REPORTS OF CASES

DECIDED BETWEEN

JULY 5, 1957 and JANUARY 30, 1958

IN THE

Supreme Court of Nebraska

JANUARY TERM 1957, SEPTEMBER TERM 1957,
and
JANUARY TERM 1958

VOLUME CLXV

WALTER D. JAMES
OFFICIAL REPORTER

GANT PUBLISHING COMPANY
LINCOLN, NEBRASKA
1958

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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

WALTER D. JAMES	Reporter
JACQUELYN M. LEACH	Assistant Reporter
GEORGE H. TURNER	Clerk
WALTER G. PURTZER	Deputy Clerk
CLARENCE S. BECK	Attorney General
CLARENCE A. H. MEYER	Deputy Attorney General
HOMER L. KYLE	Assistant Attorney General
HAROLD S. SALTER	Assistant Attorney General
HOMER G. HAMILTON	Assistant Attorney General
RICHARD H. WILLIAMS	Assistant Attorney General
GERALD S. VITAMVAS	Assistant Attorney General
CECIL S. BRUBAKER	Assistant Attorney General
EDWARD F. CARTER, JR.	Assistant Attorney General
JOHN E. WENSTRAND	Assistant Attorney General

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

PRACTICING ATTORNEYS

Admitted since the publication of Volume 164

GERALD E. KILTZ
ROBERT L. KIRK
ANDREW KIRKPATRICK PARKANSKY
JOHN M. PICK
THOMAS F. STRUNCK

TABLE OF CASES REPORTED

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1957

ROBERT G. GOTTULA, APPELLANT, V. STANDARD RELIANCE INSURANCE COMPANY, A MUTUAL INSURANCE COMPANY, ET AL., APPELLEES.

84 N. W. 2d 179

Filed July 5, 1957. No. 34133.

1. **Pleading.** A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded; but does not admit the conclusions of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, as to the effect of the facts, nor allegations of what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law.
2. ———. In passing on a demurrer to a petition, the court must consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant.
3. **Declaratory Judgments: Pleading.** The use and determination of the demurrer in actions arising under the Uniform Declaratory Judgments Act are controlled by the same principles as apply in other cases, and where a demurrer should be sustained in other civil actions, it should be sustained in a declaratory judgment action. Demurrer may be used to test the sufficiency of the complaint if it is vulnerable on any of the statutory grounds of demurrer.

4. **Insurance.** Where the insurer refuses to defend an action brought against the insured, basing its refusal on the ground that it is under no duty to defend because the claim upon which the action against the insured is founded is not within the coverage of the policy, and it appears that such claim actually is outside the policy coverage, such refusal of the insurer to defend does not constitute a breach of contract.
5. ———. Where an insurance policy obligates the insurer to defend all suits brought against the insured even though groundless, false, or fraudulent, the insurer is not liable to defend a suit based on a claim outside the coverage of the policy.

APPEAL from the district court for Gage County: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Sackett, Brewster & Sackett, for appellant.

McCown & Wullschleger and *Robert D. Baumfalk,* for appellees.

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

MESSMORE, J.

This is an action instituted by Robert G. Gottula under the Uniform Declaratory Judgments Act of the State of Nebraska, in the district court for Gage County against the Standard Reliance Insurance Company, Lincoln, Nebraska, a mutual insurance company merged with the Standard Casualty Company, a corporation, which does not in any manner change the provisions of the policy of insurance here involved nor change the parties defendant, Alvin Behrens, and Ekke Behrens, defendants. The purpose of the action was to have declared the liability of the defendant Standard Reliance Insurance Company, if any, under a policy of insurance issued to the plaintiff Robert G. Gottula. The defendant Standard Reliance Insurance Company filed a special and general demurrer to the plaintiff's petition, demurring specially on the ground that an action for declaratory judgment as prayed for in the plaintiff's petition was not proper where other equally serviceable remedies

were provided by law, and demurring generally on the ground that the petition on its face disclosed insufficient facts to constitute a cause of action against the defendant Standard Reliance Insurance Company. The trial court overruled the special demurrer and sustained the general demurrer. The plaintiff failed to amend his petition and elected to stand on it. The trial court dismissed the plaintiff's petition. The plaintiff filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the plaintiff appeals.

We deem it unnecessary to set forth the provisions of the Uniform Declaratory Judgments Act. There is no question but that an insurance contract comes within the purview of section 25-21,150, R. R. S. 1943.

This court held in the case of Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623, that a contract for insurance and the coverage thereunder was properly determinable under the Uniform Declaratory Judgments Act of this state.

The special demurrer was properly overruled.

In Brunson v. Ranks Army Store, 161 Neb. 519, 73 N. W. 2d 803, this court held: "A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded; but does not admit the conclusions of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, as to the effect of the facts, nor allegations of what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law." See, also, Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593, and cases cited therein.

In passing on a demurrer to a petition, the court must consider an exhibit attached thereto and made a part thereof, if the allegations stated therein either aid the

petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant. Freeman v. Elder, 158 Neb. 364, 63 N. W. 2d 327; Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240.

The following are applicable to the case at bar.

The rule is stated in 26 C. J. S., Declaratory Judgments, § 141, p. 333: "The use and determination of the demurrer in actions arising under the declaratory judgments act are controlled by the same principles as apply in other cases, and where a demurrer should be sustained in other civil actions, it should be sustained in a declaratory judgment action. Demurrer may be used to test the sufficiency of the complaint if it is vulnerable on any of the statutory grounds of demurrer."

In Dantzler v. Callison, 227 S. C. 317, 88 S. E. 2d 64, the court held: "The use and determination of the demurrer in actions arising under Declaratory Judgment Act is controlled by the same principles as apply in other cases."

In the case of Frach v. Schoettler, 46 Wash. 2d 281, 280 P. 2d 1038, certiorari denied 350 U. S. 838, 76 S. Ct. 75, 100 L. Ed. 747, the court held: "A proceeding commenced under the declaratory judgment act is subject to the same rules of pleading as any other civil action; hence, in such a proceeding, there is no merit to the contention that a demurrer should not be sustained but that the matter should be heard upon its merits."

In Webb v. Clatsop County School Dist. No. 3, 188 Or. 324, 215 P. 2d 368, the court held: "A demurrer may be used to test the sufficiency of a complaint in an action for a declaratory judgment, if complaint is vulnerable upon any of statutory grounds of demurrer." The following cases are cited: Fox v. Title & Trust Co., 129 Or. 530, 277 P. 1003; Central Or. Irr. Dist. v. Deschutes Co., 168 Or. 493, 124 P. 2d 518; Cabell v. Cottage Grove, 170 Or. 256, 130 P. 2d 1013, 144 A. L. R. 286. See, also, Davis v. State, 183 Md. 385, 37 A. 2d 880; Paron v. Shakopee, 226 Minn. 222, 32 N. W. 2d 603, 2 A. L. R. 2d 1227; Meyers

v. LaFayette Club, 197 Minn. 241, 266 N. W. 861; Borchard, Declaratory Judgments (2d ed.), pp. 208, 209; 16 Am. Jur., Declaratory Judgments, § 51, p. 323.

Section 25-803, R. R. S. 1943, provides for a demurrer as a pleading in this state.

We conclude that a general demurrer may be filed against a petition in a declaratory judgment action such as the instant case.

We examine the petition to ascertain whether the order of the trial court sustaining the general demurrer constituted error as contended for by the plaintiff.

The plaintiff's petition, insofar as deemed necessary to consider here, alleged that on January 12, 1952, the defendant insurance company, for a valuable consideration, issued to the plaintiff its certain combination insurance policy No. AC 922125 on a 1939 model International 2-ton motor truck, model D S35, motor number FAB241-14388, the property of the plaintiff, insuring the plaintiff, among other things, for property damage liability within the limits of $5,000 each accident, from January 12, 1952, to January 12, 1953; and that attached to said policy of insurance was an automobile policy schedule wherein the type of motor vehicle, motor number thereof, and a schedule of coverage and premiums were set forth. Also attached to the said policy of insurance was an endorsement which reads as follows: "Endorsement Attached to and forming part of Policy Number 922125 issued to Robert G. Gottula by STANDARD CASUALTY COMPANY - Lincoln, Nebraska at its Agency located (city and state) Adams, Nebraska Date of Endorsement January 12, 1952 CORN SHELLER MOUNTED ON TRUCK It is hereby understood and agreed that this policy shall not cover liability arising from operation of the sheller mounted on the insured truck. All other terms and conditions of this policy remain unchanged. Henry Gramann Jr. Agent."

There is also attached to said policy of insurance an automobile endorsement for farm trucks, which reads

as follows: "Automobile Endorsement Farm Trucks For attachment to and forming part of Policy No. 922125 of the STANDARD CASUALTY COMPANY, issued to Robert G. Gottula. It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, for Property Damage Liability and for Medical Payments with respect to the automobile classified as 'commercial (farm trucks)' applies subject to the following provisions: 1. The insurance applies to a trailer not described in the policy if designed for use with a private passenger automobile or a farm truck, if not being used with any automobile other than the automobile herein designated or a private passenger automobile, and if not a home, office, store, display or passenger trailer. 2. The insurance also applies with respect to agricultural and other farm implements while being towed by the automobile, provided: (a) the insurance does not apply to the operation of farm machinery; (b) the automobile and such an implement attached thereto shall be held to be one automobile as respects limits of liability. 3. For the purposes of any Use of Other Automobiles provision of the policy, such automobile shall be considered classified as 'pleasure and business.' All other terms and conditions remain unchanged. Countersigned January 12, 1952, at Adams, Nebraska By Henry Gramann Jr. Authorized Agent."

The petition further alleged that true and correct copies of the policy of insurance with the schedule and endorsements thereon were attached to the petition, marked "Exhibit A," and made a part thereof.

The petition further alleged that on or about October 22, 1952, and while and during the time said policy of insurance, schedule, and endorsements thereto attached, remained in full force and effect on plaintiff's truck, the plaintiff drove said truck on which was mounted a corn sheller onto private premises occupied by the defendant Alvin Behrens and owned by the defendant Ekke Behrens, and there parked same and proceeded to shell corn

therewith for defendant Alvin Behrens; that the corn sheller mounted on said truck was operated by power furnished by the motor of said truck by means of a power take-off and clutch; that while plaintiff was engaged in the operation of the motor of said truck to furnish power for the corn sheller mounted thereon, a fire started among dry corn husks near or under said truck alleged by defendant Alvin Behrens to have resulted on account of the negligence of plaintiff in operating the motor of his said truck used to operate said corn sheller, with a cracked manifold and the exhaust pipe of said motor disconnected approximately 7 feet behind said motor; that said motor had no muffler; and that plaintiff was aware of the defective and dangerous condition of said motor and was negligent in operating same in the condition in which it was thereby causing the fire complained of by the defendant Alvin Behrens.

The petition further alleged that the defendant Ekke Behrens claims that the plaintiff used the motor on said truck as motive power for the corn sheller mounted thereon; that said motor, at the time plaintiff drove same onto the premises aforesaid, known to plaintiff, had a cracked manifold and an exhaust pipe which was broken off about 3 feet from the motor; that plaintiff negligently caused insufficient water to be carried in the radiator of said truck motor causing same to heat unduly and to emit sparks from said cracked manifold and from said pipe; that notwithstanding plaintiff was aware of the defective and dangerous condition of said motor, he negligently operated same on said premises causing corn husks and buildings to catch fire; and that said defendants Alvin Behrens and Ekke Behrens have each filed petitions and actions against the plaintiff in which they pray for damages.

The petition further alleged that the plaintiff gave the defendant insurance company notice of the Behrens' claims against him as provided for under the terms of the policy; and that the defendant insurance company

refused to defend the plaintiff against the claims and actions brought by the Behrens, and advised the plaintiff that he and his truck were not covered under the provisions of the policy of insurance issued to the plaintiff.

The insurance policy also provided: "II Defense, Settlement, Supplementary Payments: As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall: (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient; * * *."

The plaintiff prayed for a declaratory judgment and decree construing and interpreting the terms of the said policy of insurance, schedule, and the endorsements thereto attached, and prayed that the court find, adjudicate, and decree that the accident thereinbefore described sustained by the plaintiff was within, covered by, and insured against under the provisions of the said policy of insurance.

In Smith v. United States Fidelity & Guaranty Co., 142 Neb. 321, 6 N. W. 2d 81, this court pointed out that an insurance policy is a contract. Where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, an insurance contract will be enforced as it is made. In construing terms used in a policy of insurance, they are to be taken in their plain, ordinary sense. So, also, in construing a written instrument for the purpose of ascertaining the intention of the parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof. The unquestioned rule is, a writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together. In this connection, it must also be admitted that the parties to a contract of insurance may contract for any lawful

coverage. An insurance company has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations not inconsistent with public policy. We have omitted the citations of authority appearing in the above-cited case so as not to unduly lengthen this opinion.

In Pickens v. Maryland Casualty Co., 141 Neb. 105, 2 N. W. 2d 593, this court held: "A clause in a public liability policy that the insurer will defend suits for personal injuries brought against the insured although they may be wholly groundless, false or fraudulent is generally construed to obligate the insurer to defend only suits upon claims for which it has assumed liability under the policy." See, also, Brodek v. Indemnity Ins. Co., 292 Ill. App. 363, 11 N. E. 2d 228; Lumberman's Mutual Casualty Co. v. McCarthy, 90 N. H. 320, 8 A. 2d 750, 126 A. L. R. 894; United Waste Mfg. Co. v. Maryland Casualty Co., 85 Misc. 539, 148 N. Y. Supp. 852, affirmed in 169 App. Div. 906, 153 N. Y. Supp. 1148.

While this rule was announced with reference to a contractor's public liability policy which by its terms did not cover an accident unless it occurred upon the premises owned by or under the control of the insured or on the public highways immediately adjacent thereto, we see no reason why the same rule would not apply to the insurance policy issued to the plaintiff in the instant case.

In Weis v. State Farm Mutual Automobile Ins. Co., 242 Minn. 141, 64 N. W. 2d 366, 49 A. L. R. 2d 688, this principle is applied to an automobile liability insurance policy where the insurer refused to defend an action against the insured. In the annotation in 49 A. L. R. 2d, p. 703, it is said: "The first situation to be discussed is the one where the insurer refuses to defend an action brought against the insured, basing its refusal on the ground that it is under no duty to defend because the claim upon which the action against the insured is

founded is not within the coverage of the policy, and it appears that such claim actually is outside the policy coverage. Since in such case the refusal of the insurer to defend does not constitute a breach of contract but, on the contrary, is a justified refusal, the insurer obviously incurs no legal liability by its action. Thus, all the cases agree that where the insurer justifiably refuses to defend, it is not guilty of a breach of contract and no liability attaches to its action." This rule is the majority rule in the United States courts and in the courts of 30 or more states of the Union. Among the cases cited under the annotation are the Nebraska cases of Pickens v. Maryland Casualty Co., *supra,* and Smith v. United States Fidelity & Guaranty Co., *supra.*

The annotation continues: "§ 5. Application of rule under policies obligating insurer to defend all suits even though groundless. (a) Generally. Most of the more recent liability policies obligate the insurer to defend all suits brought against the insured even though groundless, false, or fraudulent. Even under such a policy the insurer is still not liable to defend a suit based on a claim outside the coverage of the policy."

In United States Fidelity & Guaranty Co. v. Reinhart & Donovan Co., 171 F. 2d 681, it was stated that an insurer who was not liable under the policy for a claim sued on was not required to defend such suit merely because in the policy the insurer had agreed to defend all suits seeking to enforce such claims even though groundless, the court stating that an insurer is not obligated to defend the groundless suit when it would not be liable under its policy contract for any recovery had therein. See, also, Lunt v. Aetna Life Ins. Co., 261 Mass. 469, 159 N. E. 461. Also cited in the annotation is Pickens v. Maryland Casualty Co., *supra.*

In the light of the authorities heretofore set forth and considering the plaintiff's petition, we conclude that the insurer in the instant case is under no contractual obligation to defend the action brought against the

plaintiff by the defendants Behrens. The trial court did not err in sustaining the defendant's general demurrer.

The judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

BARBARA BIRTH, APPELLEE, V. MELVIN E. BIRTH, APPELLANT.
84 N. W. 2d 204

Filed July 5, 1957. No. 34135.

1. **Divorce.** A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief.
2. ———. Section 42-335, R. R. S. 1943, means that corroborative evidence other than the declarations, confessions, or admissions of the parties is required of the acts or conduct asserted as grounds for a divorce.

APPEAL from the district court for Lincoln County: ISAAC J. NISLEY, JUDGE. *Affirmed in part, and in part reversed and dismissed.*

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

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

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

CHAPPELL, J.

Plaintiff, Barbara Birth, sought an absolute divorce from defendant, Melvin E. Birth, together with custody of their 3-year-old daughter, an allowance for child support, and an adjustment of their financial and property rights. Plaintiff's alleged grounds for divorce were that defendant was guilty of extreme cruelty because at all times since the marriage on August 1, 1952, he had brutally made grossly excessive demands upon plain-

tiff for sexual relations which had so affected her physical and mental health as to make it impossible to continue the marriage relation. After a temporary order had been entered giving plaintiff custody of the child and allowing her $65 a month as child support, together with use of their home and $40 attorneys' fees, defendant filed an answer and cross-petition. Therein he denied generally and sought an absolute divorce together with custody of their child. His alleged grounds of divorce were that plaintiff was guilty of extreme cruelty such as to destroy the legitimate objects of matrimony by refusing to live in their home and cohabit with defendant since about March 3, 1956.

After a hearing on the merits a decree was rendered, finding and adjudging the issues generally in favor of plaintiff upon her petition and against defendant upon his cross-petition. The judgment awarded plaintiff an absolute divorce and custody of their child, together with $35 a month for child support, and the use of their home upon prescribed conditions until the child reached majority. It denied defendant a divorce and dismissed his cross-petition. Costs were taxed to defendant and each party was required to pay his own attorneys' fees. The judgment also made an adjustment of their financial and property rights and interests in a manner which is unimportant here in view of our conclusion that for want of sufficient corroboration of their respective allegations and evidence neither party was entitled to a divorce.

Defendant's motion to vacate and set aside the judgment and for new trial was overruled, after the judgment had been modified with relation only to their property rights and a limitation of defendant's right of visitation with his child. Therefrom defendant appealed, assigning insofar as important here that the trial court erred in granting plaintiff a divorce, in dismissing defendant's cross-petition, and in refusing to grant him a divorce. We conclude that the trial court erred in grant-

ing plaintiff a divorce, but properly dismissed defendant's cross-petition and denied him a divorce. As we view it, the sole question upon which decision depends is whether or not the evidence adduced by the parties was sufficient to support the awarding of a decree of divorce to either plaintiff or defendant. We conclude that it was not.

Section 42-302, R. R. S. 1943, provides in part: "A divorce from the bonds of matrimony * * * may be decreed for the cause of extreme cruelty, whether practiced by using personal violence, or by other means; * * *." In that connection, section 42-335, R. R. S. 1943, also provides in part: "No decree of divorce * * * 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." Those sections are applicable and controlling here.

In Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321, referring to section 42-302, R. R. S. 1943, we reaffirmed that: "A decree of divorce from the bonds of matrimony should only be granted when the evidence brings the case within the definition of the statute providing for such relief."

In that opinion we said: "In an appeal to this court in a divorce action the cause is tried de novo. Pestel v. Pestel, 158 Neb. 611, 64 N. W. 2d 299. The burden of proof is upon the party who seeks the divorce. Loomer v. Loomer, 73 Neb. 359, 102 N. W. 759."

In construing and applying section 42-335, R. R. S. 1943, that opinion said: " 'This statute means that corroborative evidence is required of the acts or conduct asserted as grounds for a divorce.' Pestel v. Pestel, supra.

"In this regard we said in Pestel v. Pestel, supra: ' "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 circum-

stances." 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."

Also, in Robinson v. Robinson, 164 Neb. 413, 82 N. W. 2d 550, this court said: "A divorce or legal separation must be grounded on a legal fault within the grounds enumerated in the statutes and proved in the manner therein provided. One party may not create the grounds that will sustain him or her in maintaining such a suit. It is not the province of the courts to grant such decrees for sociological reasons. The policy of the state relative to marriage is fixed by the Legislature. It is not for this court to do what it deems best for the parties. The only relief that may be granted is that provided by statute when the evidence is sufficient to bring the case within its purview."

In the light of the foregoing rules, we have examined the record. After doing so, we briefly summarize the evidence without setting forth the salacious evidence adduced by the parties. The record discloses without dispute that: Plaintiff had been previously married and had two children the issue of that marriage. They were supported by monthly checks of $89 which represented benefits resulting from the death of their father on December 7, 1951. At the time of his death plaintiff's first husband left her a home in North Platte where she and her two children lived. She was a business woman who owned and profitably operated amusement train-ride equipment from spring until fall in a park in North Platte. Plaintiff and defendant had gone together for about 6 months before plaintiff's first marriage, but they then broke up and she married another. After the death of plaintiff's first husband, she and defendant met again by prearrangement and after going together for sometime, they were married August 1, 1952. They first lived in plaintiff's home for several months. Thereafter, for 1 year they rented a larger home which had an income-producing apartment. They

then purchased that home. They had one daughter of their own who was about 3 years old at time of trial. During the last 2 years of that marriage, defendant had earned $200 a month working days for an auto supply company in North Platte, and $1 an hour working evenings for plaintiff in the park at her train-ride equipment.

At the trial on the merits plaintiff's own evidence supported her allegations of extreme cruelty by defendant. In that connection, her mother was the only witness called in plaintiff's behalf, and we find no competent evidence in her testimony which could in any manner be said to corroborate plaintiff's own allegations and evidence. In other words, we find that plaintiff's own evidence of extreme cruelty as alleged by her was not corroborated by any competent evidence, and we conclude that the trial court had no power or authority to grant plaintiff a divorce. Her petition should have been dismissed.

On the other hand, defendant's own evidence denied that he was guilty of any extreme cruelty as alleged by plaintiff and supported by her own evidence. Rather, he testified that their troubles first arose about Christmastime 1955, when plaintiff became friendly with an unmarried brother of her first husband who lived in California but came once to their home in North Platte and with whom plaintiff later visited on a trip to California, which caused plaintiff to subsequently refuse to live in their home and cohabit with defendant. Purportedly in support of defendant's evidence, he called four witnesses but they adduced no competent evidence which could in any manner be said to corroborate defendant's own allegations and evidence. In other words, we find that defendant's own evidence of extreme cruelty as alleged by him was not corroborated by any competent evidence and we conclude that the trial court had no power or authority to grant defendant a divorce. His cross-petition was properly dismissed.

In that connection, we find that the evidence ad-

duced by both plaintiff and defendant in support of their respective allegations of extreme cruelty was corroborated solely by their own declarations, confessions, and admissions which was insufficient because not supported by any other satisfactory evidence of the facts alleged in their respective petition and cross-petition as required by section 42-335, R. R. S. 1943.

For reasons heretofore stated, we conclude that the judgment awarding plaintiff an absolute divorce should be and hereby is reversed and her petition is dismissed. On the other hand, we conclude that the judgment of the trial court denying defendant an absolute divorce and dismissing his cross-petition should be and hereby is affirmed. All costs are taxed to defendant, including an allowance of $250 as fees for the services of plaintiff's attorneys rendered in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

CARTER, J., participating on briefs.

ROSE M. WOLFE, APPELLEE, V. LA VERNE J. MENDEL, APPELLANT.
84 N. W. 2d 109

Filed July 5, 1957. No. 34146.

1. **Municipal Corporations.** When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet.
2. **Trial: Appeal and Error.** Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained.
3. **Highways: Automobiles.** When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger.
4. **Automobiles: Trial.** When a person fails to see an automobile not shown to be in a favored position, the presumption is that its

driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question.

5. ———: ———. Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury.
6. ———: ———. Where a person looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury.
7. **Automobiles.** Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way.
8. **Appeal and Error.** Before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made.
9. **Trial: Damages.** As a general rule in case the defendant does not tender an instruction proper to the evidence for a present worth recovery of damages, the judgment will not be reversed because no such instruction was given.
10. ———: ———. Where an instruction does not prohibit or negative the computation of damages upon the basis of their present worth, it will not be assumed that the jury did not understand that it was to estimate the present value of future earnings lost.
11. **Opinion Overruled.** Our holding in Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, overruling in part Chambers v. Chicago, B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338, is overruled.
12. **Damages: Trial.** A verdict may be set aside as excessive only when it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or that it is clear that the jury disregarded the evidence or controlling rules of law.
13. **Damages: Appeal and Error.** The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.

APPEAL from the district court for Lancaster County: PAUL WHITE, JUDGE. *Affirmed.*

Baylor, Evnen & Baylor and *Warren K. Urbom,* for appellant.

Norma Ver Maas and *Doyle, Morrison & Doyle,* for appellee.

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

SIMMONS, C. J.

This is an accident case where two automobiles collided in an intersection. Plaintiff sued for damages to person and property. Defendant denied negligence, alleged contributory negligence of the plaintiff, and sought by counterclaim to recover judgment for property damage.

The cause was tried to a jury resulting in a judgment for the plaintiff. Defendant appeals.

We affirm the judgment of the trial court.

Certain facts are not in serious dispute. The accident occurred at Nineteenth and P Streets in the city of Lincoln, about 5 p. m. on August 17, 1955. The weather was nice and the streets were dry. The intersection was not protected by signal lights or stop signs. Neither street was an arterial highway.

Plaintiff was driving her car south on Nineteenth Street. Defendant was driving his car west on P Street. Defendant approached the intersection on plaintiff's left.

The city ordinance provided: "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right, except as otherwise herein provided. * * * The driver of any vehicle traveling at an unlawful rate of speed shall forfeit any right of way which he might otherwise have hereunder. * * * It shall be unlawful for any person to

operate a vehicle on any street * * * at a rate of speed greater than is reasonable and prudent under the conditions then existing; provided, however, it shall be unlawful for any person to operate a vehicle * * * at any time or under any conditions, at a rate of speed greater than 25 miles per hour, except on arterial streets * * *." Lincoln Traffic Ordinance No. 5699, §§ 701(a), 701(h), 720.

The cars collided in the northwest quarter of the intersection, both cars having proceeded to the point of the collision on their own side of the street but near the center line. Defendant's car struck plaintiff's car at the driver's seat door. Plaintiff's car went on south and struck parked cars along the curb and on the curb, and came to a stop some two or three car lengths south of the intersection. Defendant's car spun around counterclockwise and stopped in the southeast quarter of the intersection. Defendant's car made skidmarks for 18 feet before the impact.

At the close of all the evidence defendant moved for a directed verdict on the grounds that the evidence showed the negligence of the plaintiff was more than slight in comparison with the negligence, if any, of the defendant; that the negligence of the defendant, if any, was less than gross in comparison with the negligence of the plaintiff; and that the negligence, if any, of the defendant was not the proximate cause of the accident and resulting damages.

The motion was overruled. The defendant later moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The motion was overruled.

Defendant presents as error the ruling on these motions.

Under these circumstances we state the evidence according to the established rule that the plaintiff is entitled to have every controverted fact resolved in her favor and to have the benefit of every inference that

can be reasonably deduced from the evidence. Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405.

Plaintiff's evidence is that she was driving south at a speed of 20 to 25 miles per hour. She looked to her left or east as soon as she "could see a view," when she was about two car lengths, about 25 or 30 feet north of the curb line. She saw defendant's car coming then "about half a block away," "Probably 100 feet" away. At that time she estimated defendant's speed at 35 miles per hour. She proceeded forward. She next looked to the east after she had entered the intersection and the defendant was then 25 or 30 feet to the east. She attempted to increase her speed to avoid the collision.

Plaintiff's evidence, then, was that she approached the intersection well in advance of the defendant. In Gorman v. Dalgas, 151 Neb. 1, 36 N. W. 2d 561, we held: "When used as a measurement of distance, and nothing appears to the contrary, the commonly accepted meaning of a block is 300 feet."

The jury then could have found that the defendant was from 100 to 150 feet east of the intersection when plaintiff, on the right, was from 25 to 30 feet north of the curb line of P Street and traveling at 20 to 25 miles per hour.

Defendant's evidence is that when his car was 65 feet east of the north and south center line of the intersection, plaintiff's car was 100 feet north of the east and west center line of the intersection; when plaintiff's car was 43 feet north of the center line of the intersection defendant's car was 17 feet east of the center line of the intersection; and prior thereto his speed was 25 miles per hour and he had intended to cross the intersection ahead of the plaintiff. At that point he applied his brakes and skidded 18 feet into the plaintiff's car. Defendant estimated plaintiff's speed at 35 miles per hour prior to the impact.

Plaintiff's deposition had been taken prior to the trial.

She then testified that she made her first observation to the left as she started into the intersection and that at that time she saw defendant's car at least half a block away.

Defendant contends that plaintiff failed to look to her left in time to avoid the accident; that having seen defendant's car she failed to again look to the left in time to avoid the accident; and that these failures constitute contributory negligence more than slight as a matter of law. He contends further that having seen the defendant's car at the left in time to avoid an accident, she failed to diminish her speed or take other action to avoid an accident, and in so doing tested an obvious danger; and that her failure constituted contributory negligence more than slight as a matter of law.

The trial court instructed the jury that the term intersection as used in the ordinances involved means that space occupied by two streets at the point where they cross each other bounded by the lot lines extended and shall include the sidewalk space as well as the roadway. The giving of this instruction is not assigned as error. It becomes the law of the case.

The rule is: "Instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if, when tested by such instructions, the verdict is not vulnerable to the objections lodged against it, the assignments will not be sustained." Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739.

The lot line on P Street is 50 feet north of the center of the intersection. The north curb line on P Street is 20 feet north of the center of the intersection. Plaintiff testified that she was two car lengths or 25 or 30 feet north of the north curb of P Street when she first looked to the east and saw defendant about half a block or about 100 feet to the east. She was at that time clearly in or entering the intersection at a speed

of 20 to 25 miles per hour and had the right-of-way under her evidence.

