 1929 when it appeared as section 77-701, Comp. Stat. 1929, as follows: Moneys, *gross credits,* including corporation shares or stocks, United States legal tender notes and other notes and securities of the United States payable on demand, notes (other than notes secured by mortgages on real estate situated in this state), accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind (other than notes secured by mortgages on real estate situated in this state), securities, debentures, bonds (other than those of the United States or of this state or governmental subdivisions of this State), annuities and all other demands for labor or other valuable things, whether due or to become due, and all other intangible property shall be separately classified, listed and taxed as follows: Class A. Class A shall consist of money, United States legal tender notes and other securities of the United States payable on demand, saving accounts, all bank deposits, bills of exchange, checks and drafts. * * * Class B. Class B shall include all other kinds of intang-

ible property named in this section which is not included in Class A. * * *" (Emphasis ours.)

In 1943 there was a general revision of the statutes. The first part of this section was shortened and there it appears as follows: "77-701. Intangible property; separately classified, listed, and taxed; classification. Intangible property, other than notes secured by mortgages on real estate situated in this state and other than bonds of the United States, of this state or governmental subdivisions of this state, shall be separately classified, listed and taxed as follows: * * *." Subdivisions (1) and (2) making the division between the two classes of property were unchanged.

It is apparent from the Revisor's notes in the report of the 1943 Statute Commission, volume 3, parts 8 to 10, section 77-701, that the statute was rewritten and shortened for clarity without intended change in meaning, that intangible property was substituted for the itemization of the various types of property, and that all intangibles were intended to be covered except as specifically excepted.

The Laws of 1943 which approved the commission's report and made it law upon publication, Laws 1943, c. 115, § 9, p. 403, provide that all acts of a general nature shall be construed as a continuation of such laws and not as new enactments.

In Hoctor v. State, 141 Neb. 329, 3 N. W. 2d 558, this court held: " 'A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not necessarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. * * * No presumption arises from changes of this character that the revisers or the Legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears.' 59 C. J. 894."

In 1953, this statute was changed to its present form which is section 77-701, R. R. S. 1943, from which we quote as follows: "Intangible property, other than notes secured by mortgages on real estate situated in this state and other than bonds of the United States, of this state, or of governmental subdivisions of this state, shall be separately classified, listed, and taxed as follows:

"(1) Class 'A' shall consist of money, United States legal tender notes and other securities of the United States payable on demand, *book accounts,* savings accounts, bank deposits, bills of exchange, checks, and drafts.

"(2) Class 'B' shall include all other kinds of intangible property which is not included in Class 'A'." (Emphasis ours.)

The title to the 1953 act, Laws 1953, c. 266, p. 878, sets out its purpose as an act to amend sections 77-701, 77-703, and 77-704, R. R. S. 1943, relating to revenue and taxation; to reduce the rate of taxation of Class B intangible property; to expressly include book accounts in Class A intangible property; and to repeal the original sections.

The plaintiffs list their "book accounts" as such but claim they should deduct therefrom their accounts payable which the stipulated facts show are available from their books. It is to be noted from this discussion that since the year 1921 the deduction of debts from credits was not permitted because of the statute requiring the listing of "gross credits." The title to the legislative act in 1953 gives no intimation that the Legislature intended any change which would allow a taxpayer to deduct his accounts payable from his book accounts. The plaintiffs state that the plain and ordinary meaning of the term "book accounts" is a record of debits and credits kept in a book. They cite certain dictionaries and legal authorities in support of that contention. They also cite certain cases as follows: Taylor v. Horst,

52 Minn. 300, 54 N. W. 734; Heringa v. Ortlepp, 167 Ill. App. 586; Purvis v. Kroner, 18 Ore. 414, 23 P. 260; Robin v. Smith, 132 Cal. App. 2d 288, 282 P. 2d 135, which concern and define accounts, book accounts, mutual accounts, and open accounts. These cases all involve suits in the nature of assumpsit based on some memorandum or notation which is alleged either to be or not to be the particular type of account involved. On the question of the meaning of "book accounts" as assets to be listed for taxation they have no application.

The plaintiffs also cite State ex rel. Breckenridge v. Fleming, *supra;* Nye-Schneider-Fowler Co. v. Boone County, *supra;* Lancaster County v. McDonald, *supra,* all of which cases were decided on the statutes prior to the revenue act of 1921, asserting that the rule of deducting debits from credits to make net credits should be applied to the words "book accounts," now in the statute making them in effect "net book accounts." We cannot believe that the Legislature by the act of 1953 intended to revive a construction similar to that of some 30 years ago when the title has no reference to or suggestion of such an intent or object.

This court is familiar with the legislative problems which have for years engaged the Legislature in attempting to have intangible property properly listed for taxation. The old construction might have been useful under the Constitution of 1875 when such intangibles were subject to the same levy as ordinary tangible property, but the Legislature might not think it suitable now.

Plaintiffs assert that courts should give to statutory language its plain and ordinary meaning. We agree in general with this statement and that such meaning is appropriate in statutes requiring the taxpayers generally to list their property. The words "book accounts" in this statute would seem to include, and be understood by the ordinary taxpayers to include, his credit assets or the debts due from others. It is so understood

by an ordinary person who speaks of working on his accounts or book accounts, or of assigning them or collecting them, or reducing or curtailing them. Neither should this term be narrowly restricted to a certain type of an account kept in a book with credits and charges, or any such technical meaning as the plaintiffs seek to give to it. Nor does the term justify the reduction of the taxpayer's book accounts by his debts owed his creditors. Many taxpayers would have no record of their total book accounts receivable or book accounts payable or the net amount after one is set off against the other.

Plaintiffs assert that it is the policy of this state to avoid, so far as possible, double taxation. They cite Peter Kiewit Sons' Co. v. County of Douglas, 161 Neb. 93, 72 N. W. 2d 415; Nye-Schneider-Fowler Co. v. Boone County, *supra;* Peters Trust Co. v. Douglas County, 113 Neb. 596, 203 N. W. 1001. These cases are authority for the general proposition. They, however, likewise state that the Legislature may enact laws that result in double taxation and if it does it is a valid exercise of the taxing power. Plaintiffs contend that if the accounts receivable are not deducted from their book accounts it will result in double taxation. Defendants cite authorities which hold that double taxation in the prohibited sense does not occur because of the taxation of accounts receivable without a deduction for accounts payable. 84 C. J. S., Taxation, § 45, p. 142; Williams v. Brookline, 194 Mass. 44, 79 N. E. 779. To some extent double taxation might occur by the taxation of book accounts whether net or gross as, generally speaking, debts in either case are owed by debtors who have property which is taxed. The Legislature could levy the tax either way and the extent of double taxation by either method is not controlling as indicating its intention.

