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Civil Procedure - What Identifies a "Cause of Action"; Joinders

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CIVIL PROCEDURE—WHAT IDENTIFIES A "CAUSE OF ACTION"; JOINDERS

A considerable proportion of the problem of civil procedure turns upon the question: What matters are appropriate for decision in a single unit of litigation? The answer, whatever it may be, is strongly determinative of many other questions: The competency or propriety of a given forum, the simplicity or complexity of pleadings, the right to trial by jury, the number of necessary or proper parties, the relevancy and admissibility of evidence, the definition of ultimate issues, the form and sufficiency of verdicts and findings, and the conclusiveness of judgments.

As is so frequently the case in the formulation of procedural rules, the definition of an appropriate unit of litigation involves opposed objectives. Affirmatively, on the one hand, it is desirable to liberalize the rule in order that the judgment may dispose of as many related points of controversy as possible, and thereby avoid the inherent difficulties and inconsistencies of multiple suits. Negatively, on the other hand, the evils of excessive complexity of issues must be avoided, essentially because it is otherwise difficult to preserve the necessary distinction between those points of controversy which are related to one another and those which are not. The danger, when liberalization is carried too far, is that all issues will be colored wantonly, with a single brush. Such a process offends basic notions of fair play.[1]

Caygill v. Ipsen[2] is a recent illustration of the problem. In August, 1961, plaintiff-wife, a resident of Dodge County, Wisconsin, suffered back injuries in a Dane County auto accident in which defendant Ipsen, a Grant County resident, was involved as driver of the other car. The following January, plaintiff's back was reinjured in a Grant County collision, in which defendant Thompson, an Iowa County resident, operated the other car. On the premise that the successive injuries were medically inseparable, and therefore legally single and indivisible, plaintiff wife (joined as plaintiff by her husband, who sought damages derivatively for loss of her services and consortium) alleged a single "cause of action" against Ipsen and Thompson. The latter demurred on grounds of misjoinder and improper venue. The trial court's order overruling the demurrer was appealed and reversed. The complaint was held to state, in effect, four causes of action, one against each defendant in favor of each of the plaintiffs. So analyzed, the complaint offended all three of the limiting criteria of Wisconsin Statutes Section 263.04:[3]

[1] First Annual Report of the New York Judicial Council, 1935, at p. 43, as quoted in Tanbro Fabrics Corp. v. Beaunit Mills, Inc., 4 A.D. 2d 519, 167 N.Y.S. 2d 387, 392 (1957).
[2] Caygil v. Ipsen, 27 Wis. 2d 578, 135 N.W. 2d 284 (1965).
[3] Wis. Stat. §263.04 (1963).

> But the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately.

Ignoring the derivative claims of the husband, the decision discusses two issues: (1) Whether the successive accidents, assuming that they in fact produced a single and indivisible injury, give rise to independent causes of action; and (2) Upon affirmative answer, whether such causes could be joined in a single suit. The principal subissues were, respectively: (1) Whether unity of consequences is sufficient, despite nonunity of the delictual acts, circumstances, or occurrences, to create a single "cause of action;" and (2) Whether the "joint tort feasor" principle is broad enough to permit the conclusion that the multiple causes "affect all parties to the action."

Common Law

The *Caygill*[4] case would present no problem to the common-law lawyer, since in his system of pleading no such multiplicity of issues was permitted.

In the old English system, the king was regarded as the source and fountain of justice, and the courts of the common law were merely his aides in administering it.[5] Jurisdiction extended only to the forms of action for which writs had been or, under authority, might be devised.[6] The narrow range of remedial justice to which they were confined often compelled suitors, who found no adequate remedy in the actions and proceedings which could be brought to the law courts, to apply directly to the king for redress of their grievances.[7] The aim of the common law system was to produce a single, simple issue.[8]