Substantially this same fact situation was presented in Gorman v. Dalgas, *supra*. In that case the defendant was on the right, and had the benefits flowing from the right-of-way. Here the defendant was on the left. The contention was there made that the plaintiff was guilty of contributory negligence as a matter of law. We applied the following rules and denied the contentions: "When a person enters an intersection of two streets or highways he is obligated to look for approaching cars and to see those within that radius which denotes the limit of danger. * * * When a person fails to see an automobile not shown to be in a favorable position, the presumption is that its driver will respect his right-of-way and the question of his contributory negligence in proceeding to cross the intersection is a jury question. * * * Before a verdict can be properly directed in such a case the position of the defendant's car must be definitely located in a favored position, otherwise the question becomes one for the jury. * * * Where a person looks and does not see an approaching vehicle, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes that he can proceed and avoid a collision, the question of negligence is usually one for the jury. * * * Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right-of-way, and he may ordinarily proceed to cross, having a legal right to assume that his right-of-way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right-of-way."

The decision there is controlling here. The assignment is not sustained.

The petition herein was filed on October 29, 1955. On March 22, 1956, defendant filed a motion for the production, inspection, and copying of five separate documents. The first three relate to income tax returns. The last two related to statements given by the defendant and a witness of the defendant coupled with the statement that these last two documents were in the possession of plaintiff's attorney. The matter was noted for hearing on March 27, 1956. On March 27, 1956, an affidavit of defendant was filed.

We find no order in the transcript on the motion. The cause went to trial on April 18, 1956, and to verdict on April 20, 1956. We find no reference to this matter in the bill of exceptions.

Notice of appeal was filed and the docket fee paid September 14, 1956, and the transcript was filed here September 27, 1956. The bill of exceptions was settled October 5, 1956. On October 31, 1956, a supplemental transcript was filed here showing that defendant on September 26, 1956, filed a motion in the district court for a nunc pro tunc order as of April 14, 1956, showing that the court sustained the motion of March 22, 1956, as to the first three requests and overruled it as to the last two requests. On September 29, 1956, the trial court entered the nunc pro tunc order.

The trial court settled a supplemental bill of exceptions on October 15, 1956, relating to the proceedings on the nunc pro tunc order. On December 15, 1956, we sustained a motion to quash the supplemental bill of exceptions.

Defendant assigns and argues error in the court's refusal to sustain the motion to produce the documents.

It is obvious that the proceedings in the district court were had after jurisdiction of the cause had been vested in this court. It is also obvious that the assignment insofar as it relates to the supplemental bill of exceptions has no support here. Under these circum-

stances there is nothing here for us to determine so far as this assignment is concerned.

Plaintiff offered the testimony of a police officer who testified as to the skidmarks as made by defendant's car. While the officer was on the witness stand, defendant had the witness make a drawing showing the skidmarks with relation to the street curb and the center of the street. It was not drawn to scale. The offer of the drawing was rejected on the basis of insufficient foundation. The defendant then had the officer make a drawing of the skidmarks with relation only to the center of the street. It was not to scale. It was offered and admission refused on the same basis. Both drawings show two pairs of approximately parallel lines for approximately the same distance.

During the course of his examination the officer testified that the solid skidmarks were very much the same length and that there were four tires and four skidmarks, two from the front and two from the back. They were right together where they started and got farther apart toward the west.

It is obvious that the witness was trying by the drawings to illustrate his testimony that the defendant's car had turned slightly to the left when the brakes were applied.

Defendant relies on our holding in Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831. There certain drawings made to scale were offered and admission refused. We held that they should have been admitted. We did not reverse on that ground alone. The rule is that before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466.

Without determining whether or not the refusal of the exhibits was error, we go to the question of prejudice.

Defendant contends that it is obvious that the skid-

marks from the front wheels would begin and end ahead of the skidmarks from the rear wheels. That would be obvious to the jury also. Defendant contends that this testimony impeaches the officer's testimony as to reliability on other matters. He does not point out wherein that occurs. Defendant testified, subsequent to the officer, that his car left skidmarks; that he examined them right after the accident; and that he agreed with the officer that the skidmarks were about 18 feet long. We see no prejudice to the defendant in the denial of admission of the exhibits.

Among the negligent acts or omissions alleged by defendant against the plaintiff is this: "She failed to slow, stop or turn said Buick automobile before it collided with the automobile of the defendant."

The trial court instructed the jury that defendant alleged plaintiff negligently failed to have her automobile under reasonable control. Defendant contends that no other instruction could be considered a suggestion of the allegation of failure to slow, stop, or turn. Defendant overlooks the next allegation of negligence recited in the instruction which was that plaintiff negligently failed "to decrease her speed so as to avoid collision * * *."

The defendant assigns error that the court failed to instruct on the allegation that plaintiff was negligent in "failing to stop or turn her automobile prior to the collision." If she failed to decrease her speed, she failed to stop. The only remaining allegation not mentioned was a failure to turn before the collision.

Obviously the plaintiff failed to turn before the collision. We find nothing in the evidence suggestive of negligence by failing to turn. We see no merit in this assignment.

Defendant's next assignment of error goes to the instruction on the measure of damages. The court instructed the jury that if it found for the plaintiff it should award her such amount as would reasonably

compensate her for the damages sustained as a proximate result of the accident. Damages for loss or impairment of future earning power was included in the items to be considered, so far as proven with reasonable certainty. The court did not instruct that damages for the loss of future earning power should be reduced to their present worth. No such an instruction was requested.

In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, we disapproved in part the holding in Chambers v. Chicago, B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338.

It is patent from a study of the above cases that our statement in the latter case as to the duty of the court to instruct as to the "proper basis" upon which damages were to be assessed referred to a duty of the court to instruct as to reducing the loss or impairment of the future earnings to their present worth.

Defendant relies on the holding in the Borcherding case and contends that the failure to instruct on the matter of present worth was error, although no request for such an instruction was made. Life expectancy tables were received in evidence.

The direct holding in the Chambers case was that the failure to give such an instruction when not requested was not prejudicial error. We disapproved that in the Borcherding case and held it was the duty of the court to so instruct. However, we reversed because of the failure of the court to provide any measure by which the jury could determine the damages.

We have re-examined our decisions in this matter.

In Sweat v. Hines, 107 Neb. 1, 184 N. W. 927, and Shean v. Hines, 107 Neb. 36, 184 N. W. 934, a like question was presented. These were federal employers' liability cases. In those cases the defendants tendered instructions on the duty of the jury to reduce the probable future earnings to their present worth. The court refused the instructions and gave none on the subject. We held

it to be error. We reversed, on the basis that the verdict was grossly excessive.

The matter came again before the court in Kepler v. Chicago, St. P., M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161. In that case there was no issue of loss of future earnings. There was an issue of future pain and suffering. The defendant requested an instruction on reducing the damages to their present worth, applicable to either element of damages. The instruction requested was not proper but the attention of the court was directed to the present worth matter. We affirmed. We think is just as essential that the value of future pain and suffering be reduced to its present worth as it is that the value of loss or impairment of future earnings be reduced to its present worth. There again we examined the verdict as against a charge that it was excessive. We stated the rule as follows: "In case the defendant does not tender an instruction proper to the evidence for a present-worth recovery of damages, the judgment will not be reversed because no such instruction was given, particularly if the damages claimed and proved are not for loss of future earnings, but only for suffering and loss of bodily function."

This brings us to the Chambers case. We there held: "An instruction on the measure of damages, as contemplated by the federal employers' liability act (45 U. S. C. A. secs. 51 et seq.), should include damage for future losses of earning power in the amount thereof reduced to its present worth, and where such language is omitted, and a specific instruction is not requested, an instruction, general in terms, does not contradict the rule finding the true measure of damages, but only lacks definiteness in anouncing the rule, and is not prejudicial."

The decision is cited in 154 A. L. R. 805 as sustaining the rule that relief on appeal will be denied where a proper request is not made for an instruction limiting recovery for loss of future benefits to present worth. See, also, Annotation, 77 A. L. R. 1459. In all, some 15

jurisdictions are cited as sustaining the rule.

If the court has given a proper general instruction relating to damages, the rule is: "Where an instruction does not prohibit or negative the computation of damages upon the basis of their present worth, it will not be assumed that the jury did not understand that they are to estimate the present value of future earnings lost." 25 C. J. S., Damages, § 185, p. 895.

We adhere to our holding in the Chambers case as applicable generally in cases of this kind. We withdraw our criticism of the Chambers case made in the Borcherding case.

Defendant assigns error in that the verdict is excessive and the result of passion and prejudice. Here he relies on a factual analysis of Dunn v. Safeway Cabs, Inc., 156 Neb. 554, 57 N. W. 2d 75. The factual situation here does not make that case a controlling precedent.

Here the verdict was for $8,000. The items of property damage, medical, hospital, and allied items were stipulated. The total of those items was $723.09.

The evidence was that plaintiff's earnings as a waitress totaled about $60 a week plus a part of her meals.

The accident happened August 17, 1955. Trial was had 8 months later. A calculation of loss of wages prior to the trial was about $1,900. The total of these two items was about $2,600. This leaves $5,400 of the verdict to cover past and future pain and suffering and impairment of future earning capacity. Plaintiff's evidence was that her life expectancy was about 18 or 19 years.

Immediately following the accident plaintiff had a severe bruised area of the left thigh, left hip, the left lower portion of the abdomen, the left side of the chest, the left forearm, and on the forehead. She was hospitalized for a period of 11 days and thereafter was able to care for herself in her room where she lived alone. She describes intermittent and sometimes continuing pain from her head to her lower left leg. About 30 days after the accident it was discovered that she had a fractured rib

on the left side. At the time of the trial she had apparently recovered except for two things. One was the subjective pain about which she testified. The other was a separation of the bones of the lower left arm at the wrist which prevented her from carrying dishes as a waitress because of weakness and pain there when the hand was palm upward. Her medical testimony was that this arm condition was permanent. Plaintiff's evidence was that her earning power after the accident was reduced by $24 a week, as we calculate it.

The applicable rules are: "'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. * * * The question of the amount of damage is one solely for the jury and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of injury and damage proved.'" Bresley v. O'Connor, 163 Neb. 565, 80 N. W. 2d 711.

We conclude that under the evidence that the verdict is not shown to be excessive under the above rules.

The judgment of the trial court is affirmed.

AFFIRMED.

WENKE, J., dissenting.

I disagree with that part of the majority opinion which holds the trial court was not in error when it failed to instruct the jury that damages for the loss of future earnings, if any, should be reduced to their present worth, no instruction to that effect having been requested by appellant-defendant. I would hold that its failure to do so was prejudicial error which requires a reversal and new trial.

Outside of Chambers v. Chicago, B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338, I do not think the Nebraska cases cited in the majority opinion support the result therein reached in this respect. In fact it seems to me

they support the rule announced in Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, which, on this question, overruled Chambers v. Chicago, B. & Q. R. R. Co., *supra.* In Borcherding v. Eklund, *supra,* we said: "A jury should be fully and fairly informed as to the various items of damages which it should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item." In Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, we clarified this by affirming what the trial court therein did in this respect, which was as follows: "The jury was advised by the court that any allowance made by it on account of impairment of the earning capacity of appellee should be the present value of the difference between the amount he would reasonably have been able and expected to earn if he had not been injured and the amount he is and will be able to earn because of his reduced capacity, if any, resulting from the injury he suffered."

In Sweat v. Hines, 107 Neb. 1, 184 N. W. 927, and Sheean v. Hines, 107 Neb. 36, 184 N. W. 934, cited in the majority opinion, it is true that such an instruction was requested but the rule therein announced is stated in Sheean v. Hines, *supra,* as follows: "As was held in the Sweat case, this is one of the class of cases (actions brought under the federal employers' liability act) in which, among other things, the proper measure of damages to be awarded for ascertained future earnings must be settled according to general principles of law administered by the federal courts. The supreme court of the United States seem to have definitely decided that in such cases the sum to be awarded for the anticipated earnings of a decedent must be the present worth only of such earnings; *that it is the duty of state courts to so direct the jury;* * * *." (Emphasis mine.) See, also, Culver v. Union P. R. R. Co., 112 Neb. 441, 199 N. W. 794.

As we said in Krepcik v. Interstate Transit Lines, 153

Neb. 98, 43 N. W. 2d 609: "It is the duty of the trial court, *without request,* to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. * * *." (Emphasis mine.) See, also, Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

In cases of this character this court has always held that damages resulting from the loss of future earnings or wages can only be recovered to the extent of their present value. Borcherding v. Eklund, *supra.*

"It is always the duty of the court to instruct the jury as to the proper basis upon which damages are to be estimated. The jury should be fully and fairly informed as to the various items or elements of damage which they should take into consideration in arriving at their verdict, otherwise the jury may be confused and misled." Kroeger v. Safranek, 161 Neb. 182, 72 N. W. 2d 831. See, also, Platte Valley Public Power & Irr. Dist. v. Armstrong, *supra;* Nelson v. Wiepen, 154 Neb. 458, 48 N. W. 2d 387. As stated in Nelson v. Wiepen, *supra:* "Where the issue is duly raised, the trial court may and should advise the jury that it may award damages for impaired earning capacity by an instruction in proper form and clearly stating applicable rules."

I think the majority opinion, in view of these principles, creates an exception to the absolute duty of the trial court, without request, to instruct the jury on each issue presented by the pleadings which finds support in the evidence. I see no reason for doing so on this issue and think the majority is wrong in doing so.

As to similar holdings in other jurisdictions see Article III b 1 of the annotation on the "Duty to instruct, and effect of failure to instruct, jury as to reduction to present worth of damages for future loss on account of death or personal injury," found in 77 A. L. R. at page 1453 and in 154 A. L. R. at page 803. See, also, 25 C. J. S., Damages, § 185 e (2), p. 895.

I think, where there is evidence adduced sufficient

to submit the question of a recovery for the loss of future earnings or wages, if any, to a jury, it is reversible error for the trial court to fail to properly inform the jury that if it allows any recovery therefor it can only be allowed to the extent of the present value thereof.

While it is, in my opinion, merely dicta there is another statement in the opinion that I believe is erroneous. Therein it is stated that: "We think it just as essential that the value of future pain and suffering be reduced to its present worth as it is that the value of loss or impairment of future earnings be reduced to its present worth." I do not think the case of Kepler v. Chicago, St. P., M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161, is any authority for this statement.

As to the recovery for future pain and suffering, we said in Crecelius v. Gamble-Skogmo, Inc., 144 Neb. 394, 13 N. W. 2d 627, that: "'* * * The only future pain and suffering which the jury is entitled to consider is such as the evidence shows with reasonable certainty he will experience.' (Burkamp v. Roberts Sanitary Dairy, 117 Neb. 60, 219 N. W. 805.)" See, also, Jacobsen v. Poland, *supra.*

In Culver v. Union P. R. R. Co., *supra,* we said: "Damages for pain and suffering are not to be awarded as upon the basis of present worth based upon the life expectancy of the plaintiff, but as a gross sum presently payable." See, also, Chicago & N. W. Ry. Co. v. Candler, 283 F. 881, 28 A. L. R. 1174.

BOSLAUGH, J., joins in this dissent.

BERTHA ESCHENBRENNER, APPELLANT, V. EMPLOYERS MUTUAL CASUALTY COMPANY, A CORPORATION, ET AL., APPELLEES.

84 N. W. 2d 169

Filed July 5, 1957. No. 34161.

1. **Workmen's Compensation: Appeal and Error.** In a workmen's

compensation case an appeal to this court is considered and determined de novo upon the record.

2. **Workmen's Compensation.** 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 that a recovery may be had in an action under the Workmen's Compensation Act it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death.
4. ———. In order to recover, the burden is on the claimant to prove the foregoing by a preponderance of the evidence.
5. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.
6. ———. Mere exertion, which is not greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability or results in death, it does not constitute a compensable accidental injury.
7. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. This rule does not permit a court to award compensation where the requisite proof is lacking.

APPEAL from the district court for Dawes County: EARL L. MEYER, JUDGE. *Affirmed.*

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

Holtorf & Hansen, W. H. Snyder, and *Joseph H. McGroarty,* for appellees.

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

MESSMORE, J.

This is an action brought by Bertha Eschenbrenner, the widow of Charles W. Eschenbrenner, deceased, a police officer of the city of Crawford, plaintiff, against the Employers Mutual Casualty Company, a corporation, and the City of Crawford, defendants, under the Nebraska workmen's compensation law. The case was tried

before a judge of the Nebraska Workmen's Compensation Court resulting in the dismissal of the plaintiff's claim. A rehearing before the Nebraska Workmen's Compensation Court was waived and the plaintiff appealed directly to the district court. The cause was tried before the district court for Dawes County. The trial court dismissed the plaintiff's petition, thus denying her claim for compensation. From the judgment of the district court, the plaintiff appealed.

The plaintiff in her petition alleged that she is the widow of Charles W. Eschenbrenner, deceased, and was wholly dependent upon his earnings for support; that on or about August 22, 1955, her husband was employed by the city of Crawford as a police officer at an average weekly wage of more than $45; and that while so engaged in his employment, he sustained personal injuries arising out of and in the course of his employment resulting in his death on August 22, 1955. The petition also alleged notice and claim of compensation, and the amount of burial expense; and that the defendant insurance company issued an insurance policy, the premium being paid by the city of Crawford, wherein it agreed to pay, on behalf of the city, compensation in the event a peace officer employed by the city should sustain injuries by virtue of an accident arising out of and in the course of his employment, including death as a result of such accident, and other benefits payable under the workmen's compensation law had the insured employee and the city been subject to such law.

The defendants' answer denied that the death of Charles W. Eschenbrenner was caused by an accident arising out of and in the course of his employment, and prayed for a dismissal of the plaintiff's petition.

For convenience we will refer to Bertha Eschenbrenner as the plaintiff; to Charles W. Eschenbrenner as Mr. Eschenbrenner or Chalky, a nickname by which he was known; to the city of Crawford as the city; to the witness Jake Himmer as the night police officer or

Himmer; to Victor Hansen, a member of the State Safety Patrol, as the patrolman; and to the sheriff and deputy sheriff of the county as sheriff and deputy sheriff.

The plaintiff testified that she had resided in the city about 48 years; was the widow of Charles W. Eschenbrenner, commonly known as Chalky; and that her husband was employed by the city as chief of police for about 23 years. Immediately before his death, which occurred on August 22, 1955, he was 62 years of age. She knew he had suffered from a heart ailment for 2, 3, or 4 years prior to his death, and was under treatment for this condition. His appearance did not change in any way from the time he suffered with this trouble, nor did this ailment affect his daily life. He lost no time from work on account of such ailment. Crawford is a city of about 1,800 population. On August 22, 1955, Chalky left home after his usual breakfast, dressed in his uniform. About 10:30 a. m., she learned that there had been some excitement in the city, but she did not hear that Chalky had collapsed until she went to the hospital about 11:45 a. m. When she arrived at the hospital Chalky was in a very excitable condition. He was on the bed with his clothes on. He was raving and talking, trying to tell the doctor what had happened and of his difficulty in endeavoring to save the children of Lane who had become mentally deranged. About that time an oxygen tent was placed over him. His clothing emitted an odor that was quite strong. He died about 2½ hours after being admitted to the hospital. On cross-examination she testified that Chalky took medicine every day at home, but never complained about a pain in his chest, or anything at all.

Lorraine Haas, a daughter of the Eschenbrenners, testified that she lived in the country, and came to the city the morning of August 22, 1955, about 9 a. m. While at the Hagemeister place, across the street from where her father collapsed, she was informed of what was going on and the trouble in which her father was in-

volved. She ran across the street to where her father was standing by the Morrison lumberyard. There was a small building, which is called a little house and will hereafter be referred to as the house, 6 or 7 feet east of the lumberyard. When she first saw her father he was preparing to go up the street to the office of the police judge to obtain a warrant. She talked to him. There were other people there, including the patrolman and the city attorney. She inquired of her father as to what was going on, and he told her that Lane "just held a machine gun in my belly" and told him to get out or he would kill him, so he left. Lane also said he would kill the little children he had with him (Lane's little daughters) if anyone came near. She told her father to be careful. Chalky then went toward the office of the police judge, a short distance east on the same side of the street where they were standing. She went over to an implement shop to find her husband and inform him of what was taking place. She then went back to the Morrison lumberyard and went into the office building. There were windows on the east side of the office building where she could observe a part of what was taking place. This was about 11:30 a. m. As she was looking out the window she saw her father come back from the office of the police judge. He was walking quite rapidly. He was carrying a "sap" in his pants pocket. The patrolman came up. Her father took the "sap" out of his pocket and broke the window in the little house, and the patrolman shot gas into the house. After that the children were brought from the house. Lane's wife was in the lumberyard office and this witness helped her quiet the children. Someone came in and told her that her father had collapsed. She immediately went to his assistance. When she arrived at his side he was "wringing wet" with perspiration and in a weakened condition. She talked to him and he told her he would be all right, that the gas made him sick. He smelled strongly of gas which had a sickening smell. She re-

mained with her father until the doctor came. She went to the hospital, saw her father, and observed the same smell emitting from his clothing. It made her "deathly sick," caused her to vomit, and lie on the floor.

Victor Haas, the son-in-law of the Eschenbrenners, testified that he had known Chalky since 1934, and that he was married in 1940. From that time on he saw Chalky nearly every day, and he noticed no difference in Chalky's appearance after learning that he had heart trouble. Such trouble never kept him from performing his duties. After his wife told him about what was happening the day of the trouble, he immediately went to the Morrison lumberyard which faces north. Six or 7 feet east of the lumberyard there was a little house which also faced north. This house was 19 or 20 feet from east to west and approximately 30 feet from north to south. This house was close to the sidewalk, and did not have a yard. The front door was of heavy oak and about in the center of the north side of the house. There was a window on the west side of the house. Looking through the window in the lumberyard, a person could see the window in the west side of the house. There was a step at the front door of the house which was 6 or 7 inches high and from 20 to 24 inches deep. There was also a door on the south side of the house. There was a basement window to the east and rear of the house. He arrived at the scene about 9:30 a.m. Chalky was there, and at that time was coming out of the door of the lumberyard office. Chalky said Lane had "gone off his rocker" and had two children and was going to kill them, or threatened to do so. Chalky then told this witness about Lane sticking a gun in his "belly" and telling him to get out and stop interfering. He further testified that Chalky was excited and looked worried; that he was worried about the children; and that his actions were quicker than normal. After Chalky told him what had happened, he stepped back. Chalky then went toward the south, and before he got

to the back of the house the patrolman came and he and Chalky had a conversation. They went around the house and talked to the night police officer. Chalky at that time was in command, had the officers staked out in certain positions, and was shifting from one place to another. Chalky was "hollering" loud to Lane to let the children out. The officers were planning at all times how they might get the children out. He then recited the manner in which the window was broken and the tear gas shot into the house. Immediately after this occasion, Chalky went to the back of the house where another discussion was held, and Chalky came back to the north side of the house. There were some muffled sounds coming from the house which sounded like a gun. This witness and Chalky went back to the south part of the house. Lane had shot out through the basement window. Chalky, the patrolman, and the night police officer talked the matter over and concluded from the shots they had heard that Lane was in the basement of the house. About 20 minutes after that, Chalky came around to the front of the house, used his left foot, and kicked the front door about the height of the doorknob five or six times. The last time he did so, he lost his balance and was about to fall, but regained his balance. This witness then walked up and kicked the door in. After he did so, he dropped back 15 or 18 feet behind Chalky because of the gas which was bothering him. Chalky stood at the door about 2 minutes, looking around, then stepped back. The sheriff was there, and they talked. Chalky again went to the back of the house and this witness followed him. The night police officer was at the back of the house, and while they were there the night police officer went to the back door of the house and went in. Before he did so, there had been some shooting; about 7 shots came out of the back door. The bullet holes were at the bottom of the door. A little later Chalky went up to the back door, stood just around the corner

of the door that went to the basement, and told the night police officer to come out, that Lane might shoot up through the floor. While the night police officer was in the house, Chalky stuck his head in the door, but not for long. He stayed in that vicinity 2, 3, or 4 minutes, calling to Lane to come out and let the children out. Lane yelled out that if they used any more tear gas he was going to kill the children. Lane came out of the house carrying a baby girl in one arm, and he had a rifle, a pistol on his side, and a knife in a scabbard attached to a makeshift belt. As Lane came out, Chalky went to the east side of the back door and drew his gun. The patrolman, the deputy sheriff, and the night police officer were there. Chalky took the pistol from Lane. At that time Chalky was pale and a "little wobbly." He walked back to a tin shed which was in close proximity to the lumberyard and leaned against the shed. Chalky started to vomit, and did so twice. This witness went over to Chalky. The patrolman was also there and endeavored to get Chalky to let him take him to the city hall. Chalky refused, saying he would be all right. He started to slump down, and was held up by this witness and Chalky's son who was there. He was carried to the alley where he was when the doctor arrived.

The night police officer testified that after Chalky's death he became chief of police. He detailed the duties of the chief of police as follows: He patrols the streets and the alleys in a car or on foot; takes care of the dump; makes arrests of drunks or peddlers; and performs other duties which are not of an unusual nature. He further testified that during the last several years of Chalky's life he saw him daily, and he always appeared normal, attended to his duties, helped to keep the streets clean, and on occasions would take a shovel and shovel snow or help the men generally in addition to supervising their work. On August 22, 1955, this witness arrived at the scene of the trouble about 8:10

or 8:30 a. m. He was with or near Chalky at all times, except when he went home to get a gas gun. He further testified that Chalky gave the orders to him and to the others connected with the work; that when Chalky was loafing he moved slowly, but if something happened that required his attention, even at a distance, he moved rapidly; that was the manner in which he was moving that particular morning, walking very rapidly, moving from place to place and talking with the other officers about matters connected with the job; and that Chalky yelled and talked loudly to Lane before and after the window had been broken and the tear gas shot into the house. This witness talked to Lane's wife with reference to the manner in which they might be able to get to Lane. She described the basement window which might be raised. This witness attempted to do so at the time the tear gas was shot through the window, and Lane shot through this basement window seven times. Shortly after that, this witness entered the house. Chalky was still trying to get Lane to come out and give himself up. Lane yelled that he would shoot the children if any more gas was shot into the house, or if the gas got to him. After this witness entered the house the gas was quite strong. It choked him and made his eyes water. He was wanting Lane to come out with the children, and pleaded with him to let the children come out. Lane wanted to know what would happen if he did come out, and he was assured that nothing would happen if he sent the children up. Chalky was still at the back door. One of the little girls came up. He got hold of her and took her out the front of the house. After that this witness went to the rear of the house where they had Lane. Lane started to swear at Chalky and this witness took Lane away, after he was disarmed. He further testified that it was an extremely hot day; that he went back to the house every day for a week;

and that it took that length of time to get the gas out of the house.

On cross-examination this witness testified that when he arrived at the scene of the trouble Chalky was at the northwest corner of the lumberyard office, and eventually the sheriff and the patrolman came. Chalky took this witness into the lumberyard office, told him where to sit to watch the back door of the house, and said that he would watch the front door. It was agreed between the officers who were there that the patrolman should go after the tear gas. This witness watched the back door continuously until the patrolman returned. He further testified that there was not much activity until the patrolman brought the tear gas back. He heard Chalky yell at Lane, endeavoring to get Lane to surrender and send the children out. He further testified that he had seen Chalky arrest a number of drunks, and that he handled the arrests without much difficulty; that Chalky could get tough if he wanted to; that when Chalky started to jail with a man he went to jail whether he wanted to or not; that at times this involved a great deal of physical exercise; that he had seen Chalky disarm people carrying guns, shake them down, and apprehend them, not knowing whether they had guns or not; and that Chalky arrested persons for other offenses, meaning the general run of violations, and had dealt with suspicious characters and strangers at times who were required to be shaken down.

The patrolman testified that on the morning in question he happened to go through Crawford and met Chalky in front of the lumberyard. Chalky related the details about Lane sticking a gun in his stomach and Lane saying to Chalky: "Chalky, I like you, and you are a good man, but you turn around and get out." Chalky said he would if Lane would let him take the children out, but Lane refused. This witness testified that while he was around, he left matters up to Chalky.

He and Chalky contacted Lane's wife, who was in the lumberyard office, as to the best method to get in contact with Lane, because they wanted to use tear gas. She explained that there was a telephone next to the window on the west side of the house. Lane had been called by Chalky on the telephone with reference to this matter. They called Lane over the telephone, believing that he might be in that area of the house. This idea was unavailing. When this witness first saw Chalky he seemed natural. However, as the day went on, Chalky became a little more nervous, did a little more running around, and moved rather fast, but he always moved fast when he had something to do. He further testified that they went out along the side of the house, Chalky on the south side of the window. Chalky broke the screen, unhooked it from the inside, took out his "sap," and broke the window. He called to Lane a number of times. Chalky then jerked the shade from the window, and this witness stuck the gun into the window and let the tear gas go. It was tear gas known as "CN." After that they went to the lumberyard, then to the back of the house. This witness was near the back door of the house at all times, thinking Lane would come out that way. Chalky was at the door near the corner of the house, calling to Lane to come out or send the children out. Lane sent the little girl up, and later Lane came up armed as testified to by a previous witness. This witness shook Lane down, and as he looked up, Chalky was starting to weave a bit. This witness told Chalky to get back out of the line of the door and get away from the gas. Chalky said that he was all right, to leave him alone. Chalky had the appearance of a person about to faint. The patrolman went back to his work, and the next time this witness looked up Chalky was back toward the shed and some of the men were with him.

On cross-examination the patrolman testified that he arrived at the scene of the trouble about 8:45 a. m.;

that he left about 9:35 a. m., to go to Scottsbluff to get the tear gas; and that he returned at 11:15 or 11:30 a. m. He was gone approximately 2 hours.

The testimony of other witnesses with reference to the crowd and the fact that Chalky was hurrying back and forth and yelling at Lane endeavoring to get the children out and Lane to surrender for the most part is corroborative of the testimony of the officers.

Dr. Bishop, the family doctor of Mr. Eschenbrenner who prescribed for him and was in attendance upon his death, and Dr. Clarke, a physician and surgeon, testified for the plaintiff. Dr. Brown, a pathologist, testified for the defendants. The testimony of the foregoing doctors is long and involved and in disagreement on certain points. It would serve no useful purpose to detail their evidence, except to give their opinions, taking into consideration all the facts and circumstances shown by hypothetical questions or, as in Dr. Clarke's testimony, based upon what he heard from the witnesses, he having been present in court at all times when the testimony of the activities of the deceased were related.