The present statute, section 77-201.01, R. R. S. 1943, provides that all intangible property in this state not

expressly exempt from taxation shall be subject to taxation and valued and assessed at actual value. Section 77-107, R. R. S. 1943, reads as follows: "The word 'credits' includes corporation shares of stock, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, other than real estate mortgages, securities, debentures, bonds, other than those of the United States, annuities, and all other demands for labor or other valuable thing, whether due or to become due." Both of these sections indicate that credits are to be taxed and there is no suggestion of deducting therefrom one's debts to another.

We conclude that the Legislature intended by transferring "book accounts" to Class A in section 77-701, R. R. S. 1943, to include therein those accounts, demands, claims, and credits which are not usually evidenced by written acknowledgment.

We further hold that in listing such "book accounts" for taxation under said section the taxpayer cannot deduct therefrom his accounts payable or debts owed by him to others.

The second question involved in these cases is whether the taxpayers may deduct from their "book accounts," as provided in said section 77-701, R. R. S. 1943, their accounts receivable from school districts organized as public bodies under the laws of the state under the theory that they are exempt from taxation. Article VIII, section 2, of the Constitution reads, so far as concerns us here, as follows: "The property of the state and its governmental subdivisions shall be exempt from taxation. * * * No property shall be exempt from taxation except as provided in the Constitution."

Although obligations or debts of the state or its governmental subdivisions are not, properly speaking, property of either, it has been held that certain of their obligations are instrumentalities of the state or its subdivisions and in the hands of their creditors are not subject to taxation. This ruling has been approved by this

court and those of sister states. Allied Contractors, Inc. v. Board of Equalization, 113 Neb. 627, 204 N. W. 374; Droll v. Furnas County, 108 Neb. 85, 187 N. W. 876, 26 A. L. R. 543; Penick v. Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. N. S. 1159, 12 Ann. Cas. 346. All of these cases involve either the bonds or warrants of the state or its subdivisions. The bonds of the state and its subdivisions are now excepted from the requirement to be listed and taxed by express provisions of section 77-701, R. R. S. 1943.

The matter is discussed in Droll v. Furnas County, *supra,* as follows: "The funds of a city must be used either for some governmental purpose, or for some other purpose authorized by the legislature, and such obligations, issued in order to effectuate such a purpose, are instrumentalities of the government. After presentation and registration they draw interest at a fixed rate. The money to pay the interest must be collected by taxation. It is self-evident that an investor is concerned mainly with the net returns upon his investment, and if the state or its municipalities issues a security drawing a certain rate of interest, and at the same time taxes the owner of the security a given rate, his net return is the difference between the amount of taxes paid thereon and the amount of interest received. * * * If such securities are held to be taxable, the inevitable result will be that the rate of interest must be increased. If the rate of interest is increased, additional taxes would be required to pay it. No practical benefit would be derived."

In most cases holding the bonds or warrants exempt from taxation the ruling is based on the same line of reasoning, in brief, that it would require higher interest and in turn more taxes.

Plaintiff companies now seek to have this rule extended to include accounts receivable held by creditors of the state and its subdivisions not drawing interest and not always liquidated claims. They cite certain definitions in dictionaries stating that an account receivable

is an obligation no less than a warrant. From there they argue for a favorable decision broadening and extending the ruling to include such accounts.

This question has not been passed on by this court. The plaintiffs have not cited any case holding such accounts exempt form taxation. The defendants however have cited authority to the contrary. See Smith v. Davis, 323 U. S. 111, 65 S. Ct. 157, 89 L. Ed. 107, in which the Supreme Court of the United States held that open accounts held by taxpayers against the federal government were subject to taxation by the states. That court in the case cited said: "In the first place, an open account claim against the United States does not represent a credit instrumentality of the federal government within the meaning of this constitutional immunity. The record here reveals only that petitioners claim that the United States owes them $29,831.10, which amount is carried by them as an account receivable and 'is in the nature of an open account.' * * * Conceivably the amount claimed to be due is incorrect or is subject to certain defenses or counterclaims by the United States, necessitating further settlement or adjustment. Such a unilateral, unliquidated creditor's claim, which by itself does not bind the United States and which in no way increases or affects the public debt, cannot be said to be a credit instrumentality of the United States for purposes of tax immunity.

"In these respects a mere open account claim differs vitally from the type of credit instrumentalities which this Court in the past has recognized as constitutionally exempt from state and local taxation. Such instrumentalities in each instance have been characterized by (1) written documents, (2) the bearing of interest, (3) a binding promise by the United States to pay specified sums at specified dates and (4) specific Congressional authorization, which also pledged the faith and credit of the United States in support of the promise to pay." See, also, Davis v. Smith, 197 Ga. 95, 28 S. E. 2d 148.

In 84 C. J. S., Taxation, § 206, p. 393, it is said: "The implied immunity of one government and its agencies from taxation by the other should be narrowly restricted, and it has been stated that the decisions extending the scope of immunity have met with increasing disfavor. So, the doctrine of immunity has been said not to be undergoing a process of expansion; rather, the more recent cases indicate a tendency to restrict more sharply than ever the various exemptions which arise out of the doctrine."

In Todd v. County of Box Butte, 169 Neb. 311, 99 N. W. 2d 245, this court said: "'* * * statutes exempting property from taxation should be strictly construed, and one contending that his property is exempt from such tax must show clearly that he is within the exceptions provided by statute.'"

We hold that open accounts not bearing interest and not liquidated in the hands of a creditor of a governmental subdivision are not exempt from taxation.

It follows that the rulings of the district court were proper and its rulings in these two cases are affirmed at appellants' costs.

AFFIRMED.

WILLIAM O. COPPLE ET AL., APPELLEES AND CROSS-APPELLEES, V. ELINOR BOWLIN ET AL., APPELLEES AND CROSS-APPELLANTS, DAVID CECIL BOWLIN ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH RONNIE BOWLIN, A MINOR, APPELLANT AND CROSS-APPELLEE.

110 N. W. 2d 117

Filed June 30, 1961. No. 35025.

1. **Divorce.** A decree of divorce does not become operative until 6 months after its rendition. During such 6-months' period the bonds of matrimony between the parties are not dissolved.
2. **Marriage.** A marriage contract between a man and a woman, one of whom is married, is contrary to public policy, illegal, and void.