Each form of action had its appropriate formula of words in commencement and conclusion and the "cause of action" was stated in brief, set phrases established by precedent.[9] When such a form was once devised, it was persistently and consistently followed. Each form of action had its peculiar and technical phraseology, and the pleader, having determined the class to which his right of action belonged, was required to conform his statement to the forms of expression peculiar to the form so adopted. This requirement was intended to give the defendant notice, from the very commencement of the action, of the nature of the complaint against him, to preclude the plaintiff from changing the ground of the complaint, and to enable the court to apply to the case its appropriate rules of pleading, evidence and practice.[10]

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[4] *Supra*, note 2.
[5] Phillips, Code Pleading §159-165, at 140-145 (1st ed. 1896).
[6] Pomeroy, Remedies and Remedial Rights, §15-23, at 15-20 (1st ed. 1876).
[7] *Ibid.*
[8] *Supra*, note 5.
[9] *Supra*, note 5.
[10] *Supra*, note 6.

According to common law principles, one claim against one defendant equalled one triable action and one cause of action, unless the two defendants had actually acted in *concert,* in the conspiratorial sense of the word.[11] Even in a case involving but one plaintiff and one defendant, if the plaintiff sought redress for property damage and slander arising out of one occurrence, the two claims could not be joined because they required different forms of action. Therefore, joinder of parties was generally prohibited because of lack of concert, and joinder of claims was difficult because different and distinct forms of action were required for redress. One claim and one cause of action was the extent of most suits at common law.

THE CODE

The phrase, "cause of action," did not become a term of art in the law of pleading until the adoption of the code.[12] With the abolition of the common law forms of actions, some substitute unit of judicial action was necessary, and this was found by the code makers in the phrase, "cause of action." Different writers and formulators of the early field codes differed as to the essential ingredients of a cause of action.

Judge Charles E. Clark referred to it as ". . . a group or aggregate of operative facts giving ground or occasion for judicial action. The extent of a single cause should be determined pragmatically by trial convenience, having regard to the way in which lay witnesses would present testimony of past happenings in court.[13]

Pomeroy professed the "primary right and corresponding duty" theory. In his analysis, every judicial action, of necessity, involved the following elements: a primary right possessed by the person who is bringing the action; a corresponding primary duty devolving upon the person who allegedly committed the wrong; a delict or wrong done by defendant, constituting a breach of such primary right and duty; a remedial right in favor of plaintiff and a remedial duty resting on defendant springing from this delict; and, finally, the remedy or relief sought, itself. Pomeroy said:

> Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined, constitute the cause of action in the legal sense of the term.[14]

Pleading during this early code era became more complex. In direct contrast to the old rules, the codes allowed in one lawsuit many more claims, legal and equitable, of the plaintiff against the named defendant.

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[11] *Supra,* note 5.
[12] Clark, *The Code Cause of Action,* 33 YALE L. J. 817, 820 (1924).
[13] CLARK, CODE PLEADING §19 at 130 (2nd ed. 1947).
[14] POMEROY, CODE REMEDIES §347 at 528 (5th ed. 1929).

But the code's innovations did not abolish entirely the old limitations upon joinder. If more than one "cause of action" were stated, joinder of claims in a single suit was required to meet some highly technical requirements, most importantly the requirement that the joined claims "must affect all the parties to the action."[15]

Single Occurrence of Affair

In modern code practice, the key concept in determining whether one or more than one cause of action arises from a series of events is the limitation suggested in the term, "single occurrence of affair." In its broadest sense, all of history may be regarded as a "single occurrence or affair;" and in its narrowest sense, every fraction of a second may be conceptually divorced from its predecessors and its successors. Neither extreme approach, of course, is useful in determining a convenient unit of legal controversy for purposes of judicial administration.

Judge Charles E. Clark has suggested that the Code definition implies a factual unit, "limited as a lay onlooker"[16] would view it; and the *Caygill* opinion relies expressly on this suggestion in concluding:

> There is no doubt . . . that the plaintiff's claim(s) against Ipsen and Thompson are two separate and distinct causes of action irrespective of how the consequences have merged in the resultant injuries.[17]

Unless examined in proper context, however, Judge Clark's test may itself be productive of more confusion than assistance, because it fails to suggest any standard or measure by which the "lay onlooker" ordinarily classifies a series of more or less related events. It may be assumed, with some confidence, that the lay onlooker is commonly ignorant of any but the most obvious connections between occurrences which are temporally or spatially separated; and it may also be assumed that temporal and spatial coincidence is itself sufficient, in the eyes of the layman, to identify a "single occurrence."