Dr. Bishop testified that he had known the deceased since 1949. In November 1951, he treated the deceased. His original diagnosis was not that there was a heart attack, but a coronary sclerosis. The deceased had an old occlusion or thrombus in the left coronary artery which was partially organized and had been recanalized so that there was an attempt of some blood supply going through it again. He further testified that he rechecked the deceased in 1952. At that time he had arteriosclerosis and was given medicine to dilate the coronary blood vessels. The deceased took medicine until the time of his death. When the doctor rechecked the deceased, he found his condition to be about the same. The pain was less severe and permitted him to carry on his duties more comfortably. While there is apparently some doubt as to the dates in the record, whether he first treated the deceased in 1952 and re-

checked his condition in 1953, this fact is of no material importance. This witness saw the deceased going about his business almost daily, and observed no material change in his physical condition from that time until the date of his death. On the date of his death, this witness received a call about noon. He found the deceased in the alley behind a building. He described his condition at that time as being in a "cold type of sweat." He had an ashen gray color, was pale, complained of chest pain, and was apprehensive. His pulse was lower than usual, but he was not in shock. His blood pressure was 110 to 120. He had difficulty in breathing. At the hospital he was placed in an oxygen tent. In a few minutes time his blood pressure dropped down until he finally had none at all. He was given drugs to try and elevate the pressure above the shock level, which did not work, and the pressure never did come back. This witness diagnosed the cause of death as an acute myocardial infarction, which is explained as an area of the heart cut off from blood supply to the heart muscles due to the clot in the heart blood vessels and the coronary blood vessels. It was his opinion that the activity which the deceased had gone through helped to bring on the heart attack in a matter of minutes. A hypothetical question containing the evidence with reference to the occurrences, and including his treatment and knowledge of the deceased, was propounded to this witness. He gave his opinion, in answer to such question, that the overwork and the strain the deceased was under definitely precipitated the heart attack which caused his death.

Dr. Clarke gave as his opinion, assuming the truth of all the facts testified to by all of the witnesses and including the facts testified to by Dr. Bishop but not his conclusions, that the deceased died of a coronary thrombosis which was induced by emotional and physical strain beyond the ordinary, and possibly induced or made worse by inhalation of tear gas. He was in ac-

cord with the treatment given the deceased by Dr. Bishop. He admitted that, because of the very advanced diseased condition of the heart, the deceased could have suffered a fatal attack at any time and under any conditions. He would not concede that it would require quite a little exercise to precipitate this fatal attack.

Referring again to the testimony of Dr. Bishop, he related the facts with reference to the deceased's arteries, testifying that the arteries were badly diseased, and that the occlusion in the right coronary which caused the death was, in his opinion, "massive." The right coronary artery was very small. The narrowness of this artery was due to plaques, diseased conditions, rigidity, and calcification which disclosed a very advanced coronary sclerotic condition. The condition of the arteries was such that one could expect a thrombus or clot, or occlusion to form at any time. This testimony on this point is not disputed by Dr. Clarke.

Dr. Clarke testified further that considering the advanced coronary sclerosis and advanced diseases, and the fact that he had an old mural thrombus, plaques, and calcification, this thrombus could have occurred and formed while he was at rest at home.

Dr. Brown, the pathologist, testified in behalf of the defendants. He testified that it is the function of a pathologist to determine the nature of diseases. The purpose of a post mortem is to enable the physician to evaluate the disease processes with reference to the cause of death. He performed the post mortem on Mr. Eschenbrenner. The autopsy disclosed the following condition of the heart: The pertinent findings consisted of a very advanced sclerosis in the coronary vessels, in which there was an old occlusion of the anterior descending branch of the left coronary, and a recent occlusion of the right coronary. In addition to that there was advanced heart sclerosis in the coronary system in general with calcification of the wall, and scattered through the myocardium were occasional old scars from previous infarc-

tions. There was no evidence that was visible to the naked eye that resembled a recent infarct. The occlusion which caused the death was that described in the right coronary which was occupied by the recent thrombus.

In answer to a hypothetical question detailing the evidence and activities of the deceased on the day in question, Dr. Brown gave as his opinion that the physical activity and the emotional stress of the deceased had no part in causing the coronary thrombus; that the deceased could have had a coronary occlusion which would have been fatal at any time under any circumstances and under any conditions; that his heart was in such condition that he could have expected death at any time, regardless of any activity or excitement; and that the coronary vessels of the deceased were at the end of their usefulness.

With reference to the tear gas, the witness testified that it is an irritant, and there is no poison constituting a part of its ingredients. He found no evidence of irritation in the lungs. His opinion was that the death resulted from coronary occlusion, and not from the effects of the gas.

On cross-examination he stated that the activities in which the deceased was involved could have aggravated his condition, but due to the critical condition of his heart any activity could have aggravated it because the deceased had no cardiac reserve.

The plaintiff assigns as error the finding of the trial court that the evidence adduced by the plaintiff was insufficient to entitle her to the benefits of the Nebraska Workmen's Compensation Act; that the trial court erred in failing to find that Mr. Eschenbrenner died as the result of injuries sustained in an accident within the meaning of the Nebraska Workmen's Compensation Act; and that the findings of the trial court were contrary to the evidence and to the law.

In a workmen's compensation case an appeal to this

court is considered and determined de novo upon the record. Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394.

The word "accident" 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. See, § 48-151, R. R. S. 1943; Roccaforte v. State Furniture Co., 142 Neb. 768, 7 N. W. 2d 656; Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379.

In order that a recovery may be had in an action under the workmen's compensation law it must be proved that an accident occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death. Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658; Hassmann v. City of Bloomfield, 146 Neb. 608, 20 N. W. 2d 592; Anderson v. Cowger, *supra.*

In order to recover, the burden is on the claimant to prove the foregoing by a preponderance of the evidence. Ruderman v. Forman Bros., *supra;* Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1.

An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. Feagins v. Carver, *supra.*

The foregoing authorities are applicable to the instant case. In connection therewith, the question arises: Did Mr. Eschenbrenner, as an employee of the city of Crawford in the capacity of chief of police, suffer an accident within the meaning of the Workmen's Compensation Act and, if so, did death result from the accident?

We make reference to the evidence heretofore set out. Without too much repetition we summarize some of the evidence as to exertion and emotional stress placed upon Mr. Eschenbrenner to determine whether or not it was

in excess of that required of him in carrying out his duties as chief of police on August 22, 1955. It appears that Lane was apparently insane and had secluded himself in his home. The chief of police entered Lane's home and endeavored to persuade Lane to let him take the children out. Lane pressed a pistol to the officer's stomach and told him he liked him, that he was a good man, that he did not want to hurt him, and asked him to leave, which Eschenbrenner did. Almost immediately thereafter the officer apparently decided to file a complaint against Lane and obtain a warrant for his arrest. There is nothing in the evidence to show that the officer was excited at that time, or that he had undergone any unnecessary exertion except that within the lines of his duties as chief of police. That was the type of job he had. On occasion emotional stress and strain and physical exertion are involved in such a job. By the time this officer returned from the office of the police judge there were capable law enforcement officers at the scene of the trouble, including Himmer, the night police officer, the sheriff of the county, his deputy, a safety patrolman, and the city attorney. These officers were staked out at vantage points to watch the doors of the Lane home. Many conferences were held by them. Finally it was decided by the officers that the best method of apprehending Lane would be the use of tear gas. The patrolman left about 9:35 a.m., to go to Scottsbluff to procure the gas. He was gone approximately 2 hours. During the interim, about the only activity that was carried on was yelling or talking to Lane and by the use of the telephone in an endeavor to persuade him to give himself up and to let the children come out, which he refused to do. All of the officers, during all of the time that these events were taking place, were exposed to the same hazards as the chief of police and to the same amount of physical exertion, all of which were incidents of their employment. While admiration should be extended to this efficient officer, we find nothing in the

evidence to disclose that he was performing any duties other than those which he would ordinarily be obligated to perform as chief of police of the city of Crawford.

We have held repeatedly that mere exertion, which is not 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. See, Foster v. Atlas Lumber Co., 155 Neb. 129, 50 N. W. 2d 637; Hamilton v. Huebner, *supra;* Gilkeson v. Northern Gas Engineering Co., 127 Neb. 124, 254 N. W. 714; Anderson v. Cowger, *supra;* Feagins v. Carver, *supra.*

The plaintiff cites decisions from other jurisdictions. In referring to the decisions of other jurisdictions it must be borne in mind that the compensation laws of the various states differ widely in many essential respects. The diversity of public policy demonstrated by the differences in the various laws must be considered before decisions of other jurisdictions can be accepted as controlling precedents. See Bekelski v. Neal Co., 141 Neb. 657, 4 N. W. 2d 741.

The case of Brown v. City of Omaha, 141 Neb. 587, 4 N. W. 2d 564, which is in point with the case at bar, was a proceeding under the Workmen's Compensation Act involving a fireman fighting a fire. The city objected to the allowance of the claim on the ground that the disability of the plaintiff was due to a preexisting heart disease and not to a compensable accidental injury which arose out of and in the course of his employment as the evidence showed that the plaintiff suffered from previous chronic arthritis and heart disease. Counsel for the city argued that physical exertion and exposure to smoke and fumes, ordinarily incidental to the work of a city fireman in fighting a fire, even when combined with a preexisting heart disease producing coronary thrombosis at a later date, did not constitute an accidental injury compensable under the Workmen's

Compensation Act. Other firemen worked alongside of this fireman, did practically the same duties, were caused to vomit, and suffered as much as the claimant. This court held, in line with cases previously cited, that mere exertion, which is not greater than that ordinarily incident to the employment, which combined with pre-existing disease produces disability, does not constitute a compensable accidental injury.

The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim. This rule does not permit a court to award compensation where the requisite proof is lacking. See Hamilton v. Huebner, *supra*.

We conclude, in the light of the authorities heretofore set forth and the facts shown in the record, that the trial court did not err as contended for by the plaintiff.

The judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

CARTER, J. participating on briefs.

BILLIE B. SVOBODA ET AL., APPELLEES, V. RALPH O. DEWALD, APPELLANT.

84 N. W. 2d 211

Filed July 5, 1957. No. 34178.

1. **Frauds, Statute of.** A contract between an owner of real estate and an agent or broker authorized to sell the same is not binding upon the parties under section 36-107, R. R. S. 1943, unless the contract is in writing and signed by both parties, and contains the description of the lands to be sold and the amount of compensation to be paid.
2. ———. Where a copy of a purchase agreement is relied upon to meet the requirements of section 36-107, R. R. S. 1943, the signatures thereon being carbon tracings of the signatures on the original purchase agreement which did not contain all the elements necessary to a valid agreement, it must be shown that the parties had knowledge that the necessary elements of

a valid agreement were contained in the copy when it was signed by the carbon tracing and thus executed, and that it was so signed with the intention of making a valid contract.

3. ———. Whether or not a defendant knew that he was executing an agreement meeting the requirements of section 36-107, R. R. S. 1943, when he attached his signature to an original purchase agreement, the written agreement sued on being contained in the carbon copies thereof, presents a question for a jury where the evidence is in conflict.

4. **Trial: Appeal and Error.** When the court adequately instructs upon an issue presented by the pleadings or evidence it is not error to refuse to give a tendered instruction covering the same subject matter.

APPEAL from the district court for Thayer County: STANLEY BARTOS, JUDGE. *Affirmed.*

W. O. Baldwin and *Healey, Davies, Wilson & Barlow,* for appellant.

Robert B. Waring and *John C. Gewacke,* for appellees.

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

CARTER, J.

This is an action to recover a commission for the sale of real estate. The jury returned a verdict for $4,450.97. The defendant has appealed from the judgment rendered thereon.

The plaintiffs are copartners engaged in the business of selling real estate at auction. The plaintiff Billie B. Svoboda is also a licensed real estate broker. The defendant was the owner of a quarter section of land in Jefferson County. On or about May 1, 1952, defendant entered into an oral agreement with Billie B. Svoboda by which plaintiffs were to advertise and conduct the sale of the land at public auction. Plaintiffs were to pay all the expenses. Plaintiffs allege that the agreement was that if the land did not sell for $20,000, plaintiffs were to receive no compensation. If the land sold for more than $20,000 plaintiffs were to receive 2 percent

of $20,000 and any amount in excess of $20,000. The land was sold at public auction for $23,150 and plaintiffs claim a commission of $3,550.

A demurrer was filed to the petition on the ground that no cause of action was stated because of noncompliance with the statute of frauds. The trial court sustained the demurrer and, upon failure of plaintiffs to further plead, the action was dismissed. An appeal was taken to this court and the judgment of the district court was reversed and the cause remanded for a new trial. Svoboda v. De Wald, 159 Neb. 594, 68 N. W. 2d 178. The effect of the holding of this court was that the petition stated a cause of action. The defendant filed his answer in the district court denying that the alleged agreement had been made and denying further that any contract in writing had been entered into as required by the statute of frauds. It was upon these issues that the case was submitted to a jury.

The evidence of Billie B. Svoboda is as follows: Before the sale was held he procured a uniform sale agreement consisting of the original form on white paper and two copies, one on pink paper designated as a duplicate copy and the other on yellow paper designated as a triplicate copy. He caused the description of the land and some of the customary terms of sale to be typed thereon, using carbor paper on the duplicate and triplicate copies. After the sale was held, the name of the purchaser was inserted, the amount and terms of payment were written in, certain corrections made, and the signatures of the seller, purchaser, and the real estate agent were attached thereto. The duplicate and triplicate copies were caused to show all of the foregoing, including the signatures thereto, by the use of carbon paper inserted between such original and the copies. The foregoing facts are not in dispute.

The record shows that the amount of the commission was not inserted in the original uniform purchase agreement. This was not done for the reason that it is not

customary to thus advise the purchaser of the amount of the commission being paid. The plaintiff, Billie B. Svoboda, testified that he inserted the amount of the commission in the duplicate and triplicate copies and that he specifically pointed out such amount to the seller before he signed the original copies. This is denied by the seller. This raised a question of fact for the jury which it resolved in favor of the plaintiffs. Under the holding of this court in the former appeal, Svoboda v. De Wald, *supra*, the contract met the requirements of the statute of frauds and it was binding upon the defendant if he signed it with knowledge of its contents and intended it as a binding agreement. The jury found from the evidence that defendant signed the uniform purchase agreement with knowledge that the amount of the commission was inserted in the duplicate and triplicate copies. It is the function of the jury to resolve conflicts in the evidence. It performed this function and though the evidence was in direct conflict, it is sufficient to sustain the jury's finding.

It is clear that the original uniform purchase agreement contained no contract in writing fixing the commission to be paid the plaintiffs. No one contends that it does. The plaintiffs contend that the duplicate and triplicate copies of the purchase agreement contain the written agreement meeting the requirements of the statute of frauds governing the compensation of a real estate agent or broker for selling lands. § 36-107, R. R. S. 1943.

It is the position of the defendant that the trial court erred in refusing to give defendant's requested instruction No. 1 in dealing with the issue presented. The requested instruction was as follows: "The jury is instructed that with reference to the alleged written contract the burden is upon the plaintiffs to prove, by a preponderance of the evidence, that at the time the defendant signed such contract the figure of $3,550 had been inserted and that the defendant knew that the

figure of commission in the amount of $3,550 had been inserted in the alleged contract by the plaintiffs, and that the defendant thereupon executed the same. Unless such facts are proved, by a preponderance of the evidence, or if the evidence on such issue is evenly balanced, then your verdict should be for the defendant." The tendered instruction is a correct statement of the law applicable to the evidence in the case. The question for us to determine is whether or not the trial court adequately covered the substance of the instruction in the instructions given to the jury.

The issues as shown by the pleadings were fully set forth in the court's instruction No. 1. By instruction No. 2, the trial court instructed the jury upon the facts which the plaintiffs were required to prove by a preponderance of the evidence in order to recover, including an agreement in writing by the plaintiffs and defendant by which the latter agreed to pay a commission of $3,550. By instruction No. 5, the court instructed the jury in part as follows: "A contract or agreement entered into by the owner of real estate and the broker or agent selling the same, in order to be binding on the parties thereto, must contain the following essential elements, to-wit: (1) That the contract or agreement between the land owner and the agent or broker must be in writing. (2) The contract or agreement between the real estate owner and the agent or broker must be signed by both of them. (3) The said contract or agreement must describe the real estate owned by the owner which is to be sold by the agent or broker. (4) The said contract or agreement must set forth the compensation to be allowed by the owner to the agent or broker, if the real estate is sold by the agent or broker." The court then told the jury that elements (1), (2), and (3) were conclusively established and with reference to element (4) the court further instructed the jury in part as follows: "The only issues for you to determine from the evidence are: (1) Whether or not the signa-

tures of the owner of the real estate and the agent or broker were placed thereon by them and each of them with the intent and knowledge to be bound thereby. (2) That the amount of compensation, to-wit: $3,550 was agreed upon by them. If you find, by a preponderance or greater weight of the evidence, that the owner of the real estate and the plaintiffs, as agents or brokers, have each placed their signature on the instrument with the intent and knowledge to be bound by the terms thereof at the time the signatures were affixed thereto, and agreed upon the amount of the compensation or commission, then your verdict should be for the plaintiffs. * * *."

The cited portions of the court's instructions advised the jury that the contract under consideration was that between the defendant as owner of the real estate and the plaintiffs as agents or brokers. The jury was told that such contract must be in writing and must set forth the amount of compensation to be paid to the plaintiffs. The court then told the jury that if the signatures were placed on the written agreement with the intent and knowledge to be bound thereby and that the amount of compensation was agreed upon, the verdict should be for the plaintiffs.

We think the instructions considered as a whole adequately informed the jury that it must find, if plaintiffs were to recover, that the agreement must be in writing and contain, among other things, the amount of the compensation to be paid at the time the written agreement was signed and that both parties knew that the amount of compensation was therein stated when they signed it.

The jury could not have been misled by the wording of the instructions. It knew that the contract referred to was that between the owner of the lands sold and the agent or broker. The necessary elements to be contained in that contract were set out and from them the jury knew that the amount of compensation was required

to be stated in the written agreement at the time it was signed. The jury was further told that the written contract must have been signed with the intent and knowledge to be bound by it, and since the jury had already been instructed that the amount of compensation had to be stated in the written agreement, we cannot say that it was in any way misled by the form of the instructions or the language used therein. It is a firmly established rule that error may not be predicated upon the refusal to give a tendered instruction where the court has covered the substance of the one tendered by other instructions. Bailey v. Spindler, 161 Neb. 563, 74 N. W. 2d 344; Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677. We think the instructions considered as a whole fully and fairly submitted the issues to the jury.

The evidence of the plaintiffs is that the defendant in signing the original agreement intended to bind himself to pay the compensation stated on the duplicate and triplicate copies. This is denied by the defendant. Defendant contends that since the jury was required to determine if the amount of compensation was contained in the agreement at the time it was signed by resolving conflicting parol evidence, it fails to meet the requirements of section 36-107, R. R. S. 1943. We do not concur with this view. If there had been but one copy of the agreement between the parties, a defense that a part was inserted after the signing would present a jury question where the evidence thereon is in conflict. In the instant case the original uniform purchase agreement was executed and delivered to the purchaser of the land. The purchaser had no interest in the amount of compensation being paid to the agent or broker. In fact, it is a matter that the landowner and his agent or broker usually do not care to reveal to the purchaser. Since the original uniform purchase agreement is delivered to the purchaser, it does not appear illogical for the written agreement between the landowner and the agent or broker to appear on the duplicate and triplicate copies

which are retained by these parties. Since the agreement between the landowner and the agent or broker is wholly contained in the duplicate and triplicate copies, the latter have no relation to the original insofar as the agreement of the owner and the agent or broker is concerned. If, under such circumstances, it be established that a written agreement meeting the requirements of the statute has been executed on a copy, it is the copy containing such purported agreement that will be scrutinized. A defense that a subsequent insertion has been made, or that defendant did not know of the insertion when he signed it, will no more defeat the claim as a matter of law than if such defense had been made against a contract consisting of a single instrument.

In the present case the jury found that the duplicate and triplicate copies contained the amount of compensation when they were signed and that defendant had knowledge of that fact. His claim that he at no time entered into a written contract with plaintiffs setting forth the compensation to be allowed by the owner in case of a sale by the broker or agent presented an issue of fact for a jury. Since a jury has resolved the conflicts in the evidence in favor of the plaintiffs, and the evidence is sufficient to sustain the jury's finding, no reason exists for this court to interfere with the judgment rendered thereon. Since no prejudicial error appears in the record, the judgment of the district court is affirmed.

AFFIRMED.

WOODROW W. KEITH, APPELLEE AND CROSS-APPELLANT, V. ART WILSON, APPELLEE AND CROSS-APPELLEE, IMPLEADED WITH THE KIEWIT COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLEE, PAWNEE SPRINGS RANCH CO. ET AL., APPELLANTS AND CROSS-APPELLEES.

84 N. W. 2d 192

Filed July 5, 1957. No. 34199.

1. **Workmen's Compensation.** If the task of a laborer on a farm or ranch is one which is usually classed as farm or ranch labor and the operation in which he is engaged is generally in furtherance of farming and ranching purposes the employee will be regarded as a farm and ranch laborer within the meaning of the Workmen's Compensation Act.
2. ———. An employer of farm or ranch labor, being excepted from the Workmen's Compensation Act, who elects to subject himself to it becomes subject to all of the provisions of the act to the same extent as an employer who is not excepted from it.
3. ———. A person, firm, or corporation, subject to the Workmen's Compensation Act, has engaged in a scheme, artifice, or device to enable him or it to execute work without responsibility to workmen when he or it contracts with another for the performance of the work without exacting that the other contracting party obtain workmen's compensation insurance.
4. **Opinion Overruled in Part.** Dobesh v. Associated Asphalt Contractors, 138 Neb. 117, 292 N. W. 59, is overruled in part.
5. **Workmen's Compensation.** The liability which attaches by the terms of section 48-116, R. R. S. 1943, to an employer of farm and ranch labor who has brought himself under the Workmen's Compensation Act under the terms of section 48-106, R. R. S. 1943, applies only to a party or parties who have effected or carried out a scheme, artifice, or device to evade the operation of the act.
6. ———. An innocent party excepted from the Workmen's Compensation Act does not become liable thereunder by the performance of a scheme, artifice, or device, within the meaning of the act, of another.

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

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

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

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

YEAGER, J.

This is an action which was commenced in the workmen's compensation court by Woodrow W. Keith, plaintiff, and appellee and cross-appellant herein, against Art Wilson, defendant, and appellee and cross-appellee herein, The Kiewit Company, a corporation, Pawnee Springs Ranch Co., Peter Kiewit, and The Employers Mutual Liability Insurance Company of Wisconsin, defendants, and appellants and cross-appelleees herein, to recover workmen's compensation benefits to which he claimed he was entitled by reason of an alleged injury sustained while directly employed by the defendant Wilson, for which the other defendants were also liable. The action was dismissed by the workmen's compensation court whereupon an appeal was taken to the district court.

A trial was had in the district court wherein a judgment for compensation was rendered in favor of plaintiff and against Peter Kiewit and The Employers Mutual Liability Insurance Company of Wisconsin. This company was the workmen's compensation insurance carrier of Peter Kiewit. The amount of the award does not require mention since it is not in controversy. The judgment was in favor of all other defendants.

From the judgment Peter Kiewit, who will be referred to hereinafter as Kiewit, and The Employers Mutual Liability Insurance Company of Wisconsin, which will be referred to as the company, have appealed. The plaintiff has cross-appealed.

The brief of Kiewit and the company contains four assignments of error as grounds for reversal, but basically the only question presented by their brief and

argument is that of whether or not on the facts these parties were liable under the workmen's compensation law to pay workmen's compensation to the plaintiff. The facts as to employment of plaintiff, his injuries, and the extent thereof are not in dispute on this appeal.

The pertinent facts are that at the time involved here Kiewit was the lessee of and was operating a large farm and ranch under the name of the Pawnee Springs Ranch Company. Hay was produced on the ranch. Prior to the incidents involved here he elected to cause himself to become an employer within the meaning of the Workmen's Compensation Act and to cause his operation to be controlled particularly by section 48-106, R. R. S. 1943, which is a part of the workmen's compensation law, and generally by the other provisions. On June 3, 1955, he entered into a written contract with Wilson whereby Wilson agreed to cut and stack hay on the farm and ranch for $4.35 a ton. The plaintiff was employed by Wilson to work in the operation. On July 19, 1955, the plaintiff sustained an injury which arose out of and in the course of his employment. Kiewit did not at any time require Wilson to obtain workmen's compensation insurance to compensate his employees in case of accidental injuries sustained in the course of their employment.

The question requiring first consideration in the determination of this case is that of whether or not the plaintiff at the time was engaged in farm or ranch labor. This is true since the liability of Kiewit and also Wilson depends upon their status and characterization as defined by section 48-106, R. R. S. 1943, in part, as follows: "The provisions of this act shall apply * * * to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer, except railroad companies engaged in interstate or foreign commerce. The following are declared not to be hazardous occupations and not within the provisions of this act: Employers of household do-

mestic servants and employers of farm or ranch laborers, except as hereinafter provided; Provided, that any such employers may elect to provide and pay compensation for accidental injuries sustained by any of his employees by insuring and keeping insured his employees in some corporation, association or organization authorized and licensed to transact the business of workmen's compensation insurance in this state."

In application and interpretation of this provision this court in Keefover v. Vasey, 112 Neb. 424, 199 N. W. 799, 35 A. L. R. 191, wherein many cases dealing with the question of what is farm labor were reviewed, said: "Where a group of farmers combined in the purchase of a threshing machine for the purpose primarily of threshing their own grain, they and their employees while so engaged are not within the operation of the employers' liability law, which excludes 'employers of farm laborers.' "

In Oliver v. Ernst, 148 Neb. 465, 27 N. W. 2d 622, it was said: "A workman is not a farm laborer simply because at the moment he is doing work on a farm, nor because the task on which he is engaged happens to be what is ordinarily considered farm labor; but the whole character of his employment must be looked to to determine whether he is a farm laborer within the provisions of section 48-106, R. S. 1943."

In the case at bar the work contemplated by the contract between Kiewit and Wilson was cutting and stacking hay on the farm and ranch of Kiewit. The work in which the plaintiff was engaged was participation in this work on the ranch. The only reasonable conclusion to be drawn is that this was farm and ranch work.

In the light of this and the undisputed facts in the case it becomes necessary to say that Wilson was not an employer within the meaning of this section of the statute. The same is not true as to Kiewit. By Kiewit's act of obtaining workmen's compensation insurance he became an employer within the meaning of the section

and subject to the liabilities imposed by the Workmen's Compensation Act. All of this becomes clear from a reading of the statute itself. This cannot well be disputed.

Kiewit and the company, as we interpret, do not urge that Kiewit is not subject to the provisions of the act, but only that on the facts there is no liability for compensation to the plaintiff. The theory of the contention, again as we interpret, is that the plaintiff was in no sense an employee of Kiewit, but was an employee of Wilson who was excepted from the act because of engagement in farm and ranch labor, in consequence of which no liability existed under the Workmen's Compensation Act in favor of plaintiff and against Wilson, and thus there could be none in favor of the plaintiff and against Kiewit.

The plaintiff insists on the other hand that Kiewit became liable under the terms of section 48-116, R. R. S. 1943, as follows: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this act, shall be included in the term 'employer,' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act. * * *"

It is of course true in the light of the clear and explicit wording of this section that if the contract between Kiewit and Wilson and performance under it was a scheme, artifice, or device to execute the work of making hay on the farm and ranch, Kiewit, since he subjected himself to the act, became an employer of plaintiff within the meaning of the act and became liable to him for workmen's compensation.

It may not with good reason be said that what was done did not amount to a plan the effect of which, if accomplished, would protect Kiewit against claims for workmen's compensation for injuries to workmen en-

gaged in the performance of farm and ranch labor in this operation. In the light of previous decisions of this court it must be regarded as a device. In the light of these decisions it is not necessary to the existence of a scheme, artifice, or device that there shall be active fraud or evil design.

In Sherlock v. Sherlock, 112 Neb. 797, 201 N. W. 645, by way of illustrating what might be a device, this court said, referring to an agreement the purport of which was to relieve the employer of a contractor from liability for workmen's compensation: "This may fairly be considered a 'device' within the meaning of the workmen's compensation law, if the corporation disregarded a statutory duty to require its independent contractor to procure compensation insurance." In the case at bar Kiewit had a statutory duty, since he had elected to come under the workmen's compensation law, to require Wilson to procure workmen's compensation insurance which he failed to perform. See, also, Standish v. Larsen-Merryweather Co., 124 Neb. 197, 245 N. W. 606; Jones v. Rossbach Coal Co., 130 Neb. 302, 264 N. W. 877; New Masonic Temple Assn. v. Globe Indemnity Co., 134 Neb. 731, 279 N. W. 475; Hiestand v. Ristau, 135 Neb. 881, 284 N. W. 756; Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810.

The next question to be considered is that of whether or not, assuming that plaintiff has no right of action against Wilson under the workmen's compensation law, he has such an action against Kiewit. The opinion in the case of Dobesh v. Associated Asphalt Contractors, 138 Neb. 117, 292 N. W. 59, contains a statement the effect of which is to say that he would not. The statement must be rejected and the opinion in that case to that extent overruled for two reasons. First no such question was involved in that case. The question before the court was that of whether or not the plaintiff could maintain his action against the village of Ansley since notice had not been served in the time required by stat-

ute. The second is that the liability of Kiewit, if it exists, is not dependent upon imputation but upon clear and specific terms of statute which define and declare the liability.

The question remaining for consideration is that of whether or not Wilson is liable along with Kiewit for workmen's compensation. The district court found and adjudicated that he was not so liable. The conclusion of this court is the same as that of the district court.

It is to be observed that by section 48-106, R. R. S. 1943, Wilson was excepted from the operation of the Workmen's Compensation Act. The exception is applicable to him unless by voluntary act he as an employer of farm and ranch labor subjected himself to liability under the act. He did not so subject himself.

The plaintiff contends however that he became subject to the act by reason of the terms of section 48-116, R. R. S. 1943. The contention is not tenable.

It is to be observed that this section imposes directly no liability upon anyone except a person, firm, or corporation who has effected or carried on a scheme, artifice, or device to evade the operation of the act. Conclusively on the record Wilson did not effect or carry on or have knowledge of any such scheme, artifice, or device. There was nothing to charge him with such knowledge. No liability therefore could attach to Wilson under the terms of the provision which imposed liability.

It is urged however that Wilson became liable under the following language contained in the provision: "* * * and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act." In other words, it is urged that Wilson, the immediate employer who was not under the act, became liable to the plaintiff under this language and the fact that Kiewit created and carried on his scheme, artifice, or device.