3. **Divorce: Time.** In determining if the 6-months' period has elapsed, the rule is to exclude the first day and include the whole of the last day in said period.
4. **Workmen's Compensation.** Under section 48-124, R. R. S. 1943, a child living in the home and dependent upon the deceased employee, who is not a child, adopted child, or stepchild of the deceased, does not qualify as a beneficiary of death benefits under the Workmen's Compensation Act.
5. ———. A son of a deceased employee by a former marriage who resides with his mother under an order of court granting his custody to her is not constructively living with his father, even though the father contributes to his support.
6. ———. Where a deceased father, pursuant to court order, contributed $30 per month to the support of a child residing with a former wife, and the evidence shows that such amount only partially supported the child, such child is a partial dependent under section 48-124, R. R. S. 1943.
7. ———. Where a question of dependency is involved under section 48-124, R. R. S. 1943, and there is no question of heirship or right of inheritance, paternity may be established as provided by section 13-109, R. R. S. 1943.
8. ———. Where a child is wholly dependent upon a deceased father, he takes the death benefits accruing under the Workmen's Compensation Act to the exclusion of partial dependents by the express provisions of section 48-124, R. R. S. 1943.
9. ———. Where a determination of paternity is a necessary incident to the determination of dependency under section 48-124, R. R. S. 1943, the workmen's compensation court has power and authority to make such determination.
10. **Costs.** The circumstances of each case are to be considered in determining to whom the fees of guardians ad litem are to be taxed, or from what source they are to be paid. Considerations of justice and equity are the controlling factors.

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

C. Russell Mattson, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees Copple et al.

Joseph Ginsburg, for appellees David Cecil Bowlin and Sharon Lee Campbell.

Justin C. Tallman, for appellee Elinor Bowlin.

Kenneth Cobb, for appellee Caralyn Kay Campbell.

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

CARTER, J.

This is a workmen's compensation case brought by the employer and his insurance carrier to determine the dependents entitled to the benefits resulting from an employee's death arising out of and in the course of his employment. The trial court held that the minor defendant David Cecil Bowlin was entitled to recover all the benefits provided by the Nebraska Workmen's Compensation Act resulting from the death of his father Cecil Bowlin. An appeal to this court was taken by the minor defendant Ronnie Bowlin.

Cecil Bowlin was employed by William O. Copple to manage a service station in Lincoln. He received weekly earnings of $85 per week. The Hartford Accident and Indemnity Company is the workmen's compensation insurance carrier for Copple. On April 24, 1959, Cecil Bowlin was accidentally killed in an accident arising out of and in the course of his employment. The employer and the insurance company admit liability for compensation benefits for 325 weeks at $34 per week and a burial benefit of $350. All hospital and medical benefits were paid by the insurance carrier before the commencement of this action. The plaintiffs admit complete liability but desire a judgment determining to whom such benefits are to be paid.

The issue to be determined grows out of the following facts: The deceased married the defendant Esther Bowlin on June 15, 1945. To this marriage one child, Ronnie, was born. Ronnie was 11 years of age at the time of trial and has lived with his mother since her divorce from Cecil Bowlin on February 21, 1950. This decree of divorce provided that Cecil Bowlin should pay $30 per month for the support of Ronnie. The amount that should have been paid at the time of the

death of Cecil Bowlin was $3,330. The sum of $1,889 had actually been paid thereon. On December 18, 1952, Cecil Bowlin entered into a ceremonial marriage with Elinor Campbell at Nebraska City, Nebraska. To this purported marriage one son, David Cecil Bowlin, was born. David Cecil Bowlin was 6 years of age at the time of trial. He has lived in the home of Cecil and Elinor Bowlin since their ceremonial marriage and was living there at the time of Cecil Bowlin's death on April 24, 1959.

The defendant Elinor Bowlin was married to Arthur L. Campbell prior to her marriage to Cecil Bowlin. The minor defendants Caralyn Kay Campbell and Sharon Lee Campbell were born to this marriage. At the time of trial they were 17 and 12 years of age. On June 18, 1952, Elinor and Arthur L. Campbell were divorced by decree of the district court. Elinor thereafter, as we have hereinbefore stated, entered into a ceremonial marriage with Cecil Bowlin on December 18, 1952. Thereafter Sharon Lee Campbell lived with and was wholly supported by Cecil Bowlin until his death. Caralyn Kay lived with her maternal grandparents and was wholly cared for by them.

Death benefits under the Workmen's Compensation Act are fixed by section 48-122, R. S. Supp., 1957. Dependents entitled to such benefits are fixed by section 48-124, R. R. S. 1943. The latter section provides in part as follows: "The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (1) A wife upon a husband with whom she is living at the time of his death; * * * and (3) a child or children under the age of eighteen years, * * * upon the parent with whom he is * * * living at the time of death of such parent, there being no surviving parent entitled to compensation; * * *. The terms child and children shall include stepchildren and adopted children if members of the deceased's household at the time of his death, * * *. In all other

cases, questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency."

Elinor Bowlin claims that she is entitled to the death benefits as the widow of the deceased. The issue as to Elinor Bowlin is whether or not she was the wife of the deceased at the time of his death. The record shows that Elinor Bowlin was granted a decree of divorce from Arthur L. Campbell on June 18, 1952. This decree was not effective until December 19, 1952. § 42-340, R. R. S. 1943. It is clear that Elinor Bowlin was not free to enter into a marriage until 6 months after the date of her divorce from Arthur L. Campbell. Where a certain period must elapse before a divorce becomes final, in determining whether or not such period has elapsed, the rule is to exclude the first day and include the whole of the last day in said period. Garrett v. State, 118 Neb. 373, 224 N. W. 860. The evidence shows that the ceremonial marriage between Elinor Bowlin and the deceased was entered into in the utmost good faith. This is not, however, a matter that can be advanced to sustain the marriage. The statute is one of legislative policy involving a subject over which it has complete control. The wisdom of the legislation is for the Legislature, with which this court has no right to interfere. We necessarily conclude that Elinor Bowlin was the wife of Arthur L. Campbell at the time of her purported marriage to the deceased. As a result, her marriage to the deceased was wholly void and she was not the wife of Cecil Bowlin at the time of his death. Scott v. Scott, 153 Neb. 906, 46 N. W. 2d 627, 23 A. L. R. 2d 1431. She

is not therefore a beneficiary of the deceased under the Workmen's Compensation Act. We necessarily hold, also, that Caralyn Kay Campbell and Sharon Lee Campbell were not stepchildren of Cecil Bowlin at the time of his decease.