The identification of a "cause of action" in terms of the layman's classification of events, however, is proper only in the sense of general limitation, and not in the sense of an affirmative criterion. Applied in its intended negative sense, the suggested "layman's eye view" discourages any temptation to identify a "single" cause of action as that series of events which give rise to a "single" legal injury or to a "single" demand for legal relief.[18] The utility of the layman's eye view, in short, is to prevent lumping together the conglomeration of "occurrences" which, in a lawyer's eye, may appear to have some bearing upon the relief sought.

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[15] *Supra,* note 3.
[16] Blume, Free Joinder of Parties, A.B.A. Special Committee, Series A (at 46-48, 1942), quoting from Clark, Code Pleading (2nd ed. 1947).
[17] *Supra,* note 2, at 565, 582-83.
[18] *Supra,* note 2, at 586.

Given an "occurrence" which the layman would regard as "single," however, there is no necessary conclusion that a "single" cause of action will arise therefrom. Whether one or more than one "primary right" of the plaintiff has been violated in the course of a "single" occurrence is a legal, not a layman's, consideration; and, while successive violations of the same primary right of the same plaintiff will give rise to a "single" cause of action only when those successive violations are part of the same "occurrence," even simultaneous violations of *different* primary rights (either of the same or different plaintiffs, and by either the same or different defendants) will give rise to dual or multiple causes of action.[19]

To reason, as plaintiffs in *Caygill* attempted to do, that successive violations of the same primary right of the same plaintiff *ipso facto* give rise to one cause of action (or do so when the resultant damage is indivisible) is erroneous on two counts. First, the law does not treat the concept of primary right in isolation from its legal concomitants, primary duty, breach, and remedy.[20] Second, even a complete legal harmonization of these criteria will not produce a single cause of action where the operative facts do not fall "into a single unit or occurrence as a lay person would view them." Such multiple occurrences may well permit joinder of causes, but they do not permit that such multiple causes be united into one.

If, for example, the two accidents in *Caygill* had both involved Thompson as driver of the other car, the resultant claims would probably have been joinable in the same complaint, but would have remained distinct, as separate causes of action, regardless.

Much of the confusion on the question appears to result from twin errors. First, there is a tendency to misread cases in which plaintiff grounds a single claim alternatively upon several different legal theories or factual allegations. Especially where the alleged liabilities of numerous defendants necessarily vary as the alternative theories are applied, there is a tendency to assume that more than one cause of action is necessarily involved in such cases. Second, there is a common tendency to merge, in one statement, rules which limit the definition of a single cause of action with other rules permitting multiple causes to be joined in a single complaint.

Rogers v. Oconomowoc[21] is illustrative of both difficulties. There,

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[19] Ryder v. Jefferson Hotel Company, 121 S.C. 72, 113 S.E. 474 (1922); Pomeroy stated that when there is a tort of a personal nature, such as false imprisonment, committed upon two or more persons, the right of action must be several. Wisconsin has modified this rule through section 260.12, "And when more than one person makes a separate claim for damages against the same persons or person based on the *same alleged tortious conduct,* they may unite in prosecuting their claims in one action." (Emphasis added.)

[20] Rogers v. City of Oconomowoc, 16 Wis. 2d 621, 115 N.W. 2d 635 (1962).

[21] *Ibid.*

plaintiff was injured in an accident at a bathing beach. The complaint included claims against the city, as owner and operator of the beach, upon nuisance, gross and ordinary negligence, and upon the safe place statute; against the city's lifeguard, grounded upon gross and ordinary negligence in supervision; and against the city's recreation director, for ordinary negligence in supervision of the park. The city's demurrer was overruled and the order affirmed.