The words taken in their separate context or in their

relationship with the entire section or with the entire act are not reasonably capable of such an interpretation. The clear purport and effect of this section is to define and declare only the obligation and fix the liability of a person, firm, or corporation who or which has created or carried on a scheme, artifice, or device within the meaning of the provision. It may not reasonably be said that a liability is created by a reference in a legislative enactment to a nonexistent liability in the absence of an express or implied intent to impose or create a liability.

All that may be said for this language is that in a case where there has been a scheme, artifice, or device the one creating or carrying it on is liable under the Workmen's Compensation Act; and if the immediate employer is subject to the act the one creating or carrying on the scheme, artifice, or device is jointly and severally liable with that one; but if the immediate employer is not subject to the act the one creating or carrying on the scheme, artifice, or device is nevertheless liable.

It must be said therefore that the judgment of the district court is in all respects correct and it is affirmed.

An attorney's fee in the amount of $500 is taxed in favor of plaintiff and against the appellants. All costs in this court are taxed against the appellants except those of Wilson, which are taxed against the plaintiff.

AFFIRMED.

SIMMONS, C. J., dissenting.

The court here reaches the conclusion that Kiewit must pay workmen's compensation to plaintiff, although plaintiff was working for Wilson, and that Wilson is not liable for workmen's compensation to plaintiff although he was Wilson's employee.

I shall not consume space here to more than mention the established rule that the compensation act is to be liberally construed to carry out its beneficent purposes, and the rule of statutory construction which enjoins courts to avoid absurd results.

I shall not discuss the question as to whether or not the work being done here is "farm or ranch" labor. As I see it, in this instance, it is not a material consideration. It is, however, a matter of common knowledge that in large farm and ranch operations in this state the harvesting of crops is no longer a farm but is a commercial operation. There is respectable authority, cited to the court, that operations such as are here involved are not within the contemplation of the "farm or ranch" exceptions of the act.

Kiewit elected to provide and pay compensation to his employees. The court, however, does not quote that provision of section 48-106, R. R. S. 1943, which makes Kiewit liable to his employees. The provision is: "The procuring by any such employer of such a policy of insurance, which is in full force and effect at the time of an accident to any of his employees, *shall be conclusive proof* of such employer's and his employees' election to be bound by sections 48-109 to 48-147, *to all intents and purposes as if they had not been specifically excluded by the terms of this section;* * * *." (Emphasis supplied.)

It is my view that when Kiewit took out the insurance he brought the "farm and ranch" work within the act "to all intents and purposes" as though "farm and ranch laborers" were never excluded from the act. The effect of the court's decision is that Kiewit brought his employees within the act but left the work without the act. I do not agree that such was the legislative intent. The statute at no place separates the employee or employer from the work being done.

We are agreed that had plaintiff been employed by Kiewit when he was injured, Kiewit would have been liable for compensation under the act.

Kiewit, then, contracted with Wilson to do the work of putting up hay. Section 48-116, R. R. S. 1943, then, becomes applicable.

I shall not argue the question of what constitutes a "scheme, artifice or device."

We have held: "The provisions of section 48-116, make a person who lets a contract liable to an employee of the contractor, unless he requires the contractor to procure insurance from a company licensed to make such insurance contracts in this state." Standish v. Larsen-Merryweather Co., 124 Neb. 197, 245 N. W. 606. See, also, Sherlock v. Sherlock, 112 Neb. 797, 201 N. W. 645; Jones v. Rossbach Coal Co., 130 Neb. 302, 264 N. W. 877; New Masonic Temple Assn. v. Globe Indemnity Co., 134 Neb. 731, 279 N. W. 475; Hiestand v. Ristau, 135 Neb. 881, 284 N. W. 756; Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810. The ultimate test of these cases is this: Did the owner or principal contractor require the contractor or subcontractor to procure insurance? If he did, he was not liable to the employee of the contractor or subcontractor. If he did not, then he was liable.

The court holds that under section 48-116, R. R. S. 1943, Kiewit is "included in the term 'employer,'" and is liable to the plaintiff. I agree. The court holds that Wilson is not liable although the statute says that Kiewit and "the immediate employer (Wilson) shall be *jointly* and severally liable * * *."

The Legislature made an exception in section 48-106, R. R. S. 1943, but it made none in section 48-116, R. R. S. 1943. I think it patent that the Legislature intended that section 48-116, R. R. S. 1943, should apply to all situations where an owner subject to the act used the device of contracting out the work without requiring insurance.

The court reads out of the act the "jointly" liable-to-pay provision and reads an exception into the act which is not there.

Kiewit's liability is determined as a matter of law by section 48-116, R. R. S. 1943. That same statute makes Wilson the immediate employer subject to the act and "jointly and severally liable" with Kiewit to pay the compensation. We have repeatedly so held. See, Sher-

lock v. Sherlock, *supra;* Standish v. Larsen-Merryweather Co., *supra;* New Masonic Temple Assn. v. Globe Indemnity Co., *supra;* Hiestand v. Ristau, *supra.*

It is to be remembered that we are here dealing with work brought within the compensation act by Kiewit. Section 48-116, R. R. S. 1943, applies to such work. It makes no exception to the joint and several liability of both parties. Obviously to do so would defeat the purpose of the act. The compensation act permits an owner or contractor to take exempted work within the act and secure the benefits as well as the liabilities of the act. It does not contemplate that the owner can thereafter take that work without the act by contracting it to an uninsured third party, and thereby escape responsibility to the workmen covered. The act in unmistakable terms makes both the statutory employer and the immediate employer jointly and severally liable.

The court overrules a "statement" in Dobesh v. Associated Asphalt Contractors, 138 Neb. 117, 292 N. W. 59. The court does not quote the "statement." It is: "The liability of a third party, under section 48-116, Comp. St. 1929, for failing to require a contractor to carry compensation insurance is an imputed one, in the sense that none can exist against him, if none exists against the employer."

When analyzed, that statement is in accord with my construction of the act. It is necessary to overrule it in order to relieve Wilson of liability. In the Dobesh case, claim for compensation had been given to the immediate employer within the time provided by the act. Claim within the time provided by the act had not been given to the village which had contracted with the immediate contractor. The question was whether or not the claim to the immediate employer was sufficient to meet the requirement of notice to the village. We there, in effect, applied the joint and several liability rule to the facts of that case and said that if liability did not exist against the immediate employer, then none existed

against the "third party" (statutory employer). The converse of the rule is that if liability exists against the third party it also exists against the immediate employer. The two rules add up to joint and several liability of both the "employer" and the "immediate employer."

I would direct the entry of a judgment against Kiewit and against Wilson, holding them jointly and severally liable to pay compensation to the plaintiff.

ROSE VASA, APPELLANT, V. JOE VASA, APPELLEE.
84 N. W. 2d 185

Filed July 5, 1957. No. 34217.

1. **Judgments: Appeal and Error.** Where the evidence given on a former trial is not contained in the record under review this court cannot determine whether or not the judgment rendered was sustained by proper and sufficient evidence.
2. **Continuances.** The denial of an application for a continuance may not be regarded as error unless it appears that the rights of the party making the application have been prejudiced thereby.
3. **Divorce.** The district court may, after the term at which an order has been entered, for causes set forth in section 25-2001, R. R. S. 1943, and within the time provided by section 25-2008, R. R. S. 1943, set aside an order vacating a decree of divorce.
4. ———. In an action for divorce it is ordinarily within the discretion of the court to allow or refuse to allow suit money and attorney's fees.
5. ———. In an action wherein a decree of divorce has been rendered and a further decree as to care, custody, and maintenance of minor children has been made, the court is without power and jurisdiction on its own motion to change the decree as to care, custody, and maintenance of such children unless the parties have entered an appearance or have been duly notified.

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Wright, Simmons & Harris, for appellant.

Firmin Q. Feltz, for appellee.

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

YEAGER, J.

This is a proceeding by petition in an action for divorce to have an order vacating and setting aside a decree of divorce vacated and the decree reinstated. The right to the proceeding is claimed under the provisions of section 25-2001, R. R. S. 1943, which statute empowers the district court to vacate or modify its own judgment or order after the term at which such judgment or order was made for fraud practiced by the successful party in obtaining the judgment or order.

The action for divorce out of which the present proceeding emanates was instituted by Rose Vasa, plaintiff, who is appellent in this proceeding, against Joe Vasa, defendant, who is appellee herein. A decree was rendered on June 16, 1954, and filed on July 1, 1954, which granted plaintiff an absolute divorce from the defendant. By that decree she was awarded $6,600 payable in conformity with the terms of a property settlement made by the parties prior to the entry of the decree which terms require no restatement here. The defendant was required to pay an additional amount of $278.70 on account of costs in another action. The custody of a minor daughter of the parties was awarded to the defendant. On July 29, 1954, there was filed with the clerk of the court what is termed a joint motion for dismissal. It was signed by both parties. In pursuance of this motion the court entered an order on August 2, 1954, containing, in pertinent part, the following: "* * * the order of the court herein concerning this matter is hereby set aside and held for naught and that the parties hereto shall now stand concerning their personal affairs, financial affairs and custody of the children as they stood at the commencement of this action." On September 6, 1955, the defendant filed his petition

in the action for divorce to set aside the order of August 2, 1954, by which the decree of divorce was vacated.

By the petition the defendant alleged that he was induced by the fraud of plaintiff to execute the motion for dismissal. The plaintiff denied the fraud. A trial was had and on January 12, 1956, the court by its decree vacated and set aside the order whereby the decree of divorce was vacated, reinstated the decree of divorce, gave the defendant credit for payment of $6,600 which had been originally awarded, except $2,231.30, awarded the custody of the minor child of the parties to the plaintiff, ordered the defendant to pay $50 a month for the support of the child until the further order of the court or until the child should attain the age of 18 years or become self-supporting, and awarded the attorney for plaintiff a fee of $50. From this decree and an order overruling a motion for new trial the plaintiff has appealed.

The assignments of error are numerous but all of them do not require separate consideration herein. It appears proper before considering the assignments of error to say that the question of whether or not the decree of divorce was sustained by sufficient evidence is not before the court at this time. No information in this respect has been presented by the record. Therefore for the purposes of the presentation made at this time it must be assumed that the evidence was sufficient. The applicable rule is that if the evidence given on a former trial is not contained in the record under review this court cannot determine whether or not the judgment rendered was sustained by proper and sufficient evidence. See, Glissmann v. Grabow, 155 Neb. 690, 53 N. W. 2d 94; Kasai v. Kasai, 160 Neb. 588, 71 N. W. 2d 105.

Since the last assignment of error relates to propriety of the action of the court in requiring the plaintiff to proceed to trial at the time the case was tried and not to the issues in the case it will be considered first.

The plaintiff filed a motion for summary judgment

which was overruled. Thereupon motion for continuance was made. Continuance was denied and the plaintiff was required to proceed to trial. It is insisted that the denial was prejudicial error. This insistence in the light of the record is without merit. The motion was not supported in accordance with the requirements of section 25-1148, R. R. S. 1943. Also there is nothing in the record to indicate an abuse of discretion in the refusal to grant the continuance. Specifically there is nothing in the record to indicate that the plaintiff was in anywise prevented from adducing at the time any and all evidence which could or would have been adduced in the event of a continuance.

In the absence of a showing of abuse of discretion, denial of a continuance is not error. See, Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698; Cox v. State, 159 Neb. 811, 68 N. W. 2d 497.

The first, second, and third assignments of error present substantially two questions. One of these is that of whether or not the court was empowered under law to set aside the order of vacation, and the other, assuming the existence of power, whether or not under the facts the power was properly exercised.

In the presentations here there is no insistence that a decree of divorce may not be set aside on proper application and sufficient evidence. The insistence of plaintiff is in substance that an order setting aside a decree may not be set aside.

No authority has been cited or found directly in point on the question. The case of Carmony v. Carmony, 112 Neb. 651, 200 N. W. 830, however, contains language which indicates that the power to do so exists. In that case the wife was granted a decree of divorce. The husband remarried within 6 months, and within 6 months the wife requested that the decree be vacated and set aside which request was granted. After the expiration of 6 months the husband filed an application to have set aside the order vacating the decree. Notice

of the application was not given to the wife but the court did set aside the order vacating the decree. The wife then filed a special appearance alleging the court was without jurisdiction to make the order on grounds that no notice was given her. After hearing the court found it was without jurisdiction to enter the order and set aside the order reinstating the decree of divorce. On appeal to this court this order was affirmed. It was affirmed not because of the lack of power to consider the question involved in the application but because the court was without jurisdiction since no notice had been given to the wife. In the opinion it was said: "This application or motion, being made after the term at which the order complained of was entered, required notice to be given. The only method by which the order could be disturbed was that which the statute prescribes." The statute to which reference was made was the same as section 25-2001, R. R. S. 1943. This section by its terms has application to the vacation of judgments or orders made after the term at which entered including orders in divorce cases. See Carmony v. Carmony, *supra*. This, therefore, appears to be authority for the court to vacate for cause an order setting aside a decree of divorce.

There is another reason which appears to sustain the right of the court to vacate an order setting aside a decree of divorce. It is to be observed that the statute is not in its terms restrictive as to the kind or character of judgment which may be vacated. This therefore indicates that the court has power to judicially determine the existence or nonexistence of ground for vacation.

It is substantially urged however that where a party has obtained a decree of divorce such party alone has the right to have it set aside, and if the right has been exercised the other party may not be heard to complain. As applied to this case the insistence is that the plaintiff exercised that right, and of her action the defendant has no legal right to complain.

Some support for this insistence may be found in Dudgeon v. Dudgeon, 142 Neb. 82, 5 N. W. 2d 133, but what was said in that case has been rejected by later decisions of this court. In Carpenter v. Carpenter, 146 Neb. 140, 18 N. W. 2d 737, this court said: "The statute provides that the trial court may, at any time within the six months, vacate or modify the decree. It places the control of the decree within the sound judicial discretion of the trial court. Of necessity the decree of a court cannot be controlled by the whim, or changing mind or desire of a litigant. The judgment of a court is not a plaything of the litigant. It is the solemn adjudication of the rights of parties. The decree represents the judgment of the court and not necessarily the desire of the litigant. Whether or not it is to stand, be vacated or modified, is to be determined by the court. The maintenance of our judicial system and the administration of justice by courts so require. To hold as defendant contends would be to reduce the judicial act to a mere ministerial function to be performed at the direction of the litigant." This statement was approved in Colick v. Colick, 148 Neb. 201, 26 N. W. 2d 820.

It would be inconsistent in law and equity and contrary to any reasonable attitude toward ethical considerations to say that although a judicial determination was grounded in fraud the court was without power, on proper and timely application, to protect its integrity and to restore the rights of parties prejudiced by the fraud. The conclusion therefore is that the court was empowered legally to set aside the order vacating the decree.

The question of whether or not there was justification for vacating the order depends upon a review of the record. Undisputed facts are that the parties were married in May 1934 and that three children were born of the marriage. The disposition of this case relates to only the youngest whose name is Patricia Vasa. She

was 12 years of age at the time the petition for divorce was filed in February 1954.

A brief summary of pertinent evidence is that the defendant lived on a ranch and had lived there since before the marriage; that the plaintiff had not lived at the ranch since 1950 or 1951; that within a short time after the decree of divorce was rendered plaintiff came to the ranch and represented to the defendant that she desired a reconciliation; that at first none was accomplished; that on an early occasion when she was at the ranch the two engaged in the sexual relation after which plaintiff represented to defendant that by reason thereof the decree of divorce became a nullity which representation he believed; that in that belief and in the light of representations by plaintiff that she was desirous of restoration of the normal marriage relation, but elsewhere than at the ranch, he signed a joint application to set aside the decree; that on a few occasions after the decree was vacated the plaintiff came to the ranch but never for any purpose other than a brief visit; that on some of these occasions she performed some services thereabouts but she never accepted the normal place of a wife in the household; that in furtherance of his belief in the sincerity of the representations and inducements of the plaintiff the defendant made every reasonable effort to obtain a place of abode for the parties at Ogallala, Nebraska; that no place was found which was acceptable to the plaintiff; that the defendant visited plaintiff on occasions but no place was ever found which became a common habitation of the two; that the plaintiff continued to remain away as had been true before the decree was rendered; that although in 1954 the plaintiff had an independent income of $2,100 she received from the defendant from July 26 to December 23, 1954, $2,893.70, and from January 15, 1955, to July 31, 1955, $1,350; that during the total period the defendant paid on her account $180.40, making a total received by her of $4,424.10; that the earnings of plaintiff in 1955

were $1,100; and that in an action for separate maintenance instituted by plaintiff against defendant in the district court for Scotts Bluff County, Nebraska, an order was entered requiring the defendant to pay plaintiff $175 a month for her support and that of Patricia Vasa commencing on September 1, 1955, and an attorney's fee in the amount of $100.

The defendant contends that the evidence of which the foregoing is a summary makes it apparent that the plaintiff did not act in good faith in the procurement of the vacation of the decree and in effecting the pretended reconciliation, but on the contrary her representations and acts whereby the pretended reconciliation came about were false, and a scheme and device designed to avoid the operation of the decree particularly as to custody of Patricia Vasa, all of which was a fraud practiced upon the defendant and the court.

As against this charge of the defendant the plaintiff gave evidence to the contrary a brief summary of which with observations is as follows: She admitted unwillingness to return to the ranch home provided by the defendant. The only substantial reason was that she had been advised that her physical condition would not permit driving to and from the ranch. In this connection it appears that 9 miles of road were without paving or gravel, which 9 miles consisted of a two-track road. No complaint was made as to ranch home facilities. The evidence discloses that the facilities throughout were modern. She admitted that no place was found in Ogallala which was acceptable to her. She said that none of sufficient size or proper location was found. She gave substantially as her reason for starting the separate maintenance action that she was in need of an operation and knew that if she went to the hospital the defendant would not furnish money to her. She testified to the necessity for surgery at more than one place in her testimony, but at no place therein is the basis for this necessity made clear. There is no medical evidence. At

one point in her testimony appears an indication of a claim that the necessity had reference to a condition in her back and at another to her heart, but neither is made positive.

It conclusively appears that the defendant acted in good faith in his efforts to obtain a reconciliation and that he did all and more than could be reasonably expected of him to re-establish a common domicile for the parties and their family. He consented to and made sincere efforts to provide a domicile away from the ranch, even though this would have been burdensome to him in his activities as a rancher. From the time the decree was vacated to the end of July 1955 he paid to plaintiff or on her account $4,424.10, none of which was of benefit to him in anywise. It is pointed out here again that in 1954 plaintiff had earnings of her own in the amount of $2,100 and in 1955 of $1,100. The amount of money received by plaintiff over this period was over $2,000 more than she would have received under the decree. We are not unmindful of the fact that she would have been entitled to an additional amount of $1,500 under the decree on November 1, 1955, but it is apparent that these annual payments were to be regarded as advance rather than delinquent payments.

It also conclusively appears that the plaintiff did nothing which was consistent with a sincere purpose to restore the true and full marital status of these parties. The only thing she did to that end was to engage frequently with the defendant in the sex relationship.

It is not seriously contended that after the decree was vacated the defendant was guilty of any conduct or maintained an attitude the effect of which would be destructive of the marriage relation, except the bare statement of the plaintiff in relation to defendant's unwillingness to pay the expense of plaintiff's projected operation.

In the light therefore of the entire record with the reasonable inferences properly to be drawn from it the

conclusion reached is that there was an absence of good faith on the part of plaintiff in what she did to accomplish the vacation of the decree of divorce which amounted to a fraud upon the defendant and the court, and in the light of the controlling legal principles the order was properly vacated and set aside.

The next question for consideration presented by the assignments of error relates to the status of the action and the parties in the event of vacation of an order setting aside the order vacating a decree. The plaintiff insists that the parties are left as with a case for trial on the issues made by the pleadings in the action for divorce. No authorities have been cited and none have been found directly in point, but it appears that what is said in Carmony v. Carmony, *supra*, is contrary to the contention of the plaintiff.

In that case the court entered an order vacating an order whereby a decree was reinstated. The stated reason for vacation of that order was that notice had not been given to the opposite party. In that instance the case went back for trial of the issues made on account of the fact that the decree had been set aside.

In reason it would be inconsistent to say that the declaration that an order is invalid has the effect of destroying the valid order which the invalid order seeks to destroy.

The holding here is that with the vacation of the order setting aside the decree the decree became effective for all purposes and to the same extent as if it had never been vacated.

The next matter requiring consideration is a contention that the court erred in the amount of credit allowed by the court on the amount required to be paid by the defendant under the decree. The record in this respect has been examined and the conclusion reached is that plaintiff received by the decree a credit of $55.40 in excess of what the record shows she was entitled to receive.

Complaint is made that the court erred in limiting the allowance of an attorney's fee as it was limited. Ordinarily the allowance would be regarded as wholly inadequate, and what is said here is not to be regarded as either a reflection upon the ability of the attorney for plaintiff or the quality or value of his service. It is simply what is regarded as a reflection of the attitude which must be taken toward the issue presented and the determination thereon.

In a divorce action it is ordinarily within the discretion of the court to allow or refuse to allow suit money and attorney's fees. See, Blakely v. Blakely, 102 Neb. 164, 166 N. W. 259; Lippincott v. Lippincott, 152 Neb. 374, 41 N. W. 2d 232; Morehouse v. Morehouse, 159 Neb. 255, 66 N. W. 2d 579.

This is not a case wherein it may well be said that the court abused its discretion by failure to allow a fee larger than the one allowed in the light of the conclusion reached as to the merits of the action. The action is based upon fraud. The district court has found, as has also this court, that the charge has been sustained. It ought not to be required that the defendant should be made liable for the effort of the plaintiff to retain the benefits of her fraudulent acts. The court did not err in this respect. There are other assignments of error in the brief but in the light of what has been said they do not require consideration herein.

The order of the district court vacating the order of dismissal and reinstating the decree of divorce is affirmed in all respects except as to the custody of Patricia Vasa. The custody of this child shall be restored to the defendant under the conditions set out in the decree and the defendant is relieved from the obligation to make further payments to plaintiff for child support. The custody is restored in conformity with the requirements of law.

Section 42-312, R. R. S. 1943, provides as to change of custody in actions for divorce the following: "If the

circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them."

In this case neither of the parties has filed a petition for revision as to custody of the minor child. In construing the power of the court to act on its own motion this court said: "* * * unless the parents or other parties in interest have voluntarily entered an appearance, the court has no authority or jurisdiction to do so without notice to such parties and opportunity given them to appear and be heard." Morehouse v. Morehouse, *supra*. In this case it is true that the parties were before the court but no question of custody was involved. The action of the court in this respect was without notice, hence the court was without jurisdiction in this respect.

The judgment is therefore reversed and the cause remanded with directions to amend the order setting aside the order vacating the decree in conformity with this opinion. Plaintiff's costs are taxed to her and the costs of defendant to him.

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

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. EVERETT O. RICHARDS, RESPONDENT.

84 N. W. 2d 136

Filed July 12, 1957. No. 33989.

1. **Attorney and Client.** A duty rests on the courts to maintain the integrity of the legal profession by disbarring attorneys who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice.

2. ———. Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for suspension or disbarment.
3. ———. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
4. ———. An attorney, as an officer of this court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the courts.
5. ———. The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the Legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.
6. ———. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence.
7. ———. The findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action.
8. ———. The ethical standards relating to the practice of the law in this state are the canons of Professional Ethics of the American Bar Association and those which may, from time to time, be approved by the Supreme Court.
9. ———. Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.
10. **Courts.** Judicial records or papers should not be removed from the office of the clerk or files where they belong except for good and sufficient reasons, and no person has a right to remove them without permission of the court.
11. ———. The court may, however, grant permission to remove papers from the records, this being a matter within the discretion of the court both as to the removal and as to the terms and conditions on which the permission shall be granted.
12. ———. There may, however, be circumstances in which it is

not only proper but the duty of the court to deny such an application.

13. **Fraud.** Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth and not suppress facts within his knowledge or materially qualify them. Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false.

Original Action. *Judgment of suspension.*

Clarence S. Beck, Attorney General, and *Charles E. McCarl,* for relator.

Edward E. Carr and *Baskins & Baskins,* for respondent.

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

WENKE, J.

This is a disciplinary proceeding against Everett O. Richards. It was first presented to and considered by the Committee in Inquiry for the Thirteenth Judicial District, that being the judicial district wherein Everett O. Richards resides. Thereafter it was considered by the Advisory Committee for the Nebraska State Bar Association, the latter having filed the original complaint in this court. After a demurrer was sustained to the original complaint the Attorney General filed an amended complaint setting forth charges in addition to those contained in the complaint filed by the Advisory Committee. Such procedure is in accordance with Article XI, Investigation and Disposition of Charges, of the Rules Creating, Controlling and Regulating Nebraska State Bar Association. See, sections 3, 5, 7, 8, 11, and 12, of Article XI thereof.

In the amended complaint the Attorney General alleges that Richards has been guilty of unprofessional conduct in the practice of law and of conduct which was in violation of the canons of Professional Ethics of the profession of law, thereafter setting forth in detail the

conduct of Richards which it is claimed was unprofessional and in violation of such canons. In view thereof he asks, on behalf of the Nebraska State Bar Association, that this court enter an order for such discipline against Richards as it may deem reasonable and proper. Richards filed an answer to this amended complaint wherein he raised issues of fact and, based thereon, asked that the amended complaint be dismissed. We thereupon appointed a referee. See part III, § 7, Disciplinary Proceedings, of the Revised Rules of the Supreme Court.

The referee arranged for and had a hearing. He thereafter made a written report to this court setting forth the facts as he found them to be and, based thereon, recommended that some disciplinary action be taken. Richards filed exceptions to the referee's report. The question thus presented is, was Richards guilty of unprofessional conduct in his practice of the law and, if so, should he be disciplined because thereof and to what extent?

"A duty rests on the courts to maintain the integrity of the legal profession by disbarring lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate a fraud on the courts, or to corrupt and defeat the administration of justice." State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583. See, also, 7 C. J. S., Attorney and Client, § 34, p. 793.

"Any conduct on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relationship of attorney and client or unworthy of public confidence constitutes a ground for suspension or disbarment." 7 C. J. S., Attorney and Client, § 19, p. 733. See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra*.

"The purpose of a disbarment proceeding is not so much to punish the lawyer as it is to determine in the public interest whether he should be permitted to

practice." State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra.*

Everett O. Richards, also referred to in the record as E. O. Richards and whom we shall herein refer to as either Richards or respondent, was admitted to the practice of law in Nebraska on November 8, 1939, and has, at all times since then, been legally qualified to do so. He commenced the practice of law at Chappell in Deuel County, Nebraska, on November 15, 1939, and has engaged in the practice at that place ever since.

"In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts." State ex rel. Attorney General v. Burr, 19 Neb. 593, 28 N. W. 261. See, also, State v. Fisher, 103 Neb. 736, 174 N. W. 320; State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra.*

" 'An attorney, as an officer of this court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the court.' State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W. 32." State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra.*

Section 7-104, R. R. S. 1943, provides the oath every person must take and subscribe upon being admitted to practice by this court. In State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra,* we said: "Such an oath requires lawyers to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe established standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar."

Proceedings for the discipline of attorneys are considered civil in their nature. See, part III, § 1, Disciplinary Proceedings, of the Revised Rules of the Su-

preme Court; State ex rel. Nebraska State Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138.

As to an attorney's rights we said in State ex rel. Nebraska State Bar Assn. v. Bachelor, *supra*: " 'The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.' Ex parte Garland, supra (4 Wall. (U. S.) 333)."

In State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641, we said: "In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence." See, also, State ex rel. Nebraska State Bar Assn. v. Bachelor, *supra*.

In this respect we said in State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474: "* * * the findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action." And therein we went on to say: "* * * the finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment; * * *."

In the Rules Creating, Controlling and Regulating Nebraska State Bar Association it is provided by Article X thereof as to professional conduct that: "The ethical standards relating to the practice of law in this state shall be the canons of Professional Ethics of the American Bar Association, including the additions and amend-

ments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court."

The preamble of the Canons of Professional Ethics, American Bar Association, provides: "In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."

Canon 29, Canons of Professional Ethics, American Bar Association, which deals with the subject of Upholding the Honor of the Profession, provides in part: "He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

In State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra,* we said: " 'Violation of codes of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.' (7 C. J. S., Attorney and Client, § 23, p. 741.)"

Count II of the Attorney General's charges relates to Richards' handling of certain matters in the estate of Amanda Forsythe, deceased, as it was administered in the county court of Deuel County, Nebraska. Amanda Forsythe died intestate on November 9, 1942, a resident of Deuel County and left as her only heirs at law two granddaughters living in or near Fremont, Nebraska. They were Ester Marie Bamesberger and Thelma Amanda Peterson, both of whom were then over 21 years of age. On November 10, 1942, these heirs executed and

then filed their petition, prepared by Richards, in the county court of Deuel County asking that the estate of the decedent be administered and that letters of administration be issued to E. O. Richards. Property left by the decedent was ultimately appraised as having a value of around $80,000. Because some of the assets needed immediate attention Richards was appointed and qualified as special administrator on November 17, 1942, and thereafter as regular administrator on December 3, 1942. Richards acted as his own attorney in handling the estate as the special and regular administrator thereof. No agreement was entered into nor was any understanding had between the heirs and Richards as to what his fee would be for handling the estate.

On January 2, 1943, Richards, without consulting the heirs and without their knowledge, applied to the county court for the allowance of partial administrator's and attorney's fees in this estate. Pursuant thereto, and on the same day, the county court allowed such fees in the sum of $6,000 and authorized the payment thereof, which the administrator did. Upon the discovery thereof by the heirs some months later, apparently from the contents of a letter written them by Richards on March 18, 1943, at their request, they came to Chappell with other counsel. As a result of a conference that was had between the parties Richards agreed to and did accept a total fee for handling the estate, both as administrator and counsel, of $2,000, refunding to the estate the balance of $4,000 of the partial fees allowed to himself. At the same time the heirs and Richards entered into a stipulation whereby they consented to having the application filed by Richards and the order of the court allowing the payment of partial administrator's and attorney's fees of $6,000 withdrawn from the files of the estate. Although this stipulation was not filed in the estate proceedings the then county judge testified he knew of the stipulation, and its contents, and agreed

thereto and permitted the two instruments to be withdrawn from the files and destroyed.