The evidence shows that Caralyn Kay Campbell after the marriage of her mother, Elinor Bowlin, to Cecil Bowlin lived with and was wholly maintained by her maternal grandparents. She was not a dependent within the meaning of the Workmen's Compensation Act. The evidence shows that Sharon Lee Campbell lived in the household of the deceased from the time of his marriage to Elinor Bowlin, her mother, until his death. She was totally dependent upon the deceased for her support during this 7-year period. The holding that the marriage of her mother to the deceased was void eliminates her status as a stepchild of the deceased. Not being a natural child, adopted child, or stepchild of the deceased, she has no standing as a dependent as defined by section 48-124, R. R. S. 1943.

It is the contention of the defendant Ronnie Bowlin that he is a beneficiary as a son of the deceased, who has been wholly dependent upon his deceased father for support. It is first contended that he was constructively "living" with his father at the time of the latter's death. We think not. Ronnie was residing with his mother, Esther Bowlin, at the time of his father's death. The decree of divorce in the suit between Esther Bowlin and Cecil Bowlin placed the custody of Ronnie with Esther Bowlin and required Cecil Bowlin to pay $30 per month for Ronnie's support. This is not within the provision of section 48-124, R. R. S. 1943, that a child under 18 years of age is conclusively a dependent upon the parent with whom he is living at the time of the death of the parent. The granting of Ronnie's custody to his mother and the requirement that support money be paid monthly by the father is in itself strong evidence that he was not living with

his father at the time of the latter's death. The case of Harrison v. Cargill Commission Co., 126 Neb. 185, 252 N. W. 899, is cited in support of Ronnie's contention that he was living with his father at the time of his death. In that case a wife in an insane asylum was held to be living with her husband at the time of his death. The opinion recites that the marriage relation was in no way impaired, that the wife returned home when temporarily paroled, and that temporary absences under such circumstances were not destructive of her status as a wife living with her husband within the meaning of the Workmen's Compensation Act. The case does not support a similar holding where a child is placed in the custody of his mother and a decree of child support entered. The evidence is clear that Ronnie was actually living with his mother at all times after her divorce from the deceased. It would require a strained meaning of plain language to hold that such a situation constituted a constructive living with the father at the time of his death. See Bulman v. Lyman-Richey Sand & Gravel Corp., 144 Neb. 342, 13 N. W. 2d 403.

As to Ronnie Bowlin, it is next contended that he was wholly dependent upon his deceased father for support and that he should be considered as "wholly dependent" as that term is used in section 48-124, R. R. S. 1943. The record shows that Cecil Bowlin, the deceased, was required to pay $30 per month for the support of Ronnie from the entry of the divorce decree. If he had made all of the support payments he would have paid $3,330. He in fact paid in $1,889. The record does show that for the year immediately prior to his death deceased had paid $30 per month for Ronnie's support. It is clear from the testimony of Esther Bowlin that this amount was far short of the amount necessary to house, feed, and clothe Ronnie. In fact, her testimony indicates that it required approximately $60 per month to support him. She recognized this by claiming Ronnie as an exemption for income tax purposes in each income-tax

year, except one, since she had his custody. The proof is sufficient to establish partial dependency but insufficient to sustain a finding that Ronnie was wholly dependent upon his father for his support. See Meyer v. Nielsen Chevrolet Co., 137 Neb. 6, 287 N. W. 849. A child not conclusively a dependent under the provisions of the act can become such only on proof of dependency.

It is contended that David Cecil Bowlin was wholly dependent upon his father for support and that he is entitled to the death benefits provided by the Workmen's Compensation Act. The evidence shows that David was born after the ceremonial marriage entered into by his mother and Cecil Bowlin. There is nothing to indicate that this marriage was not entered into in good faith. They lived together as husband and wife, and after his birth David lived continuously in the home. He was wholly supported by Cecil Bowlin. He was at all times known by the name of his father. He was treated as a son by the deceased father. It is here contended, in view of the invalidity of the marriage between Cecil and Elinor Bowlin, that the evidence is insufficient to establish the paternity of David. Section 13-109, R. R. S. 1943, provides: "A person may state in writing that he is the father of a child or perform acts, such as furnishing of support, which reasonably indicate that he considers himself to be the father of such child, and in such case he shall be considered to have acknowledged the paternity of such child. A child whose parents marry is legitimate." The foregoing statute and not section 30-109, R. R. S. 1943, is the controlling statute. There is no question of heirship or right of inheritance involved here. It is solely a question of dependency, not for the benefit of an estate but for those who are legally and morally entitled to support. The purpose and object of the Workmen's Compensation Act is to continue the support of dependents after casualty. The Workmen's Compensation Act makes no distinction between legitimate and illegitimate chil-

dren if the conditions of the statute are met. It is clear from the evidence that Cecil Bowlin was established as the father of David in accordance with section 13-109, R. R. S. 1943. David was a member of the family of the deceased, living with him at the time of his death, and was being wholly supported by him. David, under the evidence, was wholly dependent upon the deceased and is entitled to the death benefits provided by the Workmen's Compensation Act as the sole beneficiary named in the act who was wholly dependent upon the deceased for his support.

It is contended that the workmen's compensation court is without jurisdiction to determine the paternity of children and, consequently, it cannot be determined in a workmen's compensation case. The Workmen's Compensation Act requires the workmen's compensation court to determine questions of dependency and relationship and to make orders for the benefit of wives, husbands, children, adopted children, stepchildren, and posthumous children. Where a determination of paternity is a necessary incident to such determinations, the workmen's compensation court has the power and authority to make such a determination. If this were not so, the powers specifically granted to the workmen's compensation court as a court of original jurisdiction in matters arising under the Workmen's Compensation Act would be unduly circumscribed and in many cases would prevent the determination of issues specifically within its original jurisdiction. Bourelle v. Soo-Crete, Inc., 165 Neb. 731, 87 N. W. 2d 371; Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135, 65 A. L. R. 2d 1372; Middleton v. Luckenbach S. S. Co., Inc., 70 F. 2d 326; Roberts v. Whaley, 192 Mich. 133, 158 N. W. 209, L. R. A. 1918A 189.

It is the contention of the defendant, Elinor Bowlin, that the fees of the guardians ad litem are of the plaintiffs' own making and should be charged to the employer and his insurance carrier under the provisions of section

48-172, R. R. S. 1943. Three guardians ad litem were appointed to represent the four minor defendants in the action. One guardian ad litem was successful in the litigation, the other two were not. A guardian ad litem is entitled to a reasonable fee for his services to be taxed as costs. The litigant to whom the fee for services of a guardian ad litem shall be taxed as costs depends upon the circumstances of each particular case and the discretion of the court. Wood Realty Co. v. Wood, 132 Neb. 817, 273 N. W. 493.