The city's challenges included the contention that each of the alleged grounds of action constituted a separate cause of action; and that the different causes did not "affect all the parties," and therefore were misjoined. Specifically, the city contended that a cause of action against the city for a violation of the safe place statute did not affect either the lifeguard or the recreation director, and that the gross negligence counts against the city and the lifeguard did not affect the recreation director.

In answer to the city's objection to a joinder of causes of action in both gross and ordinary negligence, the court pointed out that *Bielski v. Schulze*[22] expressly abolished the concept of gross negligence. Consequently, any difficulty arising from multiplicity of legal theory under the earlier rule could now be disregarded, since gross and ordinary negligence, after *Bielski,* are united in a single conceptual package. But, it is a matter of some doubt whether the *Bielski* rule was necessary to permit the joinder in question, as the opinion seems to infer.

On this basis, Justice Brown, speaking for the court, asserted that no true issue of misjoinder of causes of action was involved, since there was only one subject of controversy (the single accident) among the various claims and theories present, and thus only one primary right of plaintiff involved, and one cause of action pleaded.

Rogers illustrates the principle that, despite multiplicity of theories and of defendants, a single invasion of a single primary right produces only one cause of action. Because the injury inflicted upon the plaintiff in *Rogers* occurred at once, the effect was that of an inverted triangle, where all the operative events and their results culminated at one point, raising one subject of controversy and one cause of action, "affecting" all persons contributing to the injury, and all persons suffering from it.

Apparently as an alternative basis of decision, the *Rogers* decision then suggests a legal circumstance by which the respective claims would appropriately have been joinable, even assuming that they constituted distinct causes of action. Judgments against the employees involved the interests of the city by reason of *respondeat superior,* and a judgment against the city involved the interests of the employees by reason of the city's potential rights to contribution or indemnification. Thus, the

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[22] Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962).

causes of action (assuming multiplicity) again "affected all the parties to the action."[23]

As above suggested, if the accidents in *Caygill* had both involved Thompson as driver of the other car, the actions would probably have been joinable as *two* causes of action in the same complaint, and triable in the same action. As was the case under the alternative ground of decision in *Rogers,* the specifications of section 263.04 would presumably have been met, assuming the joined causes were "separately stated." Therefore, such multiple events, whether erupting in a "single occurrence" or not, may permit trial of the resulting claims in a single unit of litigation;[24] but they do not necessarily permit such multiple causes to be united into one statement.

The basic reason for requiring *separate statement* of causes of action joined in a single complaint is to permit each separated cause to be disposed of independently of the others, on either a legal or factual basis. By this device, the general economies, sought to be achieved under doctrines of liberal joinder can be achieved, without necessity of treating the joined causes alike. Insofar as the separate causes may admit of common pleading, common procedure, common findings, or common judgment, they are handled together; but their distinctions are preserved, by separate statement, for whatever purposes it may be necessary to treat them separately.

An excellent illustration of this principle is found in *Widell v. Holy Trinity Catholic Church.*[25] The plaintiff, attending services as a member of defendant's parish, was injured when he tripped on a kneeler extending into the aisle behind the last pew. In plaintiff's first complaint he alleged separately causes of action grounded on the safe-place statute, nuisance and common-law negligence. After defendant demurred to each cause of action on the ground that none of them actually stated a cause of action, plaintiff consolidated the causes of action; but defendant's subsequent motion to make more definite and certain caused plaintiff to again set forth a first cause of action grounded on a safe-place violation, a second based on nuisance, and a third which purported to incorporate by reference the first cause of action, and to allege negligence against the church. The defendant demurred to the third cause of action on the ground that, as a negligence allegation, it was not sus-

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[23] *Supra,* note 20 at 628.

[24] Section 269.05, as to consolidation, states, "when two or more actions are pending in the same court, which might have been joined, the court . . . shall, if no sufficient cause be shown to the contrary, consolidate them into one by order." Rule 42, Federal Rules of Civil Procedure, is more liberal as to consolidation, "When actions involving a common question of law or fact are pending . . . the court . . . may order all the actions consolidated." Thus, the federal rules do not require, as Wisconsin does, that the causes of action be joinable in the first instance.