The amended complaint charges these actions by Richards in connection with this estate constituted an attempted perpetration of fraud as against the heirs of the deceased and a breach of trust and confidence as between the defendant as administrator and attorney for said estate and the heirs, and constitutes unprofessional conduct and is contrary to the Canons of Profession Ethics of the State of Nebraska.

As to the removal of the two instruments from the files of the estate with the court's knowledge and approval the following has application: "Judicial records or papers should not be removed from the office of the clerk or files where they belong except for good and sufficient reasons, and no person has a right to remove them without permission of the court. Ordinarily, papers before the court at the hearing of the cause may not be withdrawn from the records, even on application of both parties * * *. The court may, however, grant permission to remove papers from the records, this being a matter within the discretion of the court both as to the removal and as to the terms and conditions on which the permission shall be granted. * * * There may, nevertheless, be circumstances in which it is not only proper but the duty of the court to deny such an application." 21 C. J. S., Courts, § 228, p. 428.

And in section 229 of the same authority, page 430, dealing with a court's custody and control of its own records, it is stated that: "A court of record has general authority over its own records, and they are within its custody and control, particularly so far as they pertain to the court's business and so far as is essential to the proper administration of justice. * * * In exercising control over its records, a court has power to protect them from irrelevant, unimportant or superfluous papers, and to keep the records free from stain

and scandal not pertinent to the cause and unnecessary to the decision."

We think what was here done was, under the circumstances, within the discretion of the county court and that Richards was not remiss in his duties as an attorney when he entered into a stipulation with the heirs the effect of which was to ask the county court for permission to remove the two documents. They were not essential to a complete record of the estate proceedings. The same would be true of the claim filed by E. E. Richards, respondent's father, for a balance due in the sum of $487, which claim the county court permitted the claimant to withdraw.

As to what Richards did in obtaining the allowance of partial fees as administrator and attorney in the sum of $6,000 very shortly after he was appointed and qualified as administrator, without consulting the heirs when he had no agreement or understanding with them in regard thereto, and then, after they complained thereof, agreeing to a fee of $2,000 for all of his services in those two capacities, we think the following language from canon No. 11, Dealing with Trust Property, and from canon No. 12, Fixing the Amount of the Fee, Canons of Professional Ethics, American Bar Association, has application:

"The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

"In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. * * * In fixing fees it should never be forgotton that the profession is a branch of the administration of justice and not a mere money-getting trade."

We think what respondent did in this respect indicates a greater interest in his personal financial welfare than in his professional conduct in relationship to both his clients and the court.

It is true that ordinarily the charging of an excessive fee is not ground for suspension or disbarment. 7 C. J. S., Attorney and Client, § 23b, p. 745. But it may be if the fee is clearly excessive. This incident occurred a number of years before any complaint was made in regard thereto but general statutes of limitation have no application to disciplinary proceedings. 7 C. J. S., Attorney and Client, § 25b, p. 766. However, staleness of a charge may be good cause for refusing to consider it. If this were the only matter herein involved we would not, after such a long period of time, consider it of sufficient importance to justify taking any action thereon except to reprimand respondent, particularly when it happened only a few years after respondent entered the practice. However, in view of what is hereinafter said about his conduct in connection with the Dryden estate, we shall take it into consideration in determining the extent of the discipline it is proper to impose.

Count III deals with the fact that respondent, while county attorney of Deuel County and while representing the administratrix of the estate of Fermon J. Grant, deceased, and also while representing the administratrix with the will annexed of the estate of Otto J. Melton, deceased, had an order entered in each estate determining and assessing the inheritance tax due and owing from said estate. It is contended that said acts are contrary to the Canons of Professional Ethics and subject to criticism. Admittedly respondent has, at all times since 1941, been the duly elected, qualified, and acting county attorney of Deuel County.

Fermon J. Grant died intestate, a resident of Deuel County. His estate was administered by the county court of that county. Velma Grant was appointed, qualified, and acted as administratrix thereof. Respondent represented her as attorney for which he received $2,745. The assets of the estate were appraised at $148,987.60. On May 31, 1952, respondent, as county attorney of Deuel County, John H. Pace, as county treas-

urer of Deuel County, and Velma Grant, as administratrix of the Melton estate, entered into a stipulation, subject to approval by the county judge of Deuel County, that the valuations placed on the assets of the estate as fixed by the appraisers, theretofore appointed by the court for that purpose, could be accepted as the true value thereof for the purposes of determining and assessing inheritance tax on the shares and interests of the beneficiaries thereof. On the same day the county judge, based on those values, determined there was due Deuel County from Velma Grant inheritance tax in the sum of $460.44 and from Louisa Grant in the sum of $487.76, which amounts he ordered the administratrix to retain from their respective shares and pay to the treasurer of Deuel County, which she did. It is apparent that respondent acted as attorney both for the administratrix of the estate and for Deuel County in the matter of determining and assessing the inheritance tax.

Otto J. Melton died testate. He was, at the time of his death, a resident of Cheyenne County, his estate being probated in that county. Nellie Melton, his widow, was appointed, qualified, and acted as administratrix with the will annexed of the estate, employing respondent as her attorney. Decedent was the owner of real and personal property appraised at $82,363.41, of which there was real estate located in Deuel County appraised at $16,440. On November 23, 1949, the county court of Cheyenne County determined and assessed the amount of inheritance tax due Deuel County to be in the sum of $92.95, the record showing that respondent had accepted that figure as a proper computation thereof on the Deuel County land. The tax assessed was paid.

There was no prohibition against respondent, because he was county attorney of Deuel County, from continuing in the private practice of law, which would include estates. However, canon No. 6, Canons of Professional Ethics, American Bar Association, provides that: "It

is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

The consent clause in the canon has no application in the case of a public officer. Opinions 16, 34, and 77 of the Committee on Professional Ethics and Grievances of the American Bar Association.

It is the duty of the county attorney to prosecute and defend all civil suits, applications, or motions on behalf of the county and state which arise under the laws of the state and in which the county or state is a party or is interested. § 23-1201, R. R. S. 1943. This includes all matters involving the determination of inheritance tax. See Ch. 77, art. 20, R. R. S. 1943. This duty is now specifically set out in section 77-2018.03, R. S. Supp., 1955.

But respondent seems to rely on the fact that he did not act in either of these estates in regard to inheritance tax until after he had had a conference with the county commissioners of Deuel County and fully explained to them the situation therein and their right to appoint special counsel to handle the inheritance tax matter for the county. The record shows that in each estate the county commissioners, after checking the values placed on the property of the decedent by the appraisers appointed therein, decided the appraised values put on the property by the appraisers were the true values thereof and that it was not necessary to appoint special counsel. But, as we have already stated, the county commissioners could not waive respondent's duties in this regard. He was representing both the representative of the estate and the county and state when he appeared before the county court in respect thereto.

It is also brought out by the evidence adduced that no

one ever questioned the inheritance tax assessed; that no damage resulted therefrom; that the federal authorities used the same values for assessing federal estate tax; and that no fraud, deceit, or unscrupulous practice was involved. But for conduct to be unethical it is not necessary that some damage result therefrom because of fraud, deceit, or unscrupulous practice. As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134: "An attorney should not only avoid impropriety but should avoid the appearance of impropriety." See, also, Opinion 77, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 182. And, as stated in Opinion 34, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 118: "* * * it is the duty of an attorney in public employ to be and remain above all suspicion, even at personal financial sacrifice."

This, and comparable situations, undoubtedly present difficult problems for county attorneys who have a private practice, as most of them have to in order to make a living in view of the low salaries paid for such office in most of the counties of the state. However, because of that fact, we cannot see fit to lower the ethical standards of the profession applicable thereto. In the situation here the problem could have been met, as it was in the Dryden estate hereinafter more fully discussed, by the appointment of special counsel to represent the county. What is the practical solution of the problem it is difficult to visualize. Every attorney, who is also a county attorney, will have to meet each individual situation as he is confronted with it in his private practice. If this was the only matter for our consideration herein we would only admonish respondent and advise him to be more careful in the future of his dual responsibility as long as he is the county attorney.

Count I of the amended complaint deals with three phases of respondent's conduct in the drawing of sev-

eral wills for Mary E. Dryden, who, while in her early 70's, died testate on October 9, 1950, while a resident of Deuel County, and in the handling of the probate of the last will thereof in the county court of that county. The first phase relates to respondent's relationship to the decedent during the drafting of several wills leading up to the last will she executed on January 9, 1950, which respondent drafted, wherein he was made the principal beneficiary of her estate and named as executor thereof. Decedent died possessed of an estate appraised at $86,640.44. Under the terms of her last will respondent was given a cash bequest of $2,000 and a section of land appraised at $34,400, although apparently worth about $45,000. The second phase deals with respondent's handling of the probate of decedent's last will in the county court of Deuel County and his failure to fully perform all of his duties as they related to the only heirs at law of decedent who, at that time, lived in Seattle, Washington. They are her grandniece Patricia Jean Kerton (now Johnson, as she married Robert C. Johnson in 1951), and a grandnephew Lester Francis Kerton. The third phase deals with respondent's failure to pay interest on the inheritance tax levied and assessed by the county court against the share of the estate he received under the last will of decedent. We shall discuss these phases in the order herein enumerated.

We do not think respondent was guilty of unethical conduct merely because he drafted a client's will containing a provision therein whereby he became a beneficiary of a part of her estate when, as the record here shows, she insisted he do so. See, Matter of Wharton, 270 App. Div. 670, 62 N. Y. Supp. 2d 169; Tarr v. Vivian, 272 Mass. 150, 172 N. E. 257; Matter of Will of Smith, 95 N. Y. 516; In re Bottier's Estate, 106 N. J. Eq. 226, 150 A. 786. Attorneys for clients who wish to leave them or their families a bequest or devise of part of their property, which they have a perfect right to do, will do well to have the will drawn by some other

lawyer. But if a client insists on having his or her attorney draft a will containing such a provision we can see no reason why the attorney should refuse to do so and thereby defeat his client's wishes. However, when such is the case the attorney's responsibilities to the heirs at law are much greater and, become increasingly so, when he is also named in such will as the executor thereof and later acts as attorney in relation to the probate thereof.

The evidence shows that respondent had been acquainted with decedent some 10 to 12 years; that commencing about 1946 or 1947 the acquaintanceship became a social relationship; that during the last years of decedent's life the social relationship became a very close personal friendship; that commencing in February 1945 respondent became decedent's attorney; and that he continued to be such up to the time of her death, she having considerable need for legal service in connection with her property. Respondent drafted and decedent executed a series of wills the first of which was dated October 4, 1945. At that time she had a sister by the name of Araminta Jensen living in Seattle, Washington, who died on December 16, 1949. Patricia Jean Johnson and Lester Francis Kerton are grandchildren of Araminta Jensen, deceased. During the period between the date of this first will and her last will dated January 9, 1950, decedent had five other wills drafted, thus making a total of seven. In the third of these wills, dated September 3, 1947, respondent was named as executor as he was in all wills she executed thereafter. In the fifth of these wills, dated March 5, 1949, he was bequeathed the sum of $2,000, as he was in all the wills she executed thereafter, and in her last will, executed January 9, 1950, respondent was given the section of land already referred to.

Respondent offered a great deal of evidence to show the close friendship between decedent and respondent's family; her mental condition at the time she executed

her last will and up to the time of her death; the reason why decedent changed her wills so often and made different people the beneficiaries of her estate, as evidenced by the wills she had drafted; and the fact that she had informed others that she was going to give respondent some of her property. He also did the same regarding the preparation, execution, and handling of her last will. This was apparently done in order to show that decedent had mental capacity to make the will; that the respondent did not exercise any fraud, deceit, duress, or any other improper influences on her in order to induce her to put the provisions therein in his favor; and to overcome any presumptions of fraud or undue influence that might arise because of the relationship existing between the parties. However, we cannot overlook the fact, and we think it is significent, that after our opinion was released on April 4, 1952 (Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737), mandate issued pursuant thereto on April 30, 1952, and the order admitting and allowing the last will of decedent to probate set aside by the district court for Deuel County on April 23, 1953, after a hearing on the petition filed by the heirs of decedent for that purpose, that respondent, while a trial commencing April 13, 1954, was being held on the objections of the heirs, did, on April 23, 1954, settle the contest by paying the heirs $33,000 in order to get them to withdraw their objections and permit the will to be allowed and admitted to probate, which it was.

After decedent passed away Leta Ellen Koier, a first cousin and then of Excelsior Springs, Missouri, filed a petition, prepared by respondent, in the county court of Deuel County asking that decedent's last will, dated January 9, 1950, be allowed and admitted to probate and that administration thereof be granted to respondent, who was nominated in the will as executor. Both Patricia Jean Kerton and Lester Francis Kerton were named in said petition although their address was not

set out therein until October 24 or 25, 1950, when it was inserted by respondent. Hearing thereon was set by the county court at 10 a. m. on November 3, 1950, and notice, as required by statute, was published advising thereof. On November 3, 1950, the last will was proved and thereupon allowed and admitted to probate and respondent was appointed, qualified, and acted as executor thereof. This is the order we have already referred to herein as having been set aside subsequent to our opinion and mandate issued pursuant thereto.

The evidence shows that at the time Mary E. Dryden died, and when her last will was offered for probate in the county court of Deuel County by Leta Ellen Koier, the Kertons lived at 209 West 46th Street in Seattle, Washington. The Kertons' parents separated when Patricia, who is about 1 year younger than her brother, was about 3 years old. Thereafter Patricia and her brother went to live with their father's mother, who, at all times herein material, lived at 209 West 46th Street in Seattle. Araminta Jensen, sister of decedent Mary E. Dryden, was the grandmother of the Kerton children on the mother's side. She lived at 627 West 79th Street in Seattle. The mother died in either 1943 or 1944. Grandmother Jensen died on December 16, 1949. Neither of the Kerton children had even been in Nebraska prior to decedent's passing away. They first became acquainted with their grandaunt when she visited her sister in Seattle about 1940 or 1941. Patricia was then about 12 or 13 years of age. They renewed that acquaintanceship in the fall, October to December, 1945 when decendent again visited her sister. This latter visit in Seattle extended into May 1946, but after December 1945 decedent stayed with a Mrs. Harriette M. Bond at 617 West 79th Street in Seattle as decedent had had some difficulties with her sister.

The evidence shows that the first Patricia Jean Kerton learned of the death of decedent was when she returned to her home in Seattle on November 1, 1950,

from a vacation she had been on since October 12, 1950. At that time she received two letters, one from Leta Koier, whom she did not know, dated October 12, 1950, and one from respondent, whom she did not know, dated October 27, 1950. The letter from Leta Koier advised both her and Lester that their Aunt Mary had passed away the preceding Monday morning, October 9, 1950. Therein Leta Koier advised she was a cousin of the decedent but said nothing about her will or what was being done in regard thereto. On October 27, 1950, respondent sent a letter to Patricia Kerton at 209 West 46th Street in Seattle, therein advising her as follows: "Mary E. Dryden passed away October 9th and in-as-much as you are one of the devisees in her will I am enclosing a copy of said will. Miss Dryden's will is now in the process of probation in the County Court here. * * * P. S. I have the same address for Lester Francis Kerton, Jr., and am enclosing a copy for him, will you please see that he receives it." He enclosed two copies of the will therein referred to. He did not therein advise the Kertons they were heirs at law of the decedent. At the time Lester Kerton was at sea and did not return until about the middle of January 1951. Patricia Kerton replied to respondent's letter on November 1, 1950. In her letter she asked for information about the grand piano she had been bequeathed by the provisions of the last will of her grandaunt, then went on to say, "Any information that you might be able to give, I would appreciate if you would mail to me at my place of employment * * *." Respondent said he construed the quoted request for information as referring to the grand piano and since he did not have a key to the house where it was located, that being in the possession of Leta Koier to whom it had been devised, he could not and did not send her the information. The fact is the only information that respondent ever sent either of the sole and only heirs at law of decedent was

the letter of October 27, 1950, which we have hereinbefore quoted.

When Patricia Jean Kerton received respondent's letter on November 1, 1950, she was not aware of the fact that she and her brother were her grandaunt's closest blood relatives, as she was not acquainted with decedent's entire family. After her brother returned from sea, and they had obtained more information about the matter, they filed a petition in the county court of Deuel County on March 8, 1951, to set aside the order admitting and allowing the last will of decedent to probate and, at the same time, filed objections to the allowance of the will to probate. What happened in regard thereto has already been fully set out herein.

Under this factual situation we think the following from Johnson v. Richards, *supra,* has application in relation to respondent's duties and responsibilities to the heirs at law of decedent:

"It is unnecessary in this case to consider what the duty of Richards was, if any, in reference to appellants (the Kertons) before he volunteered to give partial information to them by his letter of October 27, 1950. But when he broke his silence he became obligated to truthfully and completely state the facts within the limits of his information and knowledge in regard to the subjects referred to by his letter and enclosure transmitted with it, and not to withhold or distort anything that would tend to cause appellants to remain inactive.

"Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth and not suppress facts within his knowledge or materially qualify them. Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false."

It is apparent that respondent sought, by his testimony, to avoid some of these responsibilities by alibis. Appellant testified he did not put the date of hearing set by the

county court for the hearing on the petition to allow and admit the last will of decedent to probate in his letter of October 27, 1950, for the reason that it was his understanding, and he thought, Leta Koier was going to do so in her letter to the Kertons advising them of decedent's death. Leta Koier does not testify to any such understanding and, in fact, her letter was written the day before the petition for probate was filed and at a time when she could not have known what date the county court would set for that purpose. We do not think respondent had any such understanding with Leta Koier but, even if he did, he would still be responsible for her failure to do so. He could not shift his responsibility to another in this respect and claim immunity when the other party failed to carry out such responsibility.

Respondent says he did not write the Kertons prior to his return from the Grand Lodge sessions of the Odd Fellows, of which he was then an officer, because he did not have their address and did not obtain it until after he returned when he obtained it from Leta Koier. Respondent apparently left Chappel very shortly after filing the petition for probate in the county court of Deuel County on October 13, 1950, to attend the annual session of the Odd Fellows already referred to and did not return for some 10 days. It appears that the Kertons' address appeared in one of the previous wills respondent had drafted, of which he had a copy in his office. It would appear respondent must have given very little, if any, thought to this matter for the Kertons' address could have easily been obtained by him from records in his own office. Respondent further states that he did not know until after November 3, 1950, that the Kertons were the only heirs of decedent, being until then of the impression that first cousins, of whom decedent apparently had several, would be of equal status as heirs as grandnieces and grandnephews. He testified that on or about October 27, 1950, he sent all first cousins, from a list furnished by Leta Koier, a copy of the will. It is

significant that he did not list such cousins in the petition for probate, which he prepared and which contains the following language: "And your petitioner further shows that the names, ages and residences of the heirs at law of said deceased, and other persons interested in said estate are as follows: * * *." While we think respondent, in handling the estate, was bound to know who would be the heirs at law of said decedent by reason of their blood relationship to her, however, we do not think this point material as it relates to respondent's knowledge for he knew the Kertons were heirs at law and when he engaged in giving them information he was bound by the same duties and responsibilities even though they did not constitute all the heirs at law.

We think the status of respondent required him, when he wrote the Kertons, to make a full disclosure of all facts within his knowledge which were material for them to know for the protection of their interests. His default in this respect, under all of the circumstances here established, constituted a breach of his trust as an attorney. See Johnson v. Richards, *supra*. It is apparent he was more concerned in making secure his rights under the will than he was of performing his duty as an attorney.

After the contest of the will was settled, and it was allowed and admitted to probate, the county commissioners of Deuel County on June 7, 1954, at the suggestion of respondent, appointed John D. Wertz, a practicing attorney at Chappell, as special counsel for the purpose of representing Deuel County and State of Nebraska in connection with the determination of the inheritance tax to be assessed in the estate of Mary E. Dryden, deceased. Thereafter, on July 26, 1954, Wertz entered into a stipulation with respondent as executor of the Dryden estate that, with his approval, the county judge could use the valuations placed on the assets of the estate by the appraisers thereof as the true value thereof for the purpose of determining and assessing inheritance tax

on the shares and interests of the beneficiaries thereof. On the following day, at the request of respondent, the county judge did so, fixing the amount thereof on the share of respondent as $4,335. However, the county judge charged no interest thereon because, as he testified, the delay was not caused by the executor or his attorney. Respondent immediately paid the amount thereof. Wertz took no appeal therefrom in behalf of the county, as he had a right to do. § 77-2023, R. S. Supp., 1955; Kearney County v. Hapeman, 102 Neb. 550, 167 N. W. 792. The charge against respondent is that he did not pay interest on this amount when he was clearly obligated to do so by the statute.

The county court of Deuel County had jurisdiction to determine and assess inheritance tax on the shares of the beneficiaries of decedent's estate (section 77-2027, R. R. S. 1943), could fix the values of the property without appointing special appraisers for that purpose (section 77-2021, R. R. S. 1943), and could therefrom determine the tax that was owing (section 77-2022, R. R. S. 1943). Proceedings for that purpose can be initiated, as was here done, by application of the executor. § 77-2018.01, R. S. Supp., 1955. The tax assessed is due and payable at the death of the decedent and draws interest unless, prior to August 27, 1951, it was paid within 12 months and since then within 16 months. § 77-2010, R. R. S. 1943, now § 77-2010, R. S. Supp., 1955. There was no basis for the county judge refusing to charge interest thereon as the 16 months leeway provided for in section 77-2010, R. S. Supp., 1955, had passed when respondent, as executor, made application to have the inheritance tax determined and assessed on July 27, 1954. The mere fact that delay had been caused by litigation did not excuse the county judge from assessing it. In re Estate of Sanford, 90 Neb. 410, 133 N. W. 870, 45 L. R. A. N. S. 228; In re Estate of Fort, 117 Neb. 854, 223 N. W. 633.

While it is apparent the then county judge failed to

properly perform his duty in this regard and that special counsel appointed by the county commissioners failed to properly look after the county's and state's best interests by failing to appeal from the county court's order determining and assessing the tax, we do not think such failure and neglect can be properly charged to respondent. Clearly he was relieved of his responsibilities to the county and state in this matter when Wertz was appointed. Likewise it was not his duty to appeal from the county court's decision nor did he have the responsibility of paying such interest when it was not charged to him by the county court. We can see nothing unethical in what respondent did in regard to this matter.

Having come to the conclusion that respondent's conduct requires that he be disciplined we come to the question as to the extent thereof based on the record before us. Respondent introduced the evidence of a number of prominent residents of Chappell to the effect that his reputation for honesty and integrity as a lawyer in that community was good and has not changed since the Dryden will contest. These witnesses, while mostly close friends or clients of respondent, are, nevertheless, representative of the community's interests. Recognizing the seriousness of disbarment to an attorney of the age of respondent (48) and the probable effect it could ultimately have upon his ability to earn a livelihood, we think this evidence of his reputation and integrity as a lawyer in a community where he has practiced law for many years should be given consideration in determining the extent of discipline that should be imposed. In re Petersen, 208 Cal. 42, 280 P. 124; People v. McCallum, 341 Ill. 578, 173 N. E. 827. However, as stated in State ex rel. Nebraska State Bar Assn. v. Gudmundsen, *supra*: "It may well be said that the reputation of a man in his community is usually a good indication of character but this is not always so." Whether or not the reputation of an attorney is of material importance in any discipline case must necessarily depend

largely upon the facts and circumstances thereof.

We think, under all of the circumstances as herein detailed, that a judgment of suspension from the right to practice law for a period of one year will adequately punish respondent for the offenses against the proper ethics of the profession which, by his conduct herein set forth, he has committed. Respondent should fully understand that he must strictly comply with this order and, if he should fail to do so, that an order of disbarment must necessarily follow.

Realizing that a reasonable time should be given respondent to get his business in order before the suspension becomes effective he is granted 30 days from the effective date of this opinion for that purpose and the year of suspension is to run therefrom. All costs of this proceeding, including the fees of the referee, are taxed to respondent.

JUDGMENT OF SUSPENSION.

CATHERINE S. PIKE, REVIVED IN THE NAME OF A. R. JOHNSON, EXECUTOR OF THE ESTATE OF CATHERINE S. PIKE, DECEASED, ET AL., APPELLANTS, V. CLARENCE A. TRISKA ET AL., APPELLEES.

84 N. W. 2d 311

Filed July 12, 1957. No. 34092.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Escrows.** An escrow is generally defined as a written instrument which by its terms imports a legal obligation, deposited by the grantor or obligor, or his agent with a stranger or third person, to be kept by the depositary until the performance of a condition or the happening of a certain event and then to be delivered to take effect.

3. ———. The grantor or obligor of an instrument held in escrow loses control over it although he retains legal title and its concomitants until performance of the conditions of the escrow contract by the grantee or obligee.
4. ———. The grantor or obligor is not entitled to a return of the instrument or a revocation thereof unless the grantee or obligee fails to fully perform the conditions of the escrow contract and upon performance of such conditions the grantee or obligee is entitled to delivery of the instrument, which will be enforced by a decree of the court.
5. **Deeds.** The evidence of the attorney who prepared the deed, of the notary who took the acknowledgment, and of the witnesses to the execution of the deed, alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions.
6. **Contracts.** The consideration for a contract may be a benefit to the promisor or a detriment to the promisee. In order for a detriment to the promisee to constitute a valid consideration for a contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.
7. ———. Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement.
8. ———. A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
9. ———. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eyes of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance.
10. ———. The practical interpretation given a contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction.
11. **Fraud.** Where it is sought to set aside a written instrument, and more especially one which has been executed with the

formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome.

12. ———. In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.

13. **Trusts.** Generally, a trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust and to see that the property is designated as property of the trust. However, by the terms of the trust, the trustee may be permitted to mingle trust property with his own and in such a case the trustee is not liable if he keeps on hand the amount of the trust property.

14. **Principal and Agent.** Generally, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency, and unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency. However, it may be understood at the time the agent is appointed that he may deal on his own account, and his failure to reveal that he is acting on his own account or that he has a personal interest in the transaction is immaterial if the principal consents to this or has manifested his consent.

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

W. I. Tillinghast, Halligan & Mullikin, and *George B. Hastings,* for appellants.

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

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

CHAPPELL, J.

On September 18, 1952, Catherine S. Pike originally brought this action as plaintiff against defendants, Clarence A. Triska, Emily J. Triska, his wife, and LeRoy A. DeVoe, seeking to set aside and cancel a contract and warranty deed allegedly procured on July 28, 1950, by mistake, fraud and misrepresentation of defendant, Clarence A. Triska. Plaintiff also sought to compel said defendant to give an accounting of rents, profits received, and expenses incurred and paid by him after allowance of proper consideration for his services performed while purportedly acting as plaintiff's agent. Further, plaintiff sought to have said defendant restrained and enjoined from molesting plaintiff and the tenants on plaintiff's farms, from going upon any of her lands, and from disposing of any money belonging to plaintiff. LeRoy A. DeVoe was joined as a defendant solely in order that the court could have jurisdiction over him because he had possession of the warranty deed. There was no allegation or contention that such defendant was guilty of any undue influence, fraud, or misrepresentations in the preparation, execution, and delivery of the contract and warranty deed. A copy of such contract, marked exhibit A, was attached to and made a part of plaintiff's petition.

A restraining order as prayed was granted ex parte, but after a hearing same was dissolved insofar as it prevented defendant, Clarence A. Triska, from going upon certain real property involved. Also, an application by plaintiff for appointment of a receiver was heard and denied.

The separate answer of defendants Triska denied generally and alleged substantially that the contract and deed were made, executed, and delivered by plaintiff as consideration for defendant Clarence A. Triska's serv-

ices and his agreement to manage plaintiff's property and financial affairs as he would his own, and take care of all her personal needs and comforts so long as she lived. A copy of a power of attorney, concededly executed and delivered to defendant on December 27, 1949, by plaintiff and her husband, Charles D. Pike, during his lifetime, together with a copy of the contract and warranty deed allegedly executed and delivered by plaintiff on July 28, 1950, were respectively marked exhibits A, B, and C, and attached to and made a part of defendant's answer. Defendants prayed for dismissal and authority to continue performance of the contract with plaintiff, or in the alternative that defendant Clarence A. Triska should have judgment against plaintiff for his own funds advanced to her and the reasonable value of his services and unpaid expenses. Insofar as important here, plaintiff's reply thereto was a general denial.

On March 2, 1954, plaintiff Catherine S. Pike died, and the action was revived by stipulation in the names of A. R. Johnson, executor of her estate, and named beneficiaries in her last will, executed January 14, 1953, who stood in plaintiff's shoes and took her rights, if any, by succession. Those latter persons included Anna Sexton, plaintiff's practical nurse and housekeeper, and Augustine Galavez, a tenant on one of plaintiff's farms. After plaintiff's death, defendants Triska filed a supplemental answer, alleging plaintiff's death and that, as provided in the contract, exhibit B attached to and made a part of their original answer, defendant Clarence A. Triska was entitled to delivery of the warranty deed to him by defendant LeRoy A. DeVoe. They renewed the prayer of their original answer and prayed in addition that the real property described in the contract and warranty deed be declared to belong to defendant Clarence A. Triska, and that defendant LeRoy A. DeVoe should be required to deliver said warranty

deed to said defendant. Insofar as important here, plaintiffs' reply thereto was a general denial.

In the meantime, on March 3, 1953, after a pre-trial hearing, the trial court entered its pre-trial order, which by agreement fixed the issues actually tried. Therein the issues tendered by plaintiff were substantially as follows: (1) That the signature of plaintiff to exhibit A, the contract of July 28, 1950, was procured by fraud or mistake; (2) that the execution of exhibit A was induced by fraudulent misrepresentation; (3) that defendant Clarence A. Triska had violated the trust or duty owing by him to plaintiff; (4) that plaintiff had the power to terminate exhibit A by the notice given in her petition; and (5) that said defendant had a duty to account to plaintiff irrespective of the validity of exhibit A, and if so, he was subject to a personal liability to pay plaintiff any balance found to be due her.

The issues tendered by defendants were substantially as follows: (1) Denial of plaintiff's tendered issues numbered 1, 2, 3, and 4; (2) defendant Clarence A. Triska conceded that he had a general duty to render a report to plaintiff of his acts, doings, and financial transactions in her behalf, but denied any liability to pay over any general balance to plaintiff in excess of amounts required for her immediate personal needs as they develop from time to time; and (3) that if an adverse finding is made as to any one of plaintiff's issues numbered 1, 2, 3, or 4, then said defendant is entitled to reimbursement for any balance due him upon the accounting between the parties.