In the instant case the plaintiffs admitted liability for all death benefits provided by the Workmen's Compensation Act. They brought the present action to determine to whom such benefits should be paid. It seems clear to us that a party, who is willing to pay the full amount due on a statutory liability and seeks only to have the beneficiary determined, should not be charged with the fees of guardians ad litem, even though they were necessary to the determination of the issue presented. As to the minor defendant, David Cecil Bowlin, there is no problem. The fee of his guardian ad litem, he being the successful party, is properly payable from the fund recovered. The guardians ad litem representing unsuccessful minor defendants are entitled to be paid. The question arises as to the source from which they shall be paid.

The circumstances of each case are to be considered in determining to whom the fees of guardians ad litem are to be taxed, or from what source they are to be paid. Not only the plaintiffs but all the minor defendants as well prayed for a determination of the party entitled to the compensation benefits. The issue could not be determined without all the minor defendants being in court. Once in court, the appointment of guardians ad litem to protect their respective interests was required. It follows that the appointment of guardians ad litem was necessary and for the benefit of all claimants of the compensation benefits, for without the guardians ad

litem none of the parties could have litigated his or her claim. Since the record shows that minor defendants are dependent upon others for support and are possessed of no property out of which the fees of the guardians ad litem can be paid, we think justice and equity require that they be paid from the fund awarded under the Workmen's Compensation Act. We think this conclusion is supported by the rules announced in In re Clapham's Estate, 73 Neb. 492, 103 N. W. 61, and Cass v. Pense, 155 Neb. 792, 54 N. W. 2d 68. The costs of this appeal should likewise be paid from the same source. German National Bank v. Beatrice Rapid Transit & Power Co., 69 Neb. 115, 95 N. W. 49; Smullin v. Wharton, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441.

We necessarily conclude that the position of the defendant David Cecil Bowlin is correct and that the contentions of the other parties are without merit. The trial court arrived at the same conclusion and its judgment is affirmed.

AFFIRMED.

OTTO SCHLIENTZ, APPELLEE, V. CITY OF NORTH PLATTE, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
110 N. W. 2d 58

Filed July 7, 1961. No. 34930.

1. **Injunction: Parties.** Defendants who have a common interest and a common defense are properly joined in one suit for injunction.
2. ———: ———. Where the act sought to be enjoined is threatened or being performed by more than one person, all may be joined as defendants.
3. **Equity: Pleading.** The mere fact that more than one equitable remedy is sought does not establish that more than one cause of action is included in a plaintiff's petition.
4. ———: ———. The particular nature of the wrong done by defendant may require the application of different remedies for the enforcement of plaintiff's right, in which event the rules governing joinder of causes of action do not preclude plaintiff

from presenting in the same pleading distinct and different grounds for recovery upon a single primary right.

5. **Municipal Corporations.** A city is a political subdivision of the state, created as a convenient agency for the exercise of such governmental powers of the state as may be entrusted to it by constitutional provision or legislative act.
6. **Constitutional Law: Zoning.** Before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the city council, or it must be without substantial relation to public health, safety, morals, or general welfare.
7. **Zoning.** A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance.
8. **Municipal Corporations.** In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
9. ———. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.
10. ———. In the exercise of police power delegated by the state Legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised.
11. **Municipal Corporations: Zoning.** What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying within the discretion and determination of the municipal body to which the power and function of zoning is committed, and unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere.
12. **Municipal Corporations.** The Legislature may expressly or by implication grant to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits.

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

Baskins & Baskins and *M. E. Crosby,* for appellants.

Maupin, Dent, Kay & Satterfield, Thomas O. David, and *James J. Duggan,* for appellee.

Wright & Simmons and *James R. Hancock,* amici curiae.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought in the district court for Lincoln County by Otto Schlientz, plaintiff, against the City of North Platte, a municipal corporation, its mayor, members of the city council, two former members of the city council, the city clerk, and the city building inspector, defendants. The purpose of the action was to enjoin the defendants, and each of them, from enforcing or attempting to enforce ordinance No. 922 of the city of North Platte. The plaintiff bases his cause of action on the contention that section 16-901, R. S. Supp., 1959, is unconstitutional, and that ordinance No. 922, enacted in pursuance thereof, is unconstitutional and invalid. The defendants moved for a summary judgment on the grounds that the pleadings, deposition, and affidavits on file showed that there was no genuine issue as to any material fact to be determined, and for other reasons which will be referred to later in the opinion. The plaintiff also moved for a summary judgment on the same grounds, and that judgment be rendered in accordance with the prayer of the plaintiff's petition. After hearing had to the trial court, the trial court found that there was no genuine issue as to any material fact to be determined; that the motion of the plaintiff for a summary judgment should be sustained for the reason that section 16-901, R. S. Supp., 1959, was unconstitutional, and ordinance No. 922 enacted by the mayor and city council in pursuance of said statute was invalid as an improper exercise of the legislative power of the city council; and that plaintiff was entitled

to an injunction as prayed. Judgment was rendered in accordance with the findings. The defendants filed a motion for new trial, which was overruled, and defendants perfected appeal to this court.

Certain parties as plaintiffs sought to file a petition wherein it was alleged that they resided in the same area as the plaintiff, were affected by section 16-901, R. S. Supp., 1959, and ordinance No. 922 of the city of North Platte in the same manner as the plaintiff, and requested the same relief as did the plaintiff. The trial court gave such plaintiffs 10 days after the final adjudication of this case upon the amended petition of the plaintiff filed in said court for such plaintiffs to file their amended petition or petitions.

The City of North Platte, hereinafter called the city, is a municipal corporation of the first class, organized and existing as such under the statutes of Nebraska. The amended petition named the mayor, the councilmen of the city, the building inspector, the city clerk, and two members of the council whose terms had expired, as defendants.

The plaintiff is a resident of Lincoln County, a legal voter therein, and the owner of real estate situated in the area 1 mile beyond and adjacent to the corporate limits of the city.

The amended petition shows that ordinance No. 922, enacted by the mayor and city council of the city on February 17, 1959, classified the plaintiff's property district No. 1, residential A zone.

The plaintiff's amended petition alleged that section 16-901, R. S. Supp., 1959, was unconstitutional, and that ordinance No. 922, enacted by the city council pursuant to section 16-901, R. S. Supp., 1959, was also unconstitutional and void. The amended petition set forth several provisions of the Constitutions of the United States and of the State of Nebraska which the plaintiff claimed were violated by the enactment of ordinance No. 922. These provisions need not be set forth. The amended

petition alleges that section 16-901, R. S. Supp., 1959, and ordinance No. 922 are unconstitutional in that said section and ordinance violated section 1, of the Fourteenth Amendment to the Constitution of the United States, and Article 1, section 1, of the Constitution of the State of Nebraska, denying the plaintiff and other residents residing within the 1-mile zone adjacent to the city equal protection and due process of law. The amended petition further alleged that if the statute involved was held to be constitutional, the ordinance enacted pursuant thereto is so vague, indefinite, unreasonable, and arbitrary that said ordinance should be declared invalid.