[25] Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 121 N.W. 2d 249 (1963).

tainable by reason of charitable immunity. The trial court overruled the demurrer, reasoning that the third cause of action incorporated the safe-place count and therefore stated a cause of action against defendant despite the possible inadequacy of the negligence count. Affirming, the Supreme Court recognized the fact that the plaintiff had sought to obtain the benefit of three causes of action while depriving the defendant of the benefit of a demurrer, but criticised the practice, despite its technical accuracy:

> While it is true the safe-place statute does not create a new cause of action but only imposes a higher standard of care, we have stated the better practice for the sake of clarity is to plead common law negligence and the safe-place statute as separate causes of action. The defendant should not be foreclosed from raising the legal sufficiency of an alleged cause of action by construing the complaint to state the same cause of action in duplicate.[26]

The pleader, therefore, is apparently directed to state separately each set of ultimate facts which, under variant substantive theories, may support his single cause of action, at no risk of effective demurrer for misjoinder of causes of action.[27] The pleading of alternative theories of action, therefore, is indistinguishable *in form* from the pleading of multiple causes of action, which *does* raise joinder problems. Whatever confusion might result yields to proper analysis of the substantive claims themselves.

Whaling vs. Stone Construction Co.[28] treated an extremely protracted series of apparently separate torts as a single cause of action. Plaintiff sought an accounting from two business associates, upon the basic allegation that they had mismanaged Stone Construction Co., a corporation in which plaintiff had a minority interest. Defendants had subsequently formed a number of other corporations in which plaintiff had no interest. Plaintiff eventually attempted to sell out his interests in Stone Construction, but no acceptable deal could be worked out. Defendant Betz at this time informed plaintiff that if he did not accept the price offered, Betz would make a "shell" out of the corporation and diminish the value of plaintiff's stock. Thereafter, plaintiff complained that the locks on the corporate offices were changed, that he received a

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[26] *Id.* at 650, 121 N.W. 2d at 251.

[27] In Weber v. Naas, 212 Wis. 537, 250 N.W. 436 (1933), the plaintiff set forth separately what he believed to be four separate causes of action. The court held he had stated, not four causes of action, but one cause of action with four degrees of evidentiary elaboration. In reluctantly overruling the demurrer, the court criticised the plaintiff for violating good rules of pleading. Thus, a dilemma for pleader tends to arise: whether to state separately two or more substantive theories of action, which he believes to constitute but one cause of action, and risk criticism for redundancy and excessive evidentiary pleading, or to set them forth in one statement at the risk of violating "proper practice" as defined in the Widell case.

[28] Whaling v. Stone Construction Co., 5 Wis. 2d 113, 92 N.W. 2d 278 (1958).

letter of termination of employment, that he was removed as an officer and director, and that he was not allowed access to the books. As a second cause of action, plaintiff alleged various manipulations by Betz and Snyder by which the corporate assets of Stone Construction Company were transferred to the corporations in which plaintiff had no interest. These other corporations were joined as parties defendant on this cause of action, plaintiff seeking an accounting and restitution from them.

Despite the fact that the "transactions and occurrences" at issue in *Whaling* were not "single" as a lay person would view them, but instead were a culmination of acts of different people occurring at different times and different places, the court ruled that the complaint stated but one cause of action, characterized as an equity action for an accounting.

Three basic situations in which such diverse situations are sufficiently united to constitute acceptable deviations from the general rule are:

(1) A common scheme or design or conspiracy to defraud or to violate the law.
(2) The fact that all the acts or the conduct are more or less consciously directed toward or connected with some common cause such as a common purpose, event, or a single claim or item of property.
(3) The fact that completely independent acts unite to cause an injury, for all or for some part of which the actors have a common liability under substantive law.[29]

Whaling, therefore, is simply a rather prosaic illustration of Professor James' first and second suggested exceptions to the general rule. His third exception is illustrated by *Rogers,* as well as by all cases illustrating the modern pseudo-joint tortfeasor situation.[30]

Caygill, however, can be classified with this third group of cases only on the premise that the successive tortfeasors incurred a degree of "common liability;" and that premise, in turn, is supportable only if one of two things was true. Either the subsequent tort must have been a "reasonably foreseeable consequence" of the prior one, so as to invoke

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[29] JAMES, CIVIL PROCEDURE §10.12, at 647 (1st ed. 1965).