Defendant Clarence A. Triska agreed to give an accounting and did so. In doing so, he employed a firm of accountants who examined and reported in writing every item of money received, deposited, and expended by said defendant while handling plaintiff's property and financial affairs, which report, disclosing a balance due defendant of $11,844.57, was made available to plaintiff and her counsel. Such report appears in the

record during separate hearings respectively as exhibit 8 and exhibit M-1. Hearings upon several issues were had by the court on April 7, July 16, September 23 and 24, 1953, and on April 30, 1956. In the meantime, however, the trial court adjourned the hearing upon the merits and appointed a referee to hear testimony in proceedings for an accounting, and report his findings to the court. Such hearings took place on November 22, 23, and 30, and December 1 and 10, 1954. Thereafter, on May 9, 1955, the referee reported at length that he found a net balance due defendant Clarence A. Triska from plaintiff of $6,303.79. The voluminous evidence adduced at that hearing was received in evidence and made a part of the bill of exceptions now before us.

Subsequently, on May 1, 1956, the trial court rendered its decree, finding and adjudging the issues generally in favor of defendants and against plaintiffs, but taxing all costs to defendant Clarence A. Triska. In doing so, the court found and adjudged with relation to the contract and deed that their execution and delivery were not induced or procured by mistake, undue influence, fraud, or misrepresentation; that defendant had performed the contract and handled plaintiff's farm operations and financial affairs as he would his own, and provided for plaintiff's support and maintenance without regard to availability of funds from Pike resources in the manner agreed upon by the parties and ratified by plaintiff, until defendant was stopped from doing so by injunctive process; that without a breach of duty by defendant in failing to so support plaintiff or refusal to turn over funds that belonged to her, the contract and deed were irrevocable; that plaintiff was entitled to a full accounting by defendant; but no demand therefor had been made by her until this action was filed, which was then done, and no damages were shown by defendant's failure to previously do so, although it appeared that defendant's bookkeeping, accounting, and fiscal matters were irregularly handled in some respects.

The decree found and adjudged that execution and delivery of the contract and deed by plaintiff had the effect of vesting the real property therein described in defendant Clarence A. Triska as of July 28, 1950, subject to a life estate in plaintiff; that upon her death, March 1, 1954, said defendant became the fee title owner thereof and entitled to delivery of the deed thereto by LeRoy A. DeVoe; and that said defendant was entitled to all crops planted upon such lands after March 1, 1954. The judgment quieted title to such real property in defendant Clarence A. Triska, ordered a writ of assistance to issue placing him in possession thereof, and enjoined plaintiffs from asserting any right, title, interest, claim, or demand thereto.

After due consideration of exceptions to the report of the referee and hearing thereon, the judgment sustained the exceptions in part and denied them in part. It found and adjudged that the 1953 and 1954 wheat crops in storage were the property of plaintiff's estate, but the 1955 wheat crop on described land belonged to defendant Clarence A. Triska, and that there was due said defendant from plaintiff the sum of $7,175.79. However, the court rendered no judgment therefor, since same was part of the consideration to be paid by said defendant in services and money for plaintiff's support and maintenance. The judgment also required the executor of plaintiff's estate to account to said defendant for the 1954 and 1955 crops upon certain described irrigated land, subject to appropriate offsets, credits, and charges for support, maintenance, expenses of last illness, and burial of plaintiff.

Thereafter, plaintiffs' motion for new trial was overruled and they appealed, assigning some 25 alleged errors, the effect of which was to allege that the judgment of the trial court was not sustained by the evidence but was contrary thereto and contrary to law. We conclude that plaintiffs' assignments should not be sustained, except with regard to one matter of law here-

inafter discussed which does not affect the result. Defendant Clarence A. Triska cross-appealed from that portion of the trial court's decree relating to the accounting, but concededly our affirmance of the judgment requires no decision upon the cross-appeal.

Hereinafter, for clarity and brevity, we will call Catherine S. Pike plaintiff. Her husband, Charles D. Pike, will be called Mr. Pike, but in speaking of both they will be called the Pikes. Defendant Clarence A. Triska will be called defendant, and his wife defendant Emily J. Triska will be called Emily, but in speaking of both they will be called defendants or the Triskas. Defendant LeRoy A. DeVoe will be called Mr. DeVoe.

"Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786.

In the light of such rule, and other authorities hereinafter cited and discussed, we have examined the record which fairly discloses the following: For many years defendants were close personal friends of plaintiff and Mr. Pike, who had no close relatives. Defendant Emily first met Mrs. Pike in 1919 when she came to Ogallala. Emily was then 15 or 16 years old, and they became acquainted at social affairs. Emily's parents lived in the country, and she lived in the home of the Pikes 4 years while attending school in Ogallala. Thus their friendship became so close and affectionate that they treated each other as parents and daughter. The Pikes even insisted that defendant obtain their consent to marry Emily. Defendant first met the Pikes about 1925 in their home when he came to court Emily. He thereafter became a close personal friend of the Pikes.

Defendants were married May 27, 1927, and moved away from Ogallala, but thereafter came often to visit with the Pikes. There they always affectionately greeted and treated each other as if there was a parental relationship. In 1945 plaintiff had a serious operation, whereupon Emily came and spent more than a week taking plaintiff back and forth to a hospital in Sutherland. She was also with plaintiff when she was operated upon.

Mr. Pike was a contractor, and during the summers of 1928 and 1929 defendant did construction work for him. Thereafter, beginning in 1931 or 1932, defendant, as requested, made out Mr. Pike's income tax returns and took care of his tax matters. He continued to do that until Mr. Pike's death on January 11, 1950.

Plaintiff had arthritis for years, and a short time after her operation she fell and broke her hip from which she never recovered sufficiently to enable her to walk. Thus in 1949 she was bedfast most of the time, which required the supervision of a practical nurse to care for her, lift her about, and do the housekeeping. However, it appears conclusively that plaintiff had mental capacity at all times here involved, and no contention was made by plaintiffs that she did not. Mrs. Anna Sexton was one of those employed as a practical nurse and housekeeper by Mr. Pike in March 1949. As such she was paid $35 a week and board, and, except for 5 weeks in July and August 1950, when she had an injured arm and was unable to do that work, she continued to be so employed. She met defendants there the first night she worked.

Mr. Pike was not in good health, but was able to work some. He had a heart difficulty and in early September 1949 he became seriously ill. About December 8 or 10, 1949, he could sit up in a chair at times, but was generally kept under oxygen except for a few moments at meal times. In December 1949, Mrs. Sexton, at Mr. Pike's request, called defendant who lived in Sidney, and told him to come down to Pikes' home.

There Mr. Pike told defendant: " 'I am not in very good physical condition, I want you to look after my affairs, because I can't get out of the house.' "

Mr. DeVoe, a lawyer who had practiced in Ogallala for almost 47 years, had known the Pikes for 25 years. He had represented them as their lawyer in various matters for many years. He had drawn Mr. Pike's will and served as attorney for his estate after his death. He first met defendant about December 27, 1949, when, at the request of the Pikes, he prepared a power of attorney which was concededly duly signed, executed, acknowledged, and delivered to defendant by the Pikes in their home. Such instrument constituted and appointed defendant: "true and lawful attorney for us and in our name, place and stead.

"To collect and receipt for any money now due or that may hereafter become due us or either one of us;

"To lease land now owned by us or either of us and collect and receipt for rentals therefrom;

"To institute suits if necessary to collect rentals or to secure possession of property belonging to us or either of us;

"To endorse checks payable to us or either of us;

"To make income tax returns for us, pay the same, and to pay any and all taxes assessed against our property;

"To execute any and all papers necessary in connection with the operation of our affairs, giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and amount (about) the premises, as fully to all intents and purposes as we might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that our said attorney or his substitute shall lawfully do or cause to be done by virtue thereof."

Thereupon defendant, who was engaged in the oil

business at Sidney and operated his own wheat farm in Chase County, assumed the broad power and authority granted by the power of attorney and undertook by agreement the operation of all Pike property and financial affairs as if they were his own, with the understanding that for doing so defendant was to ultimately receive the real property here involved. However, Mr. Pike died on January 11, 1950, the very day that defendant brought his last income tax return to Mr. Pike's home and obtained his signature thereon. Defendants were both at the Pike home that day.

Mr. Pike's will had appointed plaintiff executrix of his estate, but she was physically unable to serve, so at her request and with her consent defendant was appointed administrator with the will annexed, whereupon he served as such without compensation until the estate was closed on May 23, 1951. In that connection, the real estate involved passed to plaintiff by operation of law under the provisions of joint tenancy by which the property had been held by plaintiff and Mr. Pike. However, with plaintiff's knowledge and consent, from the date of Mr. Pike's death until this action was filed, defendant looked after the care, support, and maintenance of plaintiff, her home, and farm operations, employed and paid all help, paid all expenses as Mr. Pike would have done, and in doing so, called at plaintiff's home and farms at least once a week and more often if the occasion required it. As a matter of fact, as hereafter observed, in order to do so, it became necessary for defendant to advance substantial sums of his own money, and he did so with the knowledge and consent of planitiff.

In that connection, on January 24, 1950, plaintiff requested her lawyer, Mr. DeVoe, to draw her will. He did so as instructed, and such will was concededly duly signed and executed as provided by law on that date. Therein, after making certain cash bequests unimportant here, the will provided: "Fourth: I give, bequeath and devise unto my friend Clarence A. Triska of Sidney, Ne-

braska, all of the rest and residue of my property, both real and personal or mixed, of whatever nature and wherever found, to be and become his absolutely, the real estate so devised shall descend to him and to his heirs and assigns forever in fee simple.

"Fifth: I hereby appoint the said Clarence A. Triska executor of this my last will and testament."

Theretofore defendant had suggested to plaintiff that she should make a will, but he had made no suggestion about its contents. As a matter of fact, Mr. DeVoe had then known defendant less than a month and defendant had no knowledge that the will had been drawn and executed nor the contents thereof until the trial of this case.

Between the date of Mr. Pike's death and July 1950, it was definitely discovered that income from plaintiff's farms would be insufficient to meet necessary expenses for the support and maintenance of plaintiff and the operation of her property and affairs, so plaintiff and defendant discussed the entire matter, whereat she told defendant "she would try and arrange the affairs in such way that" defendant "could look after her affairs and pay her bills, and be protected in any money that" he "would invest in the operation, and be protected so that" defendant "would receive the property after her death." In response thereto, plaintiff asked to have her attorney, Mr. DeVoe, come to her home, and defendant told him to do so.

On Sunday afternoon, which would be July 23, 1950, plaintiff told Mrs. Kuntz, her then practical nurse and housekeeper, that on Monday or Tuesday they would have company and Mrs. Kuntz should prepare a lunch for " 'Some men about some business * * * Mr. Triska and Mr. DeVoe.' * * * that they were to sign an agreement and contract and Mr. Triska was to take over the overseeing of all her business affairs because she was bedfast, and she knew that Mr. Pike wanted Mr. Triska to do that, and that was her will to do what Charley

wanted to do before she died." However, the arrival of defendant and Mr. DeVoe was unavoidably delayed until July 28, 1950. Upon their arrival, they discussed the entire matter with Mr. DeVoe who was then attorney for Mr. Pike's estate, and had been attorney for plaintiff and Mr. Pike for many years previously. In accord with plaintiff's instructions, Mr. DeVoe then went to his office where he prepared the contract and deed here involved, and returned with them about 3:30 p. m. Plaintiff then told Mr. DeVoe " 'she would like to have him read the papers to her.' " He did so, and plaintiff said "it was perfectly all right, that was the way she wanted it." Plaintiff sometimes read with a reading glass, so defendant held the glass so that plaintiff could plainly see to write her name on the line provided therefor, whereupon, in the presence of defendant, Mr. DeVoe, and Mrs. Kuntz, plaintiff and defendant signed, executed, acknowledged, and delivered the agreement, and plaintiff signed, executed, acknowledged, and delivered the deed to Mr. DeVoe.

Thereafter, plaintiff told Mr. DeVoe she "thought now that everything was all right, the way she wanted it, because that is the way Charlie wanted her to do things * * * Mr. Pike wanted Mr. Triska to have the property." Defendant and Mr. DeVoe then took the papers with them because plaintiff told Mr. Devoe, who had done their law business for many years, "to take the papers with him and take care of them with the rest of her papers" which "she had with" him. Nothing was said at the time about a will. After the contract and deed were executed and delivered, Emily stopped at plaintiff's home to greet her. There plaintiff happily said to Emily that "she could sleep that night, because she had fixed her business over so that Clarence could look after it and she knew that no one could come in and do away with her property, and she would be taken care of * * * she knew that was the way Charlie wanted it and that was the way she wanted it; * * *."

The contract first described plaintiff's real property, consisting of two farms and her home in Ogallala. It then said: "and whereas the said Clarence A. Triska as agent for said Catherine S. Pike is caring for all of said property, overseeing the farming operations on said land and the care of the live stock thereon,

"Now therefore in consideration of said services the said Catherine S. Pike desires that at the time of her death that the said land and property in Ogallala be conveyed to the said Clarence A. Triska and thereupon the same to be and become his absolutely.

"Whereupon the said Catherine S. Pike has on this date made and executed a warranty deed conveying all of said real estate to the said Clarence A. Triska, provided however *said deed shall be held in escrow by L. A. DeVoe for and during her natural life* and immediately after her death he is instructed to deliver said deed to the said Clarence A. Triska." (Italics supplied.)

The warranty deed to said land was duly signed, executed, acknowledged, and delivered to Mr. DeVoe as provided in the contract as a part of the same transaction. There is no dispute about its terms, which were absolute in form. It so remained thereafter in the possession of Mr. DeVoe without any attempt by plaintiff to exercise any dominion or control over it or any attempt on plaintiff's part to revoke it or to revoke the contract providing for delivery thereof to defendant, until this action was filed September 18, 1952.

Contrary to plaintiffs' contention, we conclude that the contract and warranty deed were not testamentary in character. They were contractual. Also, contrary to defendants' contention, and the finding by the trial court in its judgment, we conclude that the contract and deed did not vest legal title to the property therein described in defendant as of July 28, 1950, subject only to a life estate in plaintiff. However, as hereinafter observed, such latter conclusion does not change the result.

We conclude that such instruments simply reaffirmed

plaintiff's intention, previously expressed in her will of January 24, 1950, which was executed in conformity with the understanding when the power of attorney was executed on December 27, 1949, and assured defendant that if he performed the contract he would in any event receive title to the property by delivery of the deed to him by Mr. DeVoe immediately after plaintiff's death. In other words, plaintiff and defendant thereby perfected an escrow transaction. See, 30 C. J. S., Escrows, § 4, p. 1194; 19 Am. Jur., Escrow, § 3, p. 419.

In McDaniel v. McDaniel, 131 Neb. 639, 269 N. W. 380, this court stated the applicable and controlling principle by saying: "The transaction involved in the present case may be properly regarded as an escrow, which is properly defined as 'a written instrument, which by its terms imports a legal obligation, deposited by the grantor, promisor, or obligor, or his agent with a stranger or third person, * * * to be kept by the depositary until the performance of a condition or the happening of a certain event and then to be delivered over to take effect.' 21 C. J. 865.

" 'Until the performance of the condition the legal title to the land to be conveyed remains in the grantor.' 21 C. J. 882. See, also, Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312; County of Calhoun v. American Emigrant Co., 93 U. S. 124, 23 L. Ed. 826; Muirhead v. McCullough, 234 Mich. 52, 207 N. W. 886.

"The form of the transaction implies the power of termination by the promisee in the event of failure to reasonably perform the controlling conditions required.

"In Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co., 24 Idaho, 63, 133 Pac. 655, it was held that, although a grantor cannot withdraw the instrument deposited as escrow when the grantee has complied with his part of the escrow agreement, he may do so upon actual failure of the grantee to perform. See, also, Restatement, Contracts, sec. 103, subsection (2)."

Also, in Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150, we concluded that the grantor or obligor of an instrument held in escrow loses control over it although he retains legal title and its concomitants until performance of the conditions of the escrow contract by the grantee or obligee. The grantor or obligor is not entitled to its return or revocation unless the grantee or obligee fails to fully perform the conditions of the escrow contract, and upon performance of such conditions the grantee or obligee is entitled to delivery of the instrument, which will be enforced by a decree of the court. However, when the grantee or obligee is in default he cannot enforce a delivery of the instrument to him by the depositary.

By analogy, of course, plaintiff herein retained legal title to the real property described in the contract and deed, but lost control over them so long as defendant performed the conditions of their contract and understanding, and upon full performance thereof by defendant during plaintiff's lifetime, as held by the trial court and affirmed herein, then on March 2, 1954, the date of plaintiff's death, the fee title to the property described in the deed vested in defendant, who became entitled to delivery of the instrument to him by Mr. DeVoe.

In Eggert v. Schroeder, 158 Neb. 65, 62 N. W. 2d 266, we held: "Courts should not set aside the disposition of property made by deed without good reasons, based upon clear and satisfactory proof.

"The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor."

In Little v. Curson, 114 Neb. 752, 209 N. W. 737, we held: "The evidence of the attorney who prepared the deed, of the notary who took the acknowledgment, and of the witnesses to the execution of the deed, alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor un-

derstandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions."

Plaintiff's testimony that if she executed the contract and deed they were procured by mistake, undue influence, fraud, and misrepresentations, and that she never did intend to give defendant any of her property, was self-contradictory, inconsistent, incredible, profane, and uncorroborated by any competent evidence. The evidence is overwhelming that there was no mistake, undue influence, fraud, or misrepresentation, and that plaintiff intended to and did execute and deliver the contract and deed on July 28, 1950, but subsequently, as hereinafter observed, changed her mind as a result of influences not caused or exercised by defendants.

In that connection also, plaintiffs' contention that the contract was unilateral, that it required defendant to do nothing, and was without consideration, has no merit. It is elementary that consideration for a contract may be a benefit to the promisor or a detriment to the promisee. Here we have both. Also, as recently reaffirmed in Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544: "In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.

"Mutuality of obligation of both parties to a contract is not essential to effectuate a binding agreement where there is a separate valid consideration as an inducement to the agreement.

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Plaintiffs' contention is controlled thereby.

The execution and delivery of the contract and deed was one transaction. As held in Thompson v. Jost, 108 Neb. 778, 189 N. W. 169, and reaffirmed in Farmers

Union Cooperative Elevator Federation v. Carter, 152 Neb. 266, 40 N. W. 2d 870: "The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance."

Also, as held in Jensen v. Romigh, 133 Neb. 71, 274 N. W. 199, and reaffirmed in Dakota County v. Central Bridge & Construction Co., 136 Neb. 118, 285 N. W. 309: "The practical interpretation given a contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction."

After the contract and deed had been executed and delivered, defendant continued to conduct all of plaintiff's financial affairs as if they were his own, and has always been ready, willing, and able to continue to do so. He hired and paid practical nurses to care for plaintiff and do her housekeeping. He employed a physician for her and paid his fees which, without proof, plaintiff claimed were excessive. He paid for the food consumed by plaintiff and her practical nurses, and for the maintenance of her home. He gave plaintiff money for personal incidental expenses. He employed and paid the salary of plaintiff's tenant and other laborers on her farms. He improved the fences thereon and the pump irrigation system on one farm where irrigation was used, and paid for such improvements. He supervised the farm operations, purchased seed, rotated crops, repaired and purchased machinery for use thereon, and paid for same. He purchased gas, oil, and grease for the operation of tractors, a truck, and machinery used thereon, and paid for same. He collected and spent the income from crops and livestock on the farms and paid

all taxes on plaintiff's property. Some checks for crops were made payable to both defendant and plaintiff, and she endorsed them. The crops were seriously damaged by hail in 1950 and less seriously in 1951. The income from plaintiff's farms was not sufficient to pay all such expenses, so at numerous times defendant advanced sizeable sums of his own money and paid them. A. R. Johnson, the party selected by plaintiff to take care of her property and financial affairs after defendant had been enjoined from doing so, and who also acted as executor of her estate after her death, found that to be true while he looked after such operations. Also, plaintiff was well aware of that fact. Defendant talked with her about the situation at times, and she endorsed and turned over some $4,500 in government bonds to help meet sizeable deficits. Further, defendant drove his own car from Sidney to plaintiff's home in Ogallala, and from there out to supervise her farms and pay the help and other expenses each Friday or Tuesday and sometimes more often, without receiving any money as expenses or compensation for so doing. True, he made no written itemized report to plaintiff until this action was filed, but none was ever theretofore required by plaintiff, who often talked with defendant about the farming operations and the condition of her financial affairs.

After this action was filed, defendant voluntarily produced all of his books and records and had an accounting firm make a complete audit and report of every item of income and expense in the estate and farm accounts from January 11, 1950, to September 19, 1952. In the light thereof, and other evidence adduced, a report was filed on May 9, 1955, by the referee in the accounting proceedings. Such report found that there was a gross balance due defendant from plaintiff of $10,888.10; that after deducting therefrom six debit items, there was a balance due defendant from plaintiff of $8,785.72. Therefrom the referee deducted $4,934.33 as a charge for

feeding plaintiff's alfalfa and beet tops to certain cattle belonging to defendant, which left a balance of $3,851.39 due defendant from plaintiff. Thereto the referee added $2,452.40 as the value of defendant's services and car mileage expenses, and reported that plaintiff was indebted to defendant for a net amount of $6,303.79. After due consideration of plaintiffs' and defendants' exceptions to the referee's report, the trial court's decree concluded that there was due defendant from plaintiff $7,175.79 in excess of money received by defendant. No part thereof has ever been tendered or paid by plaintiffs.

The principal factual issue involved in this case was whether or not the contract and deed of July 28, 1950, were procured by mistake, fraud, and misrepresentation. The accounting upon which the referee's report is based arose out of alleged nonperformance of the contract by defendant. In that connection, plaintiff contended that a fiduciary relationship existed between plaintiff and defendant which, having been shown, raised a presumption of fraud. In disposing of that contention, we may assume that a fidicuary relationship existed between plaintiff and defendant. As a matter of fact, defendant admits it.

In Johnston v. Johnston, 155 Neb. 222, 51 N. W. 2d 332, this court said: "The rule also is: ' " Where it is sought to set aside a written instrument, and more especially one which has been executed with the formality of being signed in the presence of witnesses and acknowledged before a notary public, on account of fraud, the presumptions of validity and regularity attaching to such a document require clear and convincing evidence to preponderate against them. The formal instrument furnishes proof of the most cogent and solemn character, and to outweigh this proof requires a greater quantum of evidence than in a case where there are no such presumptions to overcome. * * *" ' Neihart v. Ingraham, 140 Neb. 818, 2 N. W. 2d 28.

"While adhering to this rule, we feel that in the interest of exactness and in accord with the reasoning of our recent decisions, the last clause should be changed to read, 'and to outweigh this proof requires a higher quality of evidence than in a case where there are no such presumptions to overcome.' In re Estate of Baker, 144 Neb. 797, 14 N. W. 2d 585, 155 A. L. R. 950; Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525; In re Estate of Drake, 150 Neb. 568, 35 N. W. 2d 417.

"We reach the conclusion that plaintiff has not sustained his burden of proof and is not entitled to the relief prayed, and that the decree of the trial court should be affirmed as to the issues presented.

"In reaching this conclusion we are not unmindful of the relationship of trust and confidence between the parties here. The rule as to that is: 'In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.' Leichner v. First Trust Co., 133 Neb. 170, 274 N. W. 475. The answer is that a finding of fraud is not sustained by this record." See, also, Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645. That statement is controlling here.

With regard to the issue of performance, plaintiff contended that defendant, while acting as her agent in a fiduciary capacity, acted in bad faith, as follows: (1) By commingling his own money with that of plaintiff and the estate of Mr. Pike; (2) by placing his own cattle on plaintiff's farms and feeding them her alfalfa and beet tops without her knowledge or consent; and (3) by removing the tenant on one of her farms and

assuming possession and use thereof himself without her permission. In the light thereof, plaintiff argued that defendant could retain nothing acquired by him either in performance or violation of his agency, and plaintiff had a right to terminate the contract by notice given in her petition. We conclude otherwise.

With reference to plaintiff's first contention, it is conceded that defendant, as plaintiff's agent, commingled his own funds with those of plaintiff and Mr. Pike's estate, of which defendant was trustee. In that connection, however, Mr. Pike's estate was concededly closed on May 23, 1951, with a full accounting therefor by defendant, without even receiving any compensation for his services as administrator thereof with the will annexed.

The general rule is that: "The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust and to see that the property is designated as property of the trust." Restatement, Trusts, § 179, p. 456. However, as stated in comment e, p. 460: "By the terms of the trust the trustee may be permitted to mingle trust property with his own property. It may be expressly so provided by the terms of the trust or the character of the trust may be such as to make this proper. In the case of a formal trust, such as a trust created by will or deed of trust, mingling by the trustee of trust property with his own property is improper, unless it is clearly permitted by the terms of the instrument. In the case of an informal trust such mingling is proper if such is the understanding of the parties as shown by their agreement or by custom. In such a case the trustee is not liable if he keeps on hand the amount of the trust property." See, also, Rotzin v. Miller, 134 Neb. 8, 277 N. W. 811, wherein we held: "When it affirmatively appears that a trustee took title to the trust property in his individual name

in good faith, and no loss resulted from his so doing, he is not liable for breach of trust. Restatement, Trusts, sec. 179, comment d."

On the other hand, as stated in Restatement, Agency, § 387, p. 867: "Subject to and in accordance with the rules stated in §§ 388-398, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." As said in § 389, p. 873: "Unless otherwise agreed, an agent is subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency." Also, as said in comment b, p. 873: "It may be understood at the time when the agent is appointed that he may deal on his own account." As said in comment d, p. 875: "Failure by the agent to reveal that he is acting on his own account or that he has a personal interest in the transaction is immaterial if the principal consents to this or has manifested his consent." Also, as said in § 398, p. 900: "Unless otherwise agreed, an agent receiving or holding things on behalf of the principal is subject to a duty to the principal not to receive or deal with them so that they will appear to be his own, and not so to mingle them with his own things as to destroy their identity."

In the case at bar, defendant was required by agreement and understanding to handle all plaintiff's financial and business affairs as he would his own, and he did so, with plaintiff's knowledge and consent, thereby expending his own funds far in excess of the income therefrom. True, it could be inferred by innuendo, which may be easily acclaimed without substantial foundation, that one check transaction and only one was not in good faith at its inception. However, that check was never ultimately charged to plaintiff by defendant, and even if it were, plaintiff was then indebted to him far more than the amount thereof, and she suffered no loss as the result of it.

Defendant did, in the fall of 1950, purchase several

cattle and placed them on plaintiff's farms, where they consumed some of her alfalfa and beet tops. However, that was done after full knowledge thereof by plaintiff and with her permission as a part of the farm operations. Plaintiff not only knew about it and gave her consent but also on two or three trips to her farms, which were provided for by defendant at his expense and at plaintiff's request so she could inspect the farming operations, plaintiff saw the cattle and was ultimately allowed $4,372.71 for their feed and care, which still left her indebted to defendant for $7,175.79.

With the knowledge and consent of plaintiff, a tenant on one of her farms was notified by defendant to vacate because he was paying only $50 a year for pasture rent, which was an insufficient amount. In that connection, plaintiff, by oral agreement, then rented the farm to defendant himself for one-third of the crop and $150 a year for the pasture rent, and the crop therefrom was accounted for to plaintiff.

On May 16, 1951, plaintiff executed another will which disposed of her real property in a manner different from that provided in her will executed on January 24, 1950, and contrary to the terms of her contract with defendant and the deed delivered thereunder. There is evidence from which it could reasonably be inferred that she was influenced to do so by Mrs. Sexton who had been plaintiff's practical nurse and housekeeper since March 1949 and wanted to obtain plaintiff's home and the contents thereof as consideration for staying with plaintiff during her lifetime. In doing so, plaintiff did not call Mr. DeVoe who had previously been her attorney, or inform defendant of her acts or intention. Rather, she was influenced to call another attorney who prepared such will. The second paragraph thereof devised one described farm, share and share alike, to four distant relatives living in another state, most of whom she had never even seen. The third paragraph devised an undivided one-half interest in the other de-

scribed farm to the tenant thereon, and an undivided one-half interest therein to defendant as tenants in common, all in fee simple. The fourth paragraph devised and bequeathed absolutely to such tenant and defendants each an undivided one-half interest in and to all livestock, machinery, and other personal property located and used upon said latter farm. In that connection, however, the fifth paragraph made such devises and bequests subject to encumbrance for payment by said tenant and defendants, within 6 months from the date of appointment of an executor of plaintiff's estate, of all plaintiff's doctor bills, hospital and medical bills, and expenses incidental to plaintiff's last illness and burial. It then made same a lien upon said real and personal property prior to any interest of such beneficiaries until payment was duly made by them and gave her executor power to sell in order to satisfy such liens. The sixth paragraph of the will devised and bequeathed absolutely in fee simple to plaintiff's nurse and housekeeper, Anna Sexton, plaintiff's described lots and home in Ogallala, together with all improvements thereon, and the entire contents thereof used in its occupation and enjoyment. Other devises and bequests were made but they are unimportant here. A. R. Johnson was made executor.

At or about the time such will was executed, the tenant aforesaid, who claimed to have no knowledge except that which he obtained from the surrounding "air," told defendant that the lawyer who drew such will had called at plaintiff's home and that Mrs. Sexton was going to get plaintiff's farms and home, to which defendant replied, " 'you watch me.' " Contrary to plaintiff's contention, such statement by defendant, as we view it, was only a natural reaction under the circumstances. Thereupon, defendant called upon plaintiff, and, receiving no satisfactory knowledge or explanation, he consulted his lawyer, Mr. McGinley of Ogallala, who told him to file his contract of record in order to protect his interests. Defendant then filed his contract of record

on May 26, 1951. However, thereafter he continued to perform same in every respect without interruption until enjoined from doing so on September 18, 1952. In that connection, plaintiff claimed that she did not learn that defendant had recorded their agreement until her lawyer who drew her will on May 16, 1951, had checked the records in September 1952, whereupon she filed this action. Thereafter, on January 14, 1953, plaintiff executed another will, but its provisions are of no importance here except to say that the will again devised and bequeathed plaintiff's home and all its contents to Mrs. Sexton absolutely but gave defendants nothing.

It will be remembered that Mrs. Sexton was absent because concededly disabled at the time the contract and deed were executed and delivered on July 28, 1950, and her testimony with regard thereto relates to different occasions. In that connection, defendant, Mr. DeVoe, plaintiff's attorney, and Mrs. Kuntz, her then practical nurse, were present at that time. Their testimony established by clear, satisfactory, and convincing evidence that the execution and delivery of such instruments were not procured by any mistake, undue influence, fraud, or misrepresentation, and in connection with other evidence established that defendant had fully performed the conditions of their escrow contract but thereafter, without any proper or legally effective reason, plaintiff simply changed her mind and attempted to revoke and avoid the effect of her previous valid actions.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs in this court are taxed to plaintiffs.

AFFIRMED.

ANDREW V. KUCERA ET AL., APPELLEES, V. AGNES KAVAN, APPELLANT.

84 N. W. 2d 207

Filed July 12, 1957. No. 34106.

1. **Vendor and Purchaser.** An option founded upon a valuable consideration cannot be withdrawn before the time specified therein has expired.
2. ———. That the agreed amount to be paid for an option contract for the purchase of land was tendered but not accepted does not make the contract gratuitous for want of consideration. An unconditional tender of the specified amount for the purpose of avoiding loss of any rights or privileges is equivalent to payment as to all things incidental or consequential to the obligation to pay.
3. **Contracts.** A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
4. **Estoppel.** A person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration.
5. **Specific Performance.** Specific performance should, in general, be granted, as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby.

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

William H. Roether and *Edward Asche*, for appellant.

L. F. Otradovsky and *Lloyd L. Pospishil*, for appellees.

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

SIMMONS, C. J.

In this action plaintiffs seek specific performance of a contract whereby defendant agreed to sell them an interest in land. Issues were made and trial was had.

The court made a general finding for the plaintiffs and decreed specific performance. Defendant appeals.

We affirm the judgment of the trial court.

The cause is here for trial de novo. The evidence in many respects is in irreconcilable conflict. We weigh the evidence in the light of the equity rule that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

Reference will be made later to improvements placed on the premises by plaintiffs. The evidence as to their value, extent, and permanency is likewise in conflict. In considering that evidence we also consider the fact that the trial court examined the premises. See Hehnke v. Starr, 158 Neb. 575, 64 N. W. 2d 68.

We do not set out all the conflicting evidence. Rather we here find the controlling facts as they appear from the record tested by the above rules.

The plaintiffs are husband and wife. The defendant is an unmarried lady.

The land involved is some 320 acres of farm and pasture land.

In 1947 defendant and a Mrs. Hoffman were joint owners of the land. The land was rented to a tenant. Mrs. Hoffman and the defendant did not find the operation of the farm by a tenant an entirely satisfactory arrangement.

Plaintiffs desired to purchase a farm. They discussed purchase with Mrs. Hoffman and she agreed to sell. They then discussed the matter with defendant and agreed upon a purchase price without difficulty. Defendant, however, wanted a place to invest her money and offered to loan it to plaintiffs with the land as security. Plaintiffs desired a loan from a corporation.

Defendant mentioned a desire to purchase other land which she could hold in sole ownership. Plaintiffs and defendant then decided that if plaintiffs purchased the interest of Mrs. Hoffman that plaintiffs and defendant would become "partners," with plaintiffs going into possession and paying rent to defendant as the then tenant was doing. Plaintiffs were to have the right to purchase at the agreed price whenever defendant could find a suitable farm in which to invest her money.

The then tenant was the owner of several improvements on the premises. Plaintiffs bought or otherwise secured the ownership of them. In the spring of 1949 plaintiffs entered into possession, farmed the land, and thereafter paid rent on the one-half interest to defendant.

In November 1948 defendant was in an automobile accident. Plaintiffs thought that they should have something more than the verbal agreement upon which to rely because of the uncertainty of defendant's life, and the improvements already made and those contemplated. Defendant was unable or unwilling to make or carry her share of the cost of needed improvements. The matter was again discussed with defendant and she readily agreed to a written agreement. The defendant lived at Linwood.

On October 10, 1949, plaintiffs went there and took the defendant to David City some 20 miles away to a lawyer of defendant's choice. There the parties entered into a written agreement entitled an option. The recited consideration was "$1.00 and other valuable consideration." Defendant granted to plaintiffs the exclusive right of purchase of the premises for a period of 5 years for the sum of $15,500. Defendant suggested the price without prior discussion at that time. It was the price agreed upon 2 years earlier when plaintiffs bought the interest of Mrs. Hoffman. The agreement called for notice of election to purchase to be given on or before October 10, 1954, and a down payment at that

time of $1,000. The balance of $14,500 was to be paid when the transaction was completed.

Plaintiff husband tendered the $1 to defendant and she refused it, saying that she would pay her transportation that way. Defendant also paid the lawyer for his services for the same reason.

Plaintiffs then began to make permanent improvements and betterments in the farm buildings, and modernized the house. They also built intrafarm roads, drains, and dams, and contoured plow land. These improvements were made in part by plaintiffs' labor and in part by hire. They involved the expenditure of several thousand dollars. Defendant visited the farm on several occasions and knew of these improvements. She made no objection for the reasons that she was selling to the plaintiffs and the improvements paid her no added income.

At various times, particularly in the summer of 1954, plaintiffs undertook to assist the defendant to find an acceptable farm which she could purchase. The written option made no such requirement of the plaintiffs. The effort failed in part because land value had increased.

Plaintiffs then made application for a farm loan to secure the funds to complete the purchase of the defendant's interest in the land.

On October 2, 1954, plaintiff husband went to defendant's home and tendered her a personal check for $1,000 as the down payment. Defendant refused the payment and demanded a larger total purchase price. Plaintiff husband left the check with her.

By letter dated October 5, 1954, and signed by plaintiff husband alone, the verbal notice of intention to exercise the option was confirmed, and defendant was notified that performance of the contract "according to its terms" would be expected. This tender was accompanied by a cashier's check on a bank at Schuyler, Nebraska, for $1,000 and a request for a return of the personal check.

By letter dated October 7, 1954, directed to both of the plaintiffs, the defendant, by her attorney, returned both checks to the plaintiffs and advised that the cashier's check was returned for the reason that "you have never had a valid, legal option to purchase" and that no right of election existed. Plaintiffs were further advised that if they wished to acquire defendant's land by purchase they would "have to do so by forgetting an invalid option."

An effort to purchase the land without litigation failed because of the increased price demanded. This litigation followed.

Defendant argues here the contention that there was not a valid contract because there was no consideration for either the oral or written agreement. The written option agreement was patently executed to evidence the prior parol undertanding under which plaintiffs had entered possession of the land and had made substantial improvements. It fixed the terms of the parol agreement and in addition a date of expiration of the option. All parties so understood it. The written instrument recited a "consideration of $1.00 and other valuable consideration." The persuasive evidence is that the $1 was unconditionally tendered. It was not rejected as a tender but defendant directed that it be applied to the payment of her transportation to David City. At the same time and for the same reason she agreed to pay her half of the attorney's fee and that of the plaintiffs. The attorney advised them that the tender was sufficient under the circumstances. No one questioned it until this controversy arose 5 years later. Plaintiffs in reliance on the agreement went ahead and made valuable permanent improvements. Defendant at that time knew of the plan for the improvements.

The rule is: "An option to purchase land given without consideration may be withdrawn at any time before acceptance, upon giving notice to the other party thereto, but an option founded upon a valuable consideration

cannot be withdrawn before the time specified therein has expired." Von Knuth v. Ryan, 107 Neb. 351, 186 N. W. 81.

The factual situation here is quite comparable to that in George v. Schuman, 202 Mich. 241, 168 N. W. 486. The court held: "That the agreed amount to be paid for an option contract for the purchase of land was tendered but not accepted does not make the contract gratuitous for want of consideration. * * * An unconditional tender of the specified amount for the purpose of avoiding loss of any rights or privileges is equivalent to payment as to all things incidental or consequential to the obligation to pay."

The consideration here is held to be sufficient. There is another rule that requires we reach that result: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement, Contracts, § 90, p. 110.

We have twice approved and followed the above rule. See, Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544; Fluckey v. Anderson, 132 Neb. 664, 273 N. W. 41.

Defendant next contends that the acceptance of the option was not in accord with the terms of the option agreement. This argument is based on the fact that the option agreement of October 10, 1949, was an agreement to convey to Andrew V. Kucera and Rose M. Kucera. It called for a notice of election to purchase to be given by them, their heirs, or assigns on or before October 10, 1954.

On October 5, 1954, written notice of election to purchase was given, expressed in the first person singular and signed only by Mr. Kucera. The contention is that the notice of election to purchase, not being signed by Mrs. Kucera, was insufficient.

It is manifest that the parties understood throughout

that Mr. Kucera was the spokesman for both himself and his wife in this matter. Defendant recognized that fact, for the letter rejecting the tender is directed to both Mr. and Mrs. Kucera.

Here, however, the questions of agency and acceptance by one party need not be determined. Defendant rejected the notice, not for the reason here urged, but rested her return of the down payment solely on the contention that the option was invalid. At that time plaintiffs yet had time to have made a joint notice and tender had the issue been raised.

The rule is: "A person who has given a reason for his conduct and decision concerning a matter involved in controversy cannot, after litigation has begun, change his position and place or explain his conduct upon a different consideration." Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

Finally defendant contends that plaintiffs are not entitled to a decree of specific performance. This is based on the contention that the agreement does not contain the understanding of the parties, was the result of misapprehension, and to enforce it specifically would perpetrate an injustice. This seems to be a make weight argument. We find nothing tangible in this record upon which such a contention can be based.

It is manifest that the written agreement of October 10, 1949, largely carried out the oral understanding had theretofore. It fixed the terms and the duration of the option. Both parties understood what it did. The record does sustain a finding that toward the close of the 5-year period defendant found that she could not purchase acceptable land at a price she was willing to pay. The market price of land had increased. She wanted more money than the purchase price fixed in the option. She would have conveyed for a larger consideration. She had made a bargain that she thought was not advantageous when the time of performance came.

The established applicable rule is: "Specific perform-

ance should, in general, be granted, as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby." Garsick v. Dehner, 145 Neb. 73, 15 N. W. 2d 235.

The judgment of the trial court is affirmed.

AFFIRMED.

JEAN R. BROWN, APPELLEE, V. GLOBE LABORATORIES, INC., A CORPORATION, APPELLANT, IMPLEADED WITH FRANK A. JELEN ET AL., APPELLEES.

84 N. W. 2d 151

Filed July 12, 1957. No. 34148.

1. **Partnership: Parties.** It is not necessary that a dormant partner or a nominal partner be joined as a plaintiff if his nonjoinder does not in any way injure the defendant.
2. ———: ———. Where a contract is entered into and the subject matter thereof executed by a person in his own name, the fact that he is a member of a partnership, even if the other partners share in the profits, does not make it necessary to join them as parties.
3. **Corporations: Process.** Before any state can subject a foreign corporation to the jurisdiction of that state such corporation must have either expressly consented to such jurisdiction or must have done sufficient business therein to constitute a submission to such jurisdiction.
4. ———: ———. No all-embracing rule can be laid down as to just what constitutes the doing of sufficient business in a state by a foreign corporation in order to subject it to process of that jurisdiction. Each case must necessarily be determined by its own facts.
5. ———: ———. A sales manager of a foreign corporation who exercises judgment and discretion in the conduct of the corporation's affairs within this state is, within the meaning of the statute relating to service of process on such corporations, a managing agent thereof notwithstanding his acts and doings

as such agent may refer only to a part of the business transacted by the corporation.

6. Sales. In order for an express warranty to exist there must be something positive and unequivocal concerning the thing sold which the vendee relies upon and which is understood by the parties as an absolute assertion concerning the thing sold, and not the mere expression of an opinion.

7. ———. Representations which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty. Dealer's talk is permissible; and puffing, or praise of the goods by the seller, is no warranty, such representations falling within the maxim simplex commendatio non obligat.

8. ———. The Uniform Sales Act adopted by Nebraska provides in effect that where the buyer makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment, there is an implied warranty that the goods shall be reasonably fit for such purposes.

9. ———. The fact that the article had a trade name does not necessarily negative the existence of an implied warranty for fitness for a particular purpose when it is purchased not by name but for a particular purpose.

10. Witnesses: Evidence. Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony but are generally regarded as purely advisory in character; a jury may place whatever weight it may choose upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise unreasonable.

11. Sales: Damages. The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

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

George W. Becker, William P. Mueller, and *George L. DeLacy,* for appellant.

Harold A. Prince and *Gross, Welch, Vinardi & Kauffman,* for appellee Brown.

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

WENKE, J.

This is an appeal from the district court for Douglas County. It involves an action brought by Jean R. Brown against Globe Laboratories, Inc., a corporation; Frank A. Jelen; and Dr. Jelen's Veterinary Supply Corporation, a corporation. The action is based on alleged breaches of express and implied warranties of a product, Clostridium Perfringens Type D Bacterin, produced and put on the market by defendant Globe Laboratories, Inc., to be used for the prevention of Enterotoxemia in sheep. Plaintiff alleges he used it for that purpose on a large number of lambs and claims its use resulted in the death of 2,138 of the lambs he caused to be vaccinated therewith and in serious injury to a large number of the balance all because, as he claims, the bacterin used was not fit to immunize the lambs from Enterotoxemia and also because it was contaminated with some foreign substance which was injurious and poisonous to his lambs. He claims damages because of the death and injuries to his lambs which he alleges resulted from the use of this bacterin to vaccinate his lambs. Trial was had. A jury returned its verdict for the plaintiff and against Globe Laboratories, Inc., for the sum of $35,609.50 on which judgment was entered. Globe Laboratories, Inc., filed an alternative motion for either a judgment notwithstanding the verdict or for a new trial. The trial court overruled this motion and Globe Laboratories, Inc., has taken this appeal therefrom.

This being a law action we shall consider the evidence adduced according to the principle applicable in such cases and not reverse the verdict of the jury unless it is clearly wrong. The principle applicable is stated in Welstead v. Ryan Construction Co., 160 Neb. 87, 69 N. W. 2d 308, as follows: "In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it."

Appellee, Jean R. Brown, who was 46 years of age at the time of trial, is a native of Clarks, Nebraska, and lives in that town. By vocation he is a farmer and feeder with over 20 years of successful experience in buying, feeding, and marketing lambs, having fed between 400,000 and 500,000 lambs in his lifetime and as high as 40,000 in a single year. At all times herein material he had two feed lots near Clarks, with sheep pens, which he used in connection with his lamb feeding operations, one is referred to as the north place and the other as the home place. These two feed lots are about 3½ miles apart, the closest one to Clarks being some 2½ miles distance therefrom. The pens at these two feed lots were so constructed that the lambs in the different pens used the same tanks for watering and the partition fences were so constructed that although the sheep in the different pens could not intermingle they could touch each other, especially with their heads. A common supply of feed was used in feeding the lambs in the various pens.

Appellee always purchased high quality or reputation lambs for feeding, such lambs usually averaging between 70 and 75 pounds and were in full wool. The lambs are then fed from 75 to 90 days when they ordinarily reach top quality and are in "Full Bloom" as a well-fed and finished lamb is referred to in the trade. When finished a lamb should weigh about 100 pounds. Appellee had become entirely familiar with the eating habits of lambs. The usual procedure in feeding lambs, at the time herein material, was to give them ground hay and a little oats for 2 or 3 weeks after they were shipped in order to get them over the effects of shipping; then to vaccinate them for the purpose of immunizing them against Enterotoxemia, which disease will be hereinafter more fully described; then to wait another 10 or 12 days before putting them on full feed in order to give the bacterin used the necessary time to have its effect; and thereafter to gradually work the lambs onto a heavier diet for the purpose of fattening and

finishing. The usual heavier feeding consists of a daily ration of 2½ to 3 pounds of corn, ¼ pound of protein, and 1 pound of ground hay, which ordinarily produces an average daily gain of ⅓ pound. The purpose thereof is to get the lamb to "Full Bloom" as quickly as possible.

There are present in the soil bacteria or germs of a spore type called Clostridium Perfringens Type D and they are also usually present in the intestinal tract of sheep and lambs. Under ordinary conditions these bacteria or germs are not harmful. However, when lambs are put on a heavy diet of rich feeds, such as is done in commercial feeding and finishing, these bacteria or germs multiply very rapidly and produce a toxin which is poisonous and when sufficient thereof is absorbed into the bloodstream of the lamb from its digestive tract the result is fatal. This condition is brought about because the rich feeds neutralize the acidity of the intestines and allow them to absorb the toxin. It is called Enterotoxemia and is also referred to as pulpy kidney disease, overeating disease, and feed lot disease. To prevent this condition from developing in lambs when in a feed lot being fattened for market it was formerly necessary to give them more rough feed, thus extending the time necessary to bring them to a finished condition. In order to enable the feeder of lambs to cut down this time and not lose more than the normal amount, which is ordinarily not over 2 percent, there was developed a vaccine for the purpose of preventing this disease or immunizing lambs therefrom called Clostridium Perfringens Type D Bacterin, which we shall hereinafter refer to as bacterin. It first came on the American market in 1948, being produced and marketed by the Corn States Serum Company of Omaha, Nebraska, which company we shall hereinafter refer to as Corn States, although it apparently had been in use in Australia, New Zealand, and England prior thereto. Appellee began using this bacterin as soon as it came on the market.

In the years 1949, 1950, and 1951 appellee had suc-

cessfully vaccinated his lambs with bacterin produced by Corn States, having purchased it from Dr. Frank A. Jelen, a veterinarian from Omaha, Nebraska. He apparently purchased 24,000, 40,000 and 45,000 doses from Jelen during these years. It appears that Jelen lost his agency for Corn States products for he was no longer able to furnish that company's bacterin to appellee. However, in December 1950, Jelen became a wholesaler of the products of appellant Globe Laboratories, Inc., in Nebraska, which later included bacterin. This Jelen did through Dr. Jelen's Veterinary Supply Corporation, a Nebraska corporation, which he owned, operated, and used for that purpose.

Globe Laboratories, Inc., which will hereinafter be referred to as Globe, is a Texas corporation with its headquarters in Fort Worth, Texas. It manufactures and distributes veterinary biological and pharmaceutical products for use in connection with livestock, which products include Clostridium Perfringens Type D Bacterin. Globe started to perfect a method for producing the latter in December 1949; submitted an Outline of Procedure for the production thereof to the Bureau of Animal Industry of the United States Department of Agriculture on September 18, 1951, which the latter filed; there was then issued to Globe on the same day, by the United States Department of Agriculture, a license to produce such bacterin; and thereafter, on January 3, 1952, Globe released its first bacterin on the commercial market. Globe's license to produce was renewed for 1952 and was in full force and effect at all times herein material.

Prior to October 19, 1952, appellee had purchased some lambs near Douglas, Wyoming. On that date these lambs were delivered to him by rail at Clarks, Nebraska, appellee having purchased a total of 9,557. We shall hereinafter refer to them as the Wyoming lambs. About September 1, 1952, appellee had purchased 3,700 lambs, which we shall refer to herein as the Idaho lambs, and about December 1, 1952, he purchased 1,200 lambs, which

we shall herein refer to as the Omaha lambs. The name applied to each of these groups has its origin from the locale where they were purchased.

On September 22, 1952, Dr. Frank A. Jelen, whom we shall hereinafter refer to as Jelen, voluntarily wrote appellee and advised him he had bacterin available produced by Globe. Thereafter, on November 4, 1952, appellee met Jelen at Omaha in the Live Stock Exchange Building and made arrangements with Jelen whereby Jelen was to come to Clarks and vaccinate the Wyoming lambs with Globe bacterin. Jelen then ordered 10,000 doses of bacterin from Globe, which he received. It consisted of 1,250 doses of Serial 105, 1,250 of Serial 106, and 7,500 of Serial 109. We shall set out the significance of these serial numbers later in this opinion. On Thursday and Friday, November 6 and 7, 1952, Jelen went to Clarks and vaccinated 9,531 Wyoming lambs. Death and sickness occurred among these lambs immediately following their vaccination. That fact gave rise to this action. We shall discuss the facts relating thereto in more detail later in the opinion.

Before proceeding with a discussion of Globe's contentions relating to the merits of the case we shall deal with those it has raised relating to procedural and jurisdictional questions. Globe contends the trial court erred in overruling its motion to dismiss for the reason that the case was not brought in the name of the real party in interest as section 25-301, R. R. S. 1943, provides it shall be, except as otherwise provided by section 25-304, R. R. S. 1943. In this respect the trial court, by its instruction No. 8, advised the jury that as a matter of law appellee was the proper party plaintiff and had a right to bring the action in his own name.

The evidence adduced establishes the fact that appellee's brother Edwin F. Brown, who lives in Clarks, Nebraska, where he is a rural mail carrier, had loaned appellee money over a period of years, which was invested in the business, and had a fifty-fifty profit and loss shar-

ing interest in appellee's feeding operations, including the Wyoming lambs here involved. However, the record further establishes that all business was done in the name of appellee; that appellee borrowed the money to buy the Wyoming lambs in his own name from the Live Stock National Bank of Omaha; that appellee had the right to and did make all decisions as to when to buy and sell the lambs and how to feed and care for them; and that the only interest the brother of appellee had in appellee's feeding operations, because of the money he had invested therein, was the profit and loss sharing arrangement.

We think the situation here presented comes within the meaning of the language of section 25-304, R. R. S. 1943; that is, that appellee is a person in whose name a contract was made for the benefit of another and may therefore bring an action based thereon without joining with him such other person. But let us assume the evidence establishes a partnership. In that situation we think the following would be controlling: "While, as a general rule, all the members of a partnership must be joined as parties plaintiff in actions by partnerships, there are certain well-recognized exceptions which are not subject to such requirement. The most important of these governs the case of dormant or special partners, for it is now well established that it is not necessary that a dormant partner or a nominal partner be joined as a plaintiff, if his nonjoinder does not in any way injure the defendant. The other partners have the option of joining the dormant partners as plaintiffs with them in a suit on behalf of the partnership. Where a contract is made and the work executed by a person in his own name, the fact that he is a member of a partnership, even if the other partners share in the profits, does not make it necessary to join them as parties." 40 Am. Jur., Partnership, § 433, p. 432. See, also, 68 C. J. S., Partnership, § 208, p. 682; Dwyer v. Wiley Hotel Co., 91 Ohio App. 525, 108 N. E. 2d 859.

As stated in Dwyer v. Wiley Hotel Co., *supra:* "Conceding that Beasecker was a partner, the evidence shows that he was a dormant or silent partner. All business was transacted in the name of the plaintiff; all bills were charged to the plaintiff; the bank account was in the plaintiff's name; and the vendor's license was in her name. It is not necessary that a dormant or silent partner be joined in the action."

As we said in Archer v. Musick, on motion for rehearing, 147 Neb. 1018, 25 N. W. 2d 908, 168 A. L. R. 1164, quoting the following from State ex rel. Sorensen v. Nemaha County Bank, 124 Neb. 883, 248 N. W. 650: " 'In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end.' 2 Bancroft, Code Practice and Remedies, 1094."

In view of the foregoing principles, which have application here, we find Globe's contention to be without merit.

Globe further contends the trial court erred in overruling its special appearance objecting to the court's jurisdiction over it. This is primarily based on the contention that Globe, a foreign corporation, had no agent, office, merchandise, or place of business in Nebraska and had never brought itself within a situation to which section 21-1201, R. R. S. 1943, has application. Section 21-1201, R. R. S. 1943, provides, in part, as follows: "* * * and such service of process or of any such other legal notice as aforesaid upon the Secretary of State, * * * shall constitute valid service upon such corporation in all courts of this state, in counties where the cause of action, or some part thereof, arose, or in

counties where the contract, or portion thereof, entered into by such corporation has been violated or is to be performed." Appellee caused service to be made on the Secretary of State.

Before any state can subject a foreign corporation to the jurisdiction of that state such corporation must have either expressly consented to such jurisdiction or must have done sufficient acts therein to constitute a submission to such jurisdiction. McWhorter v. Anchor Serum Co., 72 F. Supp. 437.

Even though a foreign corporation has not expressly consented to such jurisdiction but is actually doing business in this state, then a valid service of process may be made against it upon the Secretary of State. Wilken v. Moorman Manufacturing Co., 121 Neb. 1, 235 N. W. 671; Yoder v. Nu-Enamel Corp., 140 Neb. 585, 300 N. W. 840.

No all-embracing rule can be laid down as to just what constitutes the manner of doing business by a foreign corporation in order to subject it to process in any given jurisdiction. Each case must necessarily be determined by its own facts. Pitzer v. Stifel, Nicolaus & Co., 143 Neb. 394, 9 N. W. 2d 495; McWhorter v. Anchor Serum Co., *supra;* American Asphalt Roof Corp. v. Shankland, 205 Iowa 862, 219 N. W. 28, 60 A. L. R. 986; Dahl v. Collette, 202 Minn. 544, 279 N. W. 561.

As already stated, Globe is a Texas corporation engaged in the production and marketing of serums, vaccines, antitoxins, biologics, and analogous products for use in the treatment of animals with its principal place of business in Fort Worth, Texas. It handled the sale of its products in Nebraska through four wholesalers, one being located in Fremont, one in Lincoln, and two in Omaha. It sold its products direct to these wholesalers who, in turn, sold them to drug stores and other retail outlets in Nebraska. While appellant had no resident agent, office, merchandise, or place of business in Nebraska it did carry on a very active program therein to

sell its products. Richard D. Watson was, at the time, employed by Globe as a traveling salesman working on a salary and commission basis and was driving a car furnished by Globe so as to permit him to call on the trade. While he was a resident of Atlantic, Iowa, his territory included most of Nebraska. He solicited many retail outlets in Nebraska, seeking to sell them Globe products. These outlets included some 300 to 400 druggists. Watson would send all orders he received to the four wholesalers in Nebraska, which one of these wholesalers the order would be sent to would depend upon which one the buyer designated. The wholesaler would fill the order from stock it had purchased from Globe and collect therefor from the retailer. Numerous shows or exhibitions, called dealer's schools, were held at various places in Nebraska, being sponsored primarily by dealers. They were usually attended by Watson and some other officer or representative of Globe. At these shows or exhibitions, which were usually attended by dealers, farmers, and students, the latter including G. I.'s, movies were shown of animal diseases and their treatment with Globe products. Lectures were also given along the same line and Globe's advertising literature would be passed out to those present. These meetings were solely for the purpose of acquainting those present with Globe products and their use as a means to promote the sale thereof.

As stated in Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632: "These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business,—inducing one local merchant to buy a particular class of goods from another, * * *." See, also, International Harvester v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479.

We think appellant was doing business in this state sufficient to authorize service upon it by serving the Secretary of State as is authorized by section 21-1201, R. R. S. 1943.

While the action was pending service was personally had in Douglas County on April 13, 1953, upon C. P. Mehaffy of Fort Worth, Texas, appellant's then vice-president and sales manager, while he was voluntarily in Omaha attending a meeting of the American Animal Health Pharmaceutical Association. Mehaffy was chairman of its executive committee and presided at a meeting of that committee held on April 14, 1953.

We said in Wilken v. Moorman Manufacturing Co., *supra*: "A sales manager of a foreign corporation who exercises judgment and discretion in the conduct of the corporation's affairs within this state is, within the meaning of the statute relating to service of process on such corporations, a managing agent, notwithstanding his acts and doings as such agent may refer only to a part of the business transacted by the corporation."

And in Klopp, Bartlett & Co. v. Creston City Guarantee Water-Works Co., 34 Neb. 808, 52 N. W. 819, 33 Am. S. R. 660, we said: "Where a foreign corporation contracts a debt in this state, as for labor and materials, service in this state upon the managing agent is sufficient, although he be but temporarily within the state."

We think service on Mehaffy was within the provisions of sections 25-511 and 21-1201, R. R. S. 1943. Mehaffy, in his capacity as sales manager, had been in Nebraska on previous occasions promoting the interests of Globe. He was an agent or managing agent within the meaning of the foregoing statutory provision while in Nebraska because of the general powers that he had in regard to appellant's business here. To hold otherwise would defeat the purpose of these statutes since Globe was actually doing business in Nebraska but not maintaining a resident agent. However, we do not think Jelen was of that capacity. See, Ord

Hardware Co. v. Case Threshing Machine Co., 77 Neb. 847, 110 N. W. 551, 8 L. R. A. N. S. 770; Ritchie v. Illinois C. R. R. Co., 87 Neb. 631, 128 N. W. 35. Consequently, effective service could not be made on him as an agent or managing agent within the meaning of the foregoing statutes.

Globe further contends the cause of action did not arise in Douglas County within the meaning of section 21-1201, R. R. S. 1943, so as to authorize the district court thereof to issue and cause to be served a valid summons upon the Secretary of State for it. We have already hereinbefore set forth that part of this statute which has application to this question.

The evidence establishes that the contract entered into by Jelen and appellee on November 4, 1952, whereby appellee purchased Globe bacterin, was entered into in Douglas County. It also included the services of Jelen, who was to vaccinate the lambs. Therefore the sale of the bacterin took place in Douglas County and any cause of action arising out of any breach of warranty relating thereto arose in that county although the use of the product subsequently occurred when the lambs were vaccinated in Merrick County. There is, or course, the further fact that the action could rightfully be brought against Jelen in Douglas County as that was the county of his residence. This latter has particular application to the service had on Mehaffy because section 25-408, R. R. S. 1943, provides an action against a foreign corporation may be brought in any county where said defendant may be found. We think the service here made on either the Secretary of State or C. P. Mehaffy was good.

At the conclusion of the trial the court dismissed Jelen and Dr. Jelen's Veterinary Supply Company from the case. The trial court stated its reason for doing so as follows: "This action is taken by the Court for the reason that said defendants last named, and each of them, were originally represented in this cause by John E.

Von Dorn, Esquire, who is now deceased; that no further appearances have been made in the present case by either of said defendants, and that the evidence received in this case shows affirmatively that Dr. Frank A. Jelen is at this time suffering from an illness which his doctor says prevents him from appearing in Court to give testimony. Therefore said defendants and each of them not being represented during the trial of this case, they are both dismissed by the Court as parties defendant."

Globe contends it was prejudiced thereby and that the case should not have been submitted to the jury solely on the question of its liability. The position now taken by Globe seems to be opposite to what it took at the beginning of the trial for the record shows its counsel then made the following motion: "Now, therefore, the defendant in the interest of a fair trial moves the Court to grant unto the defendant Globe Laboratories, Inc., a separate trial so that justice may be done and the case may be determined as between the plaintiff and the Globe Laboratories, Inc., without the presence of the other defendants."

Dr. Joseph P. Drozda, Jelen's attending physician, testified Jelen had suffered a physical relapse in the form of a severe cerebral vascular stroke on December 4, 1954; that at the time of trial he was a wheelchair patient and quite excitable and emotional; and that, in his opinion, Jelen was not then in physical or mental condition which would permit him to attend the trial and appear therein as a witness. The doctor went on to testify that in his opinion it would be fatal for him to do so.

We said in Combs v. Owens Motor Co., 121 Neb. 5, 235 N. W. 682, that: "To warrant the reversal of a judgment, it must affirmatively appear from the record that the ruling with respect to which error is alleged was prejudicial to the rights of the party complaining."

We can find nothing in the record that would indicate Globe was prejudiced in any way by what the trial court did. The record indicates the case was tried solely on the question of whether or not it was liable. Under these circumstances we think this contention to be without merit.

Globe contends the trial court erred when it overruled its motion for a directed verdict made at the close of all the testimony and after both parties had rested. This contention relates itself to the question of the sufficiency of the evidence to establish: First, that there were warranties made by Globe, either express or implied, upon which appellee relied in buying the bacterin; second, if there was, whether or not it was sufficient to establish any breach thereof; and third, if it did, whether or not it was sufficient to establish such breach was the proximate cause of injury and damage to appellee's lambs.

In this respect it is true, as Globe contends, that: "In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Cook Livestock Co. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370. But, the evidence adduced will be reviewed in the manner as hereinbefore set forth in determining these questions. See Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

The primary question for our decision under this contention is whether or not appellee adduced sufficient competent evidence from which it can be said a jury could properly find that Globe made either express or implied warranties, or both, that its bacterin was reasonably satisfactory for use in immunizing sheep from the disease of Enterotoxemia; that its use would not be injurious to them; that appellee did rely thereon

in making his purchase thereof; that a breach thereof occurred; and that injury and damages were caused to appellee's lambs by reason thereof. See Long v. Carpenter, 154 Neb. 862, 50 N. W. 2d 67.

What is a warranty? In Wat Henry Pontiac Co. v. Bradley, 202 Okl. 82, 210 P. 2d 348, that court defined it as follows: "Warranty is a matter of intention. A decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion, or his judgment, upon a matter of which vendor has no special knowledge, and on which the buyer may also be expected to have an opinion and to exercise his judgment. In the former case there is a warranty; in the latter there is not."

Section 69-412, R. R. S. 1943, being part of the Uniform Sales Act, defines express warranty as: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." It then goes on to provide that: "No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty."

Section 69-415, R. R. S. 1943, being part of the same act, provides: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows: (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose. * * * (6) An express warranty or condition does not nega-

tive a warranty or condition implied under this act unless inconsistent therewith."

We said in Ralston Purina Co. v. Iiams, 143 Neb. 588, 10 N. W. 2d 452, that: "In order for an express warranty to exist, there must be something positive and unequivocal concerning the thing sold, which the vendee relies upon, and which is understood by the parties, as an absolute assertion concerning the thing sold, and not the mere expression of an opinion; * * *." See, also, Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315; Donelson v. Fairmont Foods Co. (Tex. Civ. App.), 252 S. W. 2d 796; Miller v. Economy Hog & Cattle Powder Co., 228 Iowa 626, 293 N. W. 4. As stated in Donelson v. Fairmont Foods Co., *supra:* "It is said that an express warranty is 'an affirmation of fact or a promise by seller, relating to goods, which has a natural tendency to induce the buyer to purchase and upon which he relies in purchasing the goods * * *.'"

On the other hand in Ralston Purina Co. v. Iiams, *supra,* we said: "* * * representations which merely express the vendor's opinion, belief, judgment, or estimate do not constitute a warranty. Dealer's talk is permissible; and puffing, or praise of the goods by the seller, is no warranty, such representations falling within the maxim simplex commendatio non obligat." See, also, Cook Livestock Co. v. Reisig, *supra;* Ross v. Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A. 2d 650; Shawen v. District Motor Co. (D. C.), 34 A. 2d 29.

As stated in Saunders v. Cowl, 201 Minn. 574, 277 N. W. 12: "It is not easy to draw the line accurately between affirmations of fact and statements of opinion."

Jelen had lost the representation of Corn States and could no longer supply appellee with its bacterin, as he had in the past. In December 1950 Jelen had taken on the full line of Globe products which, after January 3, 1952, included bacterin. At a conference with President Frank Jones of Globe at Denver, Colorado, in September 1952, Jones stated to Jelen in effect that they

would not put any bacterin on the market until they had the best; that Globe's bacterin was testing as good or better than Corn States; and that Globe's bacterin was as good as any on the market. As a result of this conference, and based on what Jones had told him, Jelen wrote appellee a letter dated September 22, 1952, advising appellee he had not been able to make a deal with Corn States for bacterin but therein did advise him he thought Globe's new product, which he could supply, was "as good as any obtainable." Standing alone we think this language comes within our holdings in Ralston Purina Co. v. Iiams, *supra*, and Cook Livestock Co. v. Reisig, *supra*, and does not amount to a warranty.

However, included in this letter was a circular put out by Globe and sent to Jelen for distribution. It contained the following language: "Clostridium Perfringens Type D Bacterin is recommended for immunizing sheep and lambs against Enterotoxemia. * * * TIME FOR IMMUNITY TO DEVELOP: *Under average conditions, a protective degree of immunity is established in 10 to 12 days following vaccination.* * * * DURATION OF IMMUNITY: The exact duration of immunity is not known. Field observations indicate that immunity persists for several months." (Emphasis ours.) We think the language here set forth, particularly that part emphasized, constitutes an express warranty within the meaning and intent of our statute and the opinions hereinbefore cited. It is a positive statement as to what the product would do, which was undoubtedly intended to and would naturally have a tendency to induce a buyer to purchase it and to rely thereon in doing so. In fact that is exactly what appellee contends he did after reading the circular. He testified he read and relied on the information contained in this circular in buying and using Globe's bacterin to vaccinate his lambs as he believed, from what he read, it

would be suitable to immunize them against the disease resulting from overeating.

The language quoted from the circular above referred to and sent to appellee states that "Field observations indicate that immunity persists for several months." The record discloses Globe never did make any field tests of its bacterin nor did they bring in any feeders who had used it and found it to be satisfactory, although it is apparent Globe had sold it to others beside Jelen and that their records would disclose who had purchased it. In this situation we thing the following principle has application: "In the trial of a civil action, after the plaintiff has introduced evidence tending to prove his case, if the defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest, which presumption may be considered by the court or jury trying the case in determining the facts proved." Talich v. Marvel, 115 Neb. 255, 212 N. W. 540. See, also, Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328; Alexander v. Turner, 139 Neb. 364, 297 N. W. 589.

We think there is a further reason why there was an implied warranty that the bacterin would be reasonably fit for the purpose it was intended to be used for and free from any substance that would be injurious to lambs. Appellee knew nothing about bacterin itself but had satisfactorily vaccinated some 80,000 to 90,000 head of lambs with Corn States bacterin, which he had purchased from Jelen. Jelen knew this but had lost his ability to get bacterin from Corn States but was very desirous of keeping appellee's business, since it was substantial. In view thereof Jelen contacted Dr. Frank Jones, president of Globe, and discussed this situation with him. At that conference, which was held in Denver, Colorado, about the 12th or 13th of September, 1952, Jones told Jelen what we have

hereinbefore set forth. Jelen believed Jones and informed appellee, prior to the agreement of November 4, 1952, being entered into, of what Jones had told him. It was one of the factors that induced appellee to use Globe's bacterin and not to insist on that of Corn States, which he had found satisfactory. We think this factual situation comes within subsection (1) of section 69-415, R. R. S. 1943, and resulted in an implied warranty on the part of Globe that the bacterin would be reasonably fit for the purpose of immunizing sheep. See, Ross v. Porteous, Mitchell & Braun Co., *supra;* Shawen v. District Motor Co., *supra*; Saunders v. Cowl, *supra;* Marxen v. Meredith, 246 Iowa 1173, 69 N. W. 2d 399; Donelson v. Fairmont Foods Co., *supra;* Miller v. Economy Hog & Cattle Powder Co., *supra;* Giant Mfg. Co. v. Yates-American Mach. Co., 111 F. 2d 360; Ralston Purina Co. v. Novak, 111 F. 2d 631; Davenport Ladder Co. v. Edward Hines Lumber Co., 43 F. 2d 63; Barrett Co. v. Panther Rubber Mfg. Co., 24 F. 2d 329. As stated in Ralston Purina Co. v. Novak, *supra:* "The Uniform Sales Act adopted by Nebraska provides in effect that where the buyer makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment, there is an implied warranty that the goods shall be reasonably fit for such purposes. * * * The fact that the article had a trade name does not necessarily negative the existence of an implied warranty for fitness for a particular purpose when it is purchased not by name but for a particular purpose * * *." The situation here comes within this language.

In view of the foregoing we have come to the conclusion that the jury could have properly found that there was both an express and implied warranty that the bacterin would, under average conditions, establish a protective degree of immunity from Enterotoxemia; and that it was reasonably fit for such pur-

pose and would not be injurious to lambs that were vaccinated with it.

We come then to the question of the sufficiency of the evidence adduced to present a jury question as it relates to the issue of whether or not these warranties were breached and, if so, whether or not such breach was the causation of injury to appellee's lambs and resulting damage thereto.

The appellee adduced evidence to the following effect: That when the Wyoming lambs arrived at Clarks, Nebraska, on the morning of October 19, 1952, and unloaded, they were in excellent condition, only one having died enroute; that 9,556 lambs were unloaded; that the lambs were trucked to the two sheep feeding lots of appellee near that town, about 5,000 being taken to the north place and about 4,500 being taken to the home place; that at each of these two feed lots the lambs were separated and placed in pens according to their size, being divided into two pens at each place; that at the north place 2,000 were put in one pen and 3,000 in another while at the home place 1,000 were put in one pen and 3,500 in another, the smaller number at each place being the lighter lambs; that at the north place there was at that time a pen containing 2,000 Idaho lambs and at the home place there was at that time a pen containing 1,700 Idaho lambs; and that all the Wyoming lambs were immediately placed on the usual rations of ground hay with a small amount of oats and kept on that ration until vaccinated by Jelen on Thursday and Friday, November 6 and 7, 1952.

The appellee adduced evidence to show that on these 2 days Jelen vaccinated 9,531 lambs, as about 25 had died from natural causes since their arrival at Clarks on October 19, 1952; that the lambs were then in good condition; that they were vaccinated in order to immunize them from Enterotoxemia when put on heavy feed for finishing; and that Jelen used Globe's bac-

terin for this purpose, using 7,500 doses of Serial 109 and the balance of Serials 105 and 106.

As is often the case when lambs are vaccinated the evidence adduced shows many of the lambs vaccinated had a marked stiffness the day following their vaccination. However, this condition did not disappear, as it usually does. The evidence shows that this condition, which was present in about two-thirds of the lambs, grew worse and the lambs lost their appetite, eating only about half their usual rations; that they became gaunt looking, appeared droopy, draggy, listless, and dull; that they had dirty faces; that their wool lost its life; and that they started lying around jerking their heads back. The foregoing are not the usual symptoms of Enterotoxemia. As already stated, these conditions kept getting worse until finally, about a week after the lambs had been vaccinated, they started dying. There is evidence to the effect that they continued dying over a period of 2 or 3 weeks, the death rate reaching as high as 70 to 80 a day. This same condition existed in all four pens of Wyoming lambs which were at both feed lots; whereas, the Idaho lambs in the adjoining pens were not affected in any way. The Idaho lambs had been vaccinated with Corn States bacterin in the latter part of September.

The evidence also shows that appellee did not call a veterinarian in order to find out just what it was that was causing these lambs to die during the time they were in the condition herein described immediately following their vaccination. Consequently there is no medical testimony directly on the point of just what it was that caused these conditions to develop.

After the above conditions had somewhat subsided appellee put the heavier lambs on heavier rations in order to prepare them for market. Shortly after he did so some of them became sick and died. The condition of the sick lambs was described by appellee as follows: They were weak and wobbling around, some had fallen

down, some were grinding their teeth, and some were frothing at the mouth and throwing their heads back in a kind of stiffened condition. He testified there were many lambs on feed that had these symptoms. However, when appellee stopped feeding these lambs the heavier diet they would usually quit dying within 24 hours. Finally appellee called Drs. Farmer and Boice, veterinarians located in Central City, Nebraska. They came out to one of appellee's feed lots on December 24, 1952. There they examined the pen of Wyoming lambs that were being given the heavier rations. Some of the lambs were sick and others were dead. Dr. Boice testified that on December 24, 1952, he posted 4 dead lambs taken from this lot on that day and found they had died of Enterotoxemia. Subsequent thereto, between December 26 and 30, 1952, Drs. Farmer and Boice, on three different occasions, examined other dead lambs taken from pens of Wyoming lambs that were being given heavier feed and that an autopsy of their carcasses showed they had died of the same condition. Dr. Jelen was called and he stopped at one of appellee's feed lots on December 26, 1952. He took the carcasses of two dead Wyoming lambs with him to Omaha. He testified they had died of Enterotoxemia. He also testified he took these two carcasses over to Corn States and that Drs. Gessellchen and Baldwin of that company told him there was no question as to the cause of their deaths, it was Enterotoxemia. Jelen testified that when a lamb gets Enterotoxemia it becomes stiff, staggers, and falls on its side. Appellee testified that he lost between 700 and 800 lambs from these conditions. The deaths all occurred among the heavier lambs which had been placed on heavier rations.

Appellee had about 3,000 lighter Wyoming lambs in two pens, one pen being at each feed lot. These were not put on heavier feed until they had been revaccinated. After the initial trouble from the vaccination of November 6 and 7, 1952, had subsided there was no more trouble

among these lighter lambs. Likewise there was no trouble with the Idaho lambs in adjoining pens nor with 1,200 Omaha lambs which had been placed in a pen at the home place when they arrived about December 1, 1952. It should be said here that both the Idaho and Omaha lambs were fed out and marketed in good condition and in the normal feeding time without any trouble such as was experienced with the Wyoming lambs, although they were at all times in adjoining pens. They were, however, vaccinated with either Corn States or Fort Dodge bacterin and not Globe's.

Drs. Farmer and Boice recommended that the lambs be revaccinated, which was done commencing December 30, 1952, with Corn States and Fort Dodge bacterin. No further trouble was had thereafter in feeding out the remaining lambs. They were marketed between February 3 and May 13, 1953, a total of 7,393 being sent to market.

Appellee offered no direct proof to the effect that the bacterin used contained some substance that would be injurious to lambs when vaccinated therewith nor did he offer any direct proof that the bacterin lacked sufficient potency to immunize lambs against Enterotoxemia when vaccinated therewith except the facts as to what actually happened to his Wyoming lambs when Globe bacterin was used to vaccinate them and what happened to his Omaha and Idaho lambs in adjoining pens during the same period of time after they had been vaccinated with either Corn States or Fort Dodge bacterin.

On the other hand Globe offered proof of tests made by experts to show that its product was sterile, pure, and sufficiently potent to accomplish the purpose for which it was produced and that it contained nothing that would be injurious to lambs when used to vaccinate them against Enterotoxemia. We shall not set forth all the details of its production, which is fully covered in the record, but will set forth generally what the evidence adduced shows in that regard.

The production of this bacterin is under the authority

of and subject to regulation by the United States Department of Agriculture which, through its Bureau of Animal Industry, has promulgated and issued regulations covering that subject. Pursuant to the requirements thereof Globe, on September 18, 1951, filed an Outline of Procedure for its production of this bacterin with the Bureau of Animal Industry, attaching thereto a full statement of production procedures followed and the results of tests, et cetera, which it had made in establishing the ground work of its procedures set out therein. After this outline had been filed Globe was issued a license by the Department of Agriculture authorizing it to produce the bacterin.

Globe had begun experimental work in this field in December 1949. The preliminary experimental work and final drafting of the Outline of Procedure for production was primarily carried out by Dr. Henry D. Carpenter, a bacteriologist and Globe's laboratory director, who was assisted by Carl D. Heather, a bacteriologist employed by Globe.

When a batch of bacterin is produced it is given a serial number such as 105, 106, and 109 so its history may be known and its use properly regulated, for after it is released and put on the market it can only be used for 2 years as its potency has a tendency to deteriorate. Globe produced the history of Serial 105, Serial 106, and Serial 109 in great detail showing that all of the numerous tests relating thereto, and made by it, were satisfactory. These included toxin level tests, detoxification tests, sterility tests, purity tests, combining power unit or potency tests, and animal safety tests. This bacterin was a new product for Globe and while the men in charge of producing it testified that all of the tests were ultimately satisfactory it is evident that they were having some trouble keeping the culture media free of contamination and of causing it to become sterile by the use of formaldehyde. In fact a substantial portion of the culture media developed in the batches comprising Serials 105 and 106 had to be

discarded. The same conditions developed in several containers of culture media used in connection with producing Serial 109. However, the contents of these containers were not discarded because when they were subsequently retested it was found by those in charge they were satisfactory. The contents thereof were subsequently used and marketed, being the bulk of the bacterin used by Jelen in vaccinating appellee's lambs.

Subsequent to the difficulty encountered by the use of its product on appellee's Wyoming lambs Globe caused several tests of Serials 105, 106, and 109 to be made. It should here be stated that government regulations required, and Globe kept, samples of all bacterin produced, including Serials 105, 106, and 109, under refrigeration at its place of business in Fort Worth. In early February 1953, Carpenter and Heather of Globe conducted a test on 12 lambs by vaccinating 4 of them with 5 ccs. of the bacterin of each of Serials 105, 106, and 109, that being the amount recommended for a field dosage. They observed the reaction of these lambs for 4 weeks, but did not put them on a heavy diet of feed. It was a test to determine the reaction of the vaccination on the lambs. They found such reactions to be normal. No record of this test was kept by Globe and these men testified from their memory as to what was done and the results thereof.

On September 15, 1953, Dr. Richard D. Shuman, a veterinarian with the Pathological Division of the Bureau of Animal Industry, at the request of Globe's then counsel, tested samples of Serials 105, 106, and 109 for contamination and toxicity. The samples used had been obtained from samples in the refrigerated storage room of Globe in Fort Worth, Texas, by Dr. D. L. Berry, a veterinarian and employee of the Bureau of Animal Industry, who was stationed there. The results of the tests he made show these samples of Serials 105, 106, and 109 to be nontoxic and that they contained no bacterial contaminants that would be injurious to lambs.

Dr. Earl M. Baldwin, a bacteriologist and a doctor of veterinary medicine who was formerly with Corn States and its Director of Laboratories and the original producer of this bacterin in this country for commercial use, made a test in June 1951 of some bacterin, Lot 3, produced by Globe. He testified he did so at the request of Globe and found the potency thereof to be satisfactory. Later, after this litigation had started, Baldwin was asked to and did make another test for Globe. This time he tested samples of Serials 105, 106, and 109 sent to him by Globe. He conducted these tests on feeder lambs bought on the market but tested so he knew they had not previously been subjected to Enterotoxemia or vaccinated therefor. Using the standard dosage of bacterin he vaccinated 4 lambs with Serial 105, 4 with Serial 106, 4 with Serial 109, and 5 with Corn States bacterin, the latter in order to obtain a standard for comparison purposes. The test covered a period from December 16, 1953, to February 3, 1954. Baldwin observed these lambs daily and at no time did he observe any undesirable reaction from the vaccination in the lambs, in other words, he considered each serial was safe for use on lambs. Twenty-one days after the lambs had been vaccinated he took a blood test to compare the immunity that had been developed in the lambs by the different bacterins. This was done by determining the number of units of antitoxin or neutralizing substance that had developed in each lamb vaccinated. In the 5 lambs vaccinated with Corn States it was 4-8-8-2-8 or an average of 6 units of antitoxin per lamb; in the 4 lambs vaccinated with Serial 105 it was 8-8-1-4 or an average of 5.25 units of antitoxin per lamb; in the 4 lambs vaccinated with Serial 106 it was 8-8-1-8 or an average of 6.25 units of antitoxin per lamb; and in the 4 lambs vaccinated with Serial 109 it was 8-½-2-0 or an average of 2.6 plus units of antitoxin per lamb. Baldwin testified that bacterin should develop a potency in the average lamb of between 4 and 8 units of antitoxin although naturally all lambs will not react

the same for various reasons. However he testified the potency of the bacterin should be strong enough to do the job. He went on to testify that one-half unit of antitoxin will protect a lamb. When asked specifically about the result of Serial 109 he said the average thereof of 2.6 units was adequate although it is apparent one of the 4 lambs had built up no neutralizing substance or antitoxin from the vaccination. We shall discuss this further in dealing with instruction No. 12 given by the court.

We have not set out in full detail all of the evidence adduced by either side but from what we have set forth it is evident on what basis each party seeks to maintain his or its position. That such a defense as was here sought to be made by Globe is proper, see Shimerda v. Nebraska Serum Co., 102 Neb. 812, 169 N. W. 785. However it is Globe's thought that since it was required to and did fully meet and comply with all government regulations dealing with the production of bacterin as promulgated by the Bureau of Animal Industry by filing its Outline of Procedure for the production thereof with the Bureau of Animal Industry of the United States Department of Agriculture, by obtaining a license from the United States Department of Agriculture for its production, and by satisfactorily meeting all of its and the government's requirements relating thereto such as safety, purity, sterility, potency, et cetera, including tests made to determine those factors after appellee had had his troubles, that it was entitled to a directed verdict by the trial court and is now entitled to a judgment notwithstanding the verdict by this court in view of the fact that appellee did not offer any direct evidence that the Globe bacterin he used lacked potency, purity, and sterility and that such lack thereof was the cause of the injury and damage to his lambs. There are cases so holding, especially anti-hog-cholera cases, both as they relate to a breach of warranty or negligence and as to causation of injury and damages arising therefrom.

See, Hollingsworth v. Midwest Serum Co., 183 Iowa 280, 162 N. W. 620; Howard v. United Serum Co., 202 Iowa 822, 211 N. W. 419; Murphy v. Sioux Falls Serum Co., 47 S. D. 44, 195 N. W. 835; Eagle Biological & Supply Co. v. Breed, 90 Okl. 7, 215 P. 424; Richards v. H. K. Mulford Co., 236 F. 677; Hildebrand & Son v. Black Hawk Oil Co., 205 Iowa 946, 219 N. W. 40; Brown v. H. K. Mulford Co., 198 Mo. App. 586, 199 S. W. 582. As stated in Richards v. H. K. Mulford Co., *supra*: "Upon either the theory of negligence or of breach of warranty, plaintiff's first step is to establish that the vaccine was infected when he bought it, and if he fails in that step, it becomes immaterial whether there is an implied warranty of fitness in the sale of such an article as this."

On the other hand the appellee relies on cases in some of which, although all government regulations and requirements had been satisfactorily met in connection with the production and marketing of the product used, the court was nevertheless of the opinion that it was a jury question when the circumstances in connection therewith established that sickness and death immediately followed the use of the product. See, American Cyanamid Co. v. Fields, 204 F. 2d 151; Haberer v. Moorman Mfg. Co., 341 Ill. App. 521, 94 N. E. 2d 611; Park v. Moorman Mfg. Co., 121 Utah 339, 241 P. 2d 914, 40 A. L. R. 2d 273; Marxen v. Meredith, *supra;* Miller v. Economy Hog & Cattle Powder Co., *supra;* Ziegler v. Denver Hog Serum Co., 204 Minn. 156, 283 N. W. 134; Johnson v. Kanavos, 296 Mass. 373, 6 N. E. 2d 434; Peckham v. Eastern States Farmers' Exchange, 134 F. Supp. 950. As stated in American Cyanamid Co. v. Fields, *supra:* "* * * the jury were not bound by defendant's evidence, nor forced to accept the testimony of its experts. Here, the conflict of evidence presented a question of fact, the resolution of which was properly left to the jury, * * *."

It was of course not necessary that Globe have any guilty knowledge that its product would not do what it had advertised it would do. Yoder v. Nu-Enamel Corp.,

supra. But Globe was answerable for the natural consequences of its product when properly used for the purpose for which it was warranted. Colvin v. Powell & Co., 163 Neb. 112, 77 N. W. 2d 900. Under the circumstantial evidence rule all the law requires of the appellee in order to prove a breach of warranty and that injury and damage resulted therefrom is that the facts and circumstances adduced relating thereto, together with the inferences that may be legitimately drawn therefrom, shall indicate with reasonable certainty the breach of warranty complained of and that he was injured and damaged by reason thereof. See, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N. W. 2d 610.

In view of these principles, and the facts set out to which they apply, we think the evidence adduced presented a jury question both as to whether or not the warranties made by Globe had been breached and, if so, whether or not such breach was the proximate cause of the injury and damage to appellee's lambs. As stated in Reid v. Ehr, 43 N. D. 109, 174 N. W. 71, 6 A. L. R. 586: "The physical facts speak louder than the testimony of the experts. The plaintiff was injured. This cannot successfully be disputed. She was injured by an electric current from the lamp in question. In the face of these physical facts the testimony of the experts becomes of little probative force. The jury must have disbelieved the testimony of the experts, and this they did have a right to do. Jurors, as a rule, are men of average and reasonable minds, and in the face of physical facts expert testimony did not have any great weight with them."

Globe contends, in this respect, that where scientists or experts employed by it, the United States, and others all testified as to the results of tests and examinations made by them of the defendant's product as to purity, sterility, safety, and potency, all of which were satisfactory, and where there is no dispute as to this testi-

mony and where there is no conflict therein that the court should not have instructed the jury as it did by its instruction No. 12. This instruction is as follows: "Certain witnesses have been called who testified as expert witnesses. You are not required to take the opinions of experts as binding upon you, but they are to be used to aid you in coming to a proper conclusion. Their testimony is received as that of persons who are learned by reason of special investigation and study along lines not of general knowledge, and the conclusion of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case."

We have often approved the rule cited from 20 Am. Jur., Evidence, § 1208, p. 1060, and quoted in Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396, which is to the following effect: "Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable." See, also, Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265; McNaught v. New York Life Ins. Co., 145 Neb. 694, 18 N. W. 2d 56; Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; McNaught v. New York Life Ins. Co., on motion for rehearing, 143 Neb. 220, 12 N. W. 2d 108; Medelman v. Stanton-Pilger Drainage Dist., *supra.*

As stated in Penhansky v. Drake Realty Construction Co., *supra,* where a comparable instruction was approved: "It was entirely proper that the jury should consider the interest of the expert witnesses in the result of the suit, their relationship to the parties, their apparent fairness, or bias, if any of these conditions had been shown, and all the other evidence, facts and cir-

cumstances proved tending to corroborate or contradict such witnesses. Experts are as much subject to these human imperfections as other witnesses. * * * This instruction given is merely informative and cautionary. It explains to the jury for what reason the conclusions or opinions of experts are received, and points out the distinction between the testimony of such witnesses and other witnesses whose testimony is received only as to facts, and not as to opinions or conclusions."

Let us point out an example of what we mean. Dr. Baldwin made a test of Serials 105, 106, and 109 for Globe commencing December 16, 1953, and extending to February 3, 1954. We have already referred to this test and his testimony that a majority of lambs will usually develop between 4 and 8 units of antitoxin if a sufficiently potent bacterin is used but that an occasional lamb will, for some unexplained reason, develop as low as ½ to 1 unit thereof. He also stated that if the bacterin used is not potent enough it just won't do the job. Yet, when he deals with the results of Serial 109, in which one lamb developed one-half unit and another none, he says such results establish it as a satisfactory bacterin because one-half unit will protect. Dr. Baldwin's testimony in this regard would tax the credulity of any juror and certainly is not such evidence as any juror is bound to have to accept as conclusive merely because it is given by an expert. It is the type of evidence to which the instruction given has particular application.

We said in Long v. Carpenter, *supra*, that: "Section 69-469, R. R. S. 1943, provides in part: '(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.'"

The jury brought in a verdict of $35,609.50 consisting of $33,593 for the death of lambs; $1,265 for damages from extended feeding time; and $751.50 for damages for revaccination of lambs that had not died. There is evidence to the effect that appellee lost 2,138 lambs

between the time the lambs were originally vaccinated on November 6 and 7, 1952, and the last thereof were marketed on May 13, 1953; that a normal loss would not have been over 2 percent or 192; and that the fair market value of these lambs was $20 each. There is also evidence to the effect that the normal feeding time for all the lambs marketed was extended for more than 30 days because of the condition they developed after the use of the bacterin and that the cost of feeding a lamb was about $2.50 a month. There was also evidence adduced that it cost the appellee in excess of the amount allowed by the jury to have the balance of these lambs revaccinated. We find the evidence fully supports the jury's verdict.

Contentions are also raised by Globe that the trial court erred in refusing to give numerous instructions requested by it and erred in giving some on its own accord. It will not be necessary to separately answer the contentions made in regard thereto as they are fully answered by what we have stated herein.

The record indicates the trial was fairly conducted and the action properly submitted to the jury. We can see no reason for interfering with its verdict and, in view of what we have herein said, have come to the conclusion that an affirmance thereof should be made by this court. The verdict of the jury and the judgment of the trial court entered thereon are affirmed.

AFFIRMED.

IN RE FREEHOLDERS' PETITION.
ROSE ROY ET AL., APPELLEES, V. BLADEN SCHOOL DISTRICT NO. R-31 OF WEBSTER COUNTY, NEBRASKA, APPELLANT.
84 N. W. 2d 119

Filed July 12, 1957. No. 34194.

1. **Statutes.** In construing a statute, the court must look to the ob-

ject to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

2. ———. In enacting a statute, the Legislature must be presumed to have had in mind all previous legislation upon the subject. In the construction of a statute courts must consider the preexisting law and any other laws relating to the same subject.

3. ———. Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions.

4. ———. In general, the word "may," used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory.

5. **Schools and School Districts.** The personnel of the board created by section 79-403, R. S. Supp., 1955, is not a test of the judicial power of courts to review orders made by it, but rather the nature of the power exercised by that board.

6. **Actions.** The nature of an action, whether legal or equitable, is determinable from its main object as disclosed by the averments of the pleading and the relief sought.

7. **Schools and School Districts: Appeal and Error.** The action of the board under section 79-403, R. S. Supp., 1955, is the exercise of a quasi-judicial power, equitable in character, and upon appeal therefrom to the district court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the district court to this court it is triable de