The defendants' answer to the amended petition reserved a demurrer which was previously filed and overruled. The defendants' answer then alleged that there was a misjoinder of causes of action, a defect of parties defendant, and a misjoinder of parties defendant; that by the express provisions of section 16-901, R. S. Supp., 1959, ordinance No. 922 could not be applied to the real estate owned by the plaintiff so as to interfere with his farming and livestock operations; and that plaintiff had no such interest as entitled him to bring and maintain this action.

The defendants assign as error that the trial court erred in not finding that there was a misjoinder of causes of action, and several causes of action were improperly joined; in not finding that there was a misjoinder of parties defendant, a defect of parties defendant; in not finding that the plaintiff was not affected by section 16-901, R. S. Supp., 1959, and ordinance No. 922 of the city, and had no standing to challenge the validity of such section or ordinance; in finding that section 16-901, R. S. Supp., 1959, was unconstitutional and void for the reason that said section was in violation of certain Articles and sections of the Constitutions of the State of Nebraska and the United States; in finding ordinance No. 922 unconstitutional and void as being

in violation of certain Articles and sections of the Constitution of the State of Nebraska and the Constitution of the United States; in finding ordinance No. 922 of the city invalid as an improper exercise of the legislative power of the city; in sustaining the plaintiff's motion for a summary judgment; and in permanently enjoining the defendants from enforcing or attempting to enforce ordinance No. 922 of the city.

Section 16-901, R. S. Supp., 1959, provides as follows: "Any city of the first class is hereby granted power and authority to extend and apply by ordinance its zoning regulations, property use regulations, building ordinances, electrical ordinances, and plumbing ordinances, to the area one mile beyond and adjacent to its corporate boundaries with the same force and effect, as if such outlying area were within the corporate limits of such city; Provided, no such ordinance shall be extended or applied so as to prohibit, prevent, or interfere with the conduct of normal farming, livestock operations, existing businesses, or industry."

Section 16-902, R. S. Supp., 1959, relates to suburban development; subdivision, platting, and consent of city council required. Section 16-903, R. S. Supp., 1959, relates to platting, recording, and control by city council. Section 16-904, R. S. Supp., 1959, relates to conformity with ordinance, and dedication of avenues, streets, and alleys.

Ordinance No. 922 provides in part: "SECTION 1. All Ordinances, Rules or Regulations of the Mayor and Council of the City of North Platte, Lincoln County, Nebraska, presently in force or hereafter adopted pertaining to zoning, rezoning, use, area and height of structures, minimum structural requirements, building permits, variances, appeals to the Board of Adjustment, electrical plumbing and television antennas are hereby extended to the area one (1) mile beyond and adjacent to the corporate limits of the City of North Platte,

Lincoln County, Nebraska, as the same now exists or are hereafter altered or changed."

Section 6 of ordinance No. 922 provides: "Any person, firm or corporation who violates any of the Ordinances, Rules, or Regulations hereinbefore referred to shall upon conviction be fined or penalized as provided in the respective Ordinance, Rule or Regulation."

The plaintiff and his wife own certain land within 1 mile of and adjacent to the city limits of the city which, with accretions, contains 39.9 acres. This property was purchased in 1951 for $8,000. Located on this property are a 3-bedroom modern house, a 3-room house with bath, and 2 Quonset buildings, one 40 x 100 feet and the other 40 x 120 feet. The first 60 feet of the latter Quonset building is finished in knotty pine, sealed, and insulated, and had been used as an implement store by the plaintiff. There are also a granary, some fencing, and a ramp which plaintiff used to unload machinery. The cost of the improvements, less labor, amounted to $45,000. At the time of trial the plaintiff raised thoroughbred livestock and fed cattle, and had engaged in this type of business since 1951. The Quonset buildings are now used in the operation of this type of business. The plaintiff and his wife lived in a residence on this property. When the plaintiff acquired this property, he moved his implement business from the city to this property. The two Quonset buildings were constructed for the purpose of engaging in the implement business. In 1955, the plaintiff ceased to carry on the implement business. In 1960, he finished liquidating an $8,000 to $10,000 stock of implement parts. The Quonset buildings are now used for his livestock operations.

The plaintiff testified that prior to the time ordinance No. 922 was enacted he had two offers for the property, one for use as a sale barn and the other for a filling station, both of which he rejected; and that since the passage of such ordinance he had talked to real estate people who told him that acreage property was not

salable on account of ordinance No. 922. The plaintiff further testified that he had not made application for a building permit, nor had he done any building since the passage of ordinance No. 922. No officer of the city notified him that the ordinance was going to be enforced against him. His use of the property was the same after the enactment of ordinance No. 922 as it was before, and no representative of the city had attempted to interfere with such operations. The plaintiff further testified that the passage of ordinance No. 922 has caused "unpredictable damage" to his property.

There appears in evidence an affidavit of the city clerk to the effect that he had examined the minutes of the proceedings of the meeting of the mayor and city council; and that his examination disclosed that since the date of the enactment of the ordinance no action had been taken by the mayor or council to apply ordinance No. 922 in such a manner as would interfere with the use of the plaintiff's property as it had been used prior to the time the ordinance was enacted.

There is a plat in evidence showing the plaintiff's real estate and other real estate in the vicinity. Immediately north of plaintiff's property is the residence of a Mrs. Wilson. To the north of the Wilson residence is a building occupied by the Dawson County Public Power District. Across the highway east of plaintiff's real estate is property owned by Pittmans and Eberlys. A part of the Pittman property is rented to a man named Swedberg who feeds a few cattle and pastures some horses and milk cows. The Eberlys live on the corner north of Pittmans. North from the intersection of Highway No. 83 and the east and west county road is residential property. Some of the people in that vicinity have livestock. On the road on the west side of plaintiff's property there are two or three residences, and on the north side of the county road west from the intersection of Highway No. 83 is residential property.

The defendants contend that there is a misjoinder of

causes of action and parties defendant. We have examined the defendants' contention in this respect and the authorities cited in support thereof.

In the case at bar on this proposition the following are applicable.

In 43 C. J. S., Injunctions, § 176, p. 833, it is stated: "Defendants who have a common interest and a common defense are properly joined in one suit for injunction. Where the act sought to be enjoined is threatened or being performed by more than one person, all may be joined as defendants, * * *."

This court said in State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215: "The mere fact that more than one equitable remedy is sought does not establish that more than one cause of action is included in a plaintiff's petition. The particular nature of the wrong done by defendant may require the application of different remedies for the enforcement of plaintiff's right, in which event the rules governing joinder of causes of action do not preclude plaintiff from presenting in the same pleading distinct and different grounds for recovery upon a single primary right." See, also, Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333.

Cases are legion wherein the plaintiff may be entitled to several remedies for the prevention of a single wrong, in which event the rules governing joinder of causes of action do not preclude him from presenting in the same pleading distinct and sufficient grounds for recovery, upon a single primary right, especially if he is uncertain which ground can be established.

In the case at bar, the plaintiff is seeking to enjoin the city and its officials from enforcing an ordinance asserted to be unconstitutional. There is but a single cause of action in which he seeks injunctive relief against the defendants who threaten his constitutional rights. All of the defendants are properly joined in this action.

We conclude that the trial court did not err, as contended for by the defendants.

There are certain established principles of law applicable to the instant case as follows.

In Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420, we said: "A city is a political subdivision of the state, created as a convenient agency for the exercise of such governmental powers of the state as may be entrusted to it by constitutional provision or legislative act."

In Pettis v. Alpha Alpha Chapter of Phi Beta Pi, 115 Neb. 525, 213 N. W. 835, this court said: "The weight of judicial authority clearly appears to support the proposition that, before a zoning ordinance can be declared unconstitutional, such ordinance must be either an arbitrary or an unreasonable pronouncement of the council, or it must be without substantial relation to public health, safety, morals, or general welfare."

In City of Omaha v. Glissman, 151 Neb. 895, 39 N. W. 2d 828, this court said: "A zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is, a zoning ordinance cannot deprive the owner of a use to which his property was put before the enactment of the ordinance. * * * To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory. * * * In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation. * * * In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised. * * * What is the public good as it relates to zoning ordinances affecting the use of property is, primarily, a matter lying

within the discretion and determination of the municipal body to which the power and function of zoning is committed, and, unless an abuse of this discretion has been clearly shown, it is not the province of the courts to interfere."

Section 16-901, R. S. Supp., 1959, provides in part: "* * * Provided, no such ordinance shall be extended or applied so as to prohibit, prevent, or interfere with the conduct of normal farming, livestock operations, existing businesses, or industry." The plaintiff falls clearly within the provisions of this section of the statutes. No ordinance enacted under the authority of section 16-901, R. S. Supp., 1959, can prohibit, prevent, or interfere with the plaintiff's livestock raising and feeding of cattle. That is the business to which he has put his property to use. He disposed of his implement business in 1955, long prior to the enactment of ordinance No. 922. It will be noted that plaintiff's real estate is expressly excluded from the operation of both section 16-901, R. S. Supp., 1959, and ordinance No. 922.

The plaintiff contends that section 16-901, R. S. Supp., 1959, fails to provide, by its terms, any method or manner of notice to occupants and landowners within the 1-mile zone of action proposed to be taken under the statute, and violates the due process constitutional provisions; and that its failure to provide a tribunal, in which the plaintiff had a selective voice, for a hearing as to the classification, for zoning purposes, of plaintiff's property was likewise violative of plaintiff's constitutional rights of due process of law.

The plaintiff relies on the cases of Schutte v. Schmitt, 162 Neb. 162, 75 N. W. 2d 656; Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508; Blauvelt v. Beck, 162 Neb. 576, 76 N. W. 2d 738; Summerville v. North Platte Valley Weather Control Dist., 170 Neb. 46, 101 N. W. 2d 748, and other cases relating to notice and a tribunal before which a person or persons affected may be heard. The cited cases, under the factual situations and the legislation

referred to therein, are clearly distinguishable from the case at bar.

By section 16-901, R. S. Supp., 1959, the ordinances and regulations, the operation and effect of which cities of the first class may extend to the area 1 mile beyond their corporate limits, are "zoning regulations, property use regulations, building ordinances, electrical ordinances, and plumbing ordinances," all of which are included in the term "effective zoning."

This court said in Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N. W. 2d 634: " 'Effective "zoning" necessarily comprehends prohibitions against certain uses in named districts and restrictions as to area of lots to build upon, size and height of structures, and similar matters.' "

Section 16-901, R. S. Supp., 1959, being an enactment under the police power of the state, was the exercise of legislative power by the Legislature. The enactment of ordinance No. 922 by the city under the authorization of section 16-901, R. S. Supp., 1959, was also the exercise of a legislative function by the city council which has legislative powers.

Section 16-901, R. S. Supp., 1959, does not require the determination of any facts prior to the exercise of the power granted, nor notice, nor opportunity to be heard. None of these are required to follow the procedure in exercising the power granted by this statute.

Neither section 16-901, R. S. Supp., 1959, the action of the city council in exercising the power, nor ordinance No. 922 itself by reason of failure to provide for and have a hearing, or provide for and give notice and opportunity to be heard, are violative of any of the provisions of the Constitutions of the United States or the State of Nebraska.

The plaintiff and defendants make reference to section 19-904, R. S. Supp., 1959, and other sections of Chapter 19, article 9, pertaining to city planning and zoning. These statutes give cities of the first class, cities of the

second class, and villages certain rights relating to city planning and zoning. Section 19-904, R. S. Supp., 1959, does require a public hearing at which parties in interest and citizens have an opportunity to be heard, and notice of the time and place of such hearing to be given by publication in a paper of general circulation in such municipality at least one time 10 days prior to such hearing.

Section 16-901, R. S. Supp., 1959, and section 19-904, R. S. Supp., 1959, are complete, separate statutes providing for different procedures upon different subjects, and authorization to different classes of municipalities. Each is separate, distinct, and complete in itself.

Sections 16-901 to 16-904, R. S. Supp., 1959, refer to cities of the first class only.

There is no merit to the plaintiff's contention that section 19-904, R. S. Supp., 1959, is applicable in the case at bar.

The plaintiff contends that under the authority of State ex rel. Harte v. Moorhead, 99 Neb. 527, 156 N. W. 1067; State ex rel. Wright v. Brown, 131 Neb. 239, 267 N. W. 466; and State ex rel. Woolsey v. Morgan, 138 Neb. 635, 294 N. W. 436, the persons living in the area adjacent to and 1 mile beyond the corporate limits of the city have no voice in the selection of elective officers and officials of the city, which amounts to a disfranchisement of such persons because they are subjected to the jurisdiction of elected officers and officials whom they had no voice in choosing, and therefore section 16-901, R. S. Supp., 1959, is unconstitutional, and ordinance No. 922 is invalid.

Municipal corporations are creatures of the Legislature and endowed only with the powers granted and bestowed upon them by the Legislature. There is no doubt but that the Legislature may provide for their officers and officials and the manner of their selection and appointment insofar as cities of the various classes are concerned. See, Redell v. Moores, 63 Neb. 219, 88

N. W. 243, 93 Am. S. R. 431, 55 L. R. A. 740; State ex rel. Harris v. Hanson, 80 Neb. 724, 115 N. W. 294.

Such persons as heretofore mentioned have neither a constitutional nor inherent right to local self-government. The Legislature may subject them to the jurisdiction of officers for whom they have no voice in the selection. This does not constitute a violation of any constitutional provision. Redell v. Moores, *supra*; State ex rel. Harris v. Hanson, *supra*. The officers and officials of the city are not constitutional officers, but are such as are created by the Legislature, and which the Legislature is empowered to so create.

The cases cited by the plaintiff are distinguishable from the case at bar, and we deem it unnecessary to set forth these distinctions. The plaintiff's contention is not sustained.

The plaintiff prayed, alternatively, for an injunction against the enforcement of ordinance No. 922 in the event this court should find section 16-901, R. S. Supp., 1959, to be constitutional. The plaintiff asserts that the enactment of ordinance No. 922 constitutes an improper exercise of the legislative powers of the mayor and city council because such ordinance is vague, indefinite, arbitrary, illegal, and discriminatory as shown by the language contained therein.

Ordinance No. 922, in section 6, provides: "Any person * * * who violates any of the Ordinances, Rules, or Regulations hereinbefore referred to shall upon conviction be fined or penalized as provided in the respective Ordinance, Rule or Regulation."

The plaintiff also refers to certain language used in section 1, of ordinance No. 922, as follows: "* * * presently in force or hereafter adopted," and asserts that such ordinance makes no specific designation or reference to any ordinance, rule, or regulation, or to the penal provision thereof. In this connection, the plaintiff relies on the case of State v. Pocras, 166 Neb. 642, 90 N. W. 2d 263. In this case a charge was brought in

the name of the State against the defendant doing business as the Lincoln News Agency, charging that the defendant did unlawfully cause to be offered for sale obscene, lewd, and indecent publications contrary to a city ordinance of the city of Lincoln. This court said: " 'Where the statute uses words of no determinative meaning, or the language is so general and indefinite as to embrace not only acts commonly recognized as reprehensible, but also others which it is unreasonable to presume were intended to be made criminal, it will be declared void for uncertainty.' * * * 'It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught.' " See, also, State v. Nelson, 168 Neb. 394, 95 N. W. 2d 678.

Section 1, of ordinance No. 922, reads in part as follows: "All Ordinances, * * * are hereby extended to the area one (1) mile beyond and adjacent to the corporate limits of the City of North Platte, * * *."

The plaintiff argues that he was entitled, constitutionally, to an exact and precise definition of the conduct on his part that would render him liable for punishment under ordinance No. 922.

The ordinances and regulations extended by ordinance No. 922 over the area in question are upon subjects covered in section 16-901, R. S. Supp., 1959, and those included within the definition of effective zoning, that being prohibitions against certain uses in named districts and restrictions as to area of lots to build upon, size and height of structures, and similar matters. See Dundee Realty Co. v. City of Omaha, *supra*.

The procedure prescribed by section 16-901, R. S. Supp., 1959, was followed by the city in enacting ordinance No. 922.

In State v. Waller, 143 Ohio St. 409, 55 N. E. 2d 654, it is said: " 'The effectiveness of legislation by reference has been so generally recognized in Ohio that no

very specific declaration appears in the reported cases.' "

In Sloss-Sheffield Steel & Iron Co. v. Smith, 175 Ala. 260, 57 So. 29, the court said: "Municipal ordinances are construed by the same rules as are statutes. * * * No reason appears why ordinances and by-laws may not avail of the principles, whereby reference statutes are construed and given effect, provided, of course, the municipality has the power to ordain as undertaken."

The procedure prescribed by section 16-901, R. S. Supp., 1959, is not the enactment of any new ordinance or ordinances. What it does is to provide for the extension of the effective area of ordinances upon the particular subjects. The persons living in the area affected become subject to those ordinances upon those particular subjects. When ordinance No. 922 is published, that is a notice to such persons affected, relating to the ordinances of the city. These ordinances are readily available to any citizen, and are in charge of the city clerk of the city.

We conclude that the plaintiff's contention should not be sustained.

The Legislature may, and often does, expressly or by implication, grant to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits. See, City Transp. Co., Inc. v. Pharr, 186 Tenn. 217, 209 S. W. 2d 15; Murray v. City of Roanoke, 192 Va. 321, 64 S. E. 2d 804.

In this state, cities of the metropolitan class were authorized to exercise what is termed zoning laws within 3 miles of their corporate limits. Laws 1925, c. 45, § 12, p. 186. Cities of the primary class were granted the same general authority in 1929. Laws 1929, c. 49, § 3, p. 205. Relating to metropolitan cities, see, also, Peterson v. Vasak, *supra*.

Referring to section 16-901, R. S. Supp., 1959, the powers granted therein are generally defined as pertaining to zoning. They are enactments under police power of the state, and at most a partial or quasi extension of

the corporate limits. Both of these are legislative powers. There is nothing unreasonable about the area included, as provided for by section 16-901, R. S. Supp., 1959, nor ordinance No. 922 enacted in pursuance of said statute. We conclude that no principle of fundamental law is violated by the enactment of such statute and ordinance.

By the enactment of section 16-901, R. S. Supp., 1959, it is apparent that the Legislature recognized that cities of the first class in this state are growing and expanding. The Legislature also recognized that the area within 1 mile of the corporate limits of such cities in the future would doubtless become a part of the cities and that such extension of the boundaries of the cities of the first class should, when required, be permitted. The zoning laws and ordinances incident thereto relating to the regulations of buildings, structures, and improvements are generally for the welfare and health of the citizens under the police power of the state. The foregoing is apparently the reason for the enactment of section 16-901, R. S. Supp., 1959. We find no violation of the Constitutions of the United States or of this state, as contended for by the plaintiff, nor do we find that ordinance No. 922 is vague, indefinite, uncertain, or discriminatory.

Many other questions are raised. Those pertinent to a determination of this appeal have heretofore been set forth.

We conclude that the judgment of the district court should be reversed and the cause remanded with directions to render judgment in favor of the defendants.

REVERSED AND REMANDED WITH DIRECTIONS.