[30] The true joint tortfeasor at common law was one who participated in causing a joint tort with another by concerted acion. In such a case, there was a common purpose with mutual aid in carrying it out. In short, there was a joint enterprise, and the act of one was the act of all. Each was liable for the entire damage done; all might be joined as defendants on the same action at law; and, since each was liable for all, the jury would not be permitted to apportion the damages. The pseudo-joint tortfeasor situation is well illustrated by the *Rogers* case, where completely independent acts united to cause an injury to the plaintiff. At common law, only a several liability could arise from such a situation. Modernly, however, the liability is declared to be both joint and several, permitting the joinder of such co-defendants in a *single* cause of action.

the principle of the malpractice cases[31] and create a connection between the two events under Professor James' second exception; or else the injuries caused by the second tort must have been factually identical, in whole or part, with those caused by the first tort. In final upshot, the *Caygill* decision holds that neither alternative is satisfied simply by the fact that successive but unrelated torts injure, then reinjure, the same plaintiff in the same general way. Whether the malpractice cases are fully distinguishable from *Caygill,* under this analysis, may be doubtful.

CONCLUSION

In a recent Michigan case, *Watts v. Smith,*[32] plaintiff-passenger incurred and, eight hours later, aggravated a back injury as a result of two separate automobile accidents on the same day. The injuries were medically indivisible, so that plaintiff's problem of proof, if he were compelled to sue the drivers separately, was practically insurmountable. The court allowed joinder:

> Accepting the allegations of the plaintiff's declaration as true, that is, he suffered a single indivisible injury as a result of successive negligent acts of defendants, we conclude that plaintiff had a right to maintain his action against both defendant Smith and defendant Hovers in the same suit.
>
> ". . . although there is no concert of action between tortfeasors, if the culminative effect of their acts is single, indivisible injury, which it cannot certainly be said would have resulted but for the concurrence of such acts, the actors are to be held liable as joint tort feasors."[33]

The dissenting judge would vote not to allow joinder without concert of action or a stronger showing of closeness in time or space. He felt that to allow joinder would not promote the convenient administration of justice:

> The trial would . . . be most confusing to a jury not only as to the need to keep the facts of the two collisions in mind, but also as to a double set of instructions and as to the question of which injuries, if any, were caused by the respective collisions.[34]

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[31] In a recent malpractice case, Heims v. Hanke, 5 Wis. 2d 465, 93 N.W. 2d 455 (1958), the plaintiff was injured by the negligance of one of the defendants when he fell on a slippery sidewalk. The second defendant, the doctor, treated the plaintiff for these injuries, and aggravated said injuries. The court allowed the plaintiff to join these two defendants upon the theory that a tortfeasor is liable for the foreseeable consequences of his acts, including the hazard that the injured party will be obliged to seek medical assistance and thus expose himself to the dangers of negligent medical care. Testing the reasoning of this much-questioned rule, query, whether the same result would obtain if the accident-victim were reinjured in an ambulance collision while being rushed to the hospital? See also, Hartley v. St. Francis Hospital, 24 Wis. 2d 396, 130 N.W. 2d 1 (1964).

[32] Watts v. Smith, 375 Mich. 220, 134 N.W. 2d 194 (1965).

[33] 134 N.W. 2d at 195.

[34] 134 N.W. 2d at 200.

Contrast the Wisconsin court in *Caygill:*

> The acts are not substantially concurrent, the events are unrelated, and the accidents took place in different counties. It would appear to be unreasonable under the circumstances to permit the joinder of wrongdoers whose tortious acts were separated by so great a time and distance. The fact that their conduct resulted in indivisible injury to the plaintiff does not . . . result in the creation of any relationship between them.[35]

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[35] 27 Wis. 2d 578, 587, 135 N.W. 2d 284, 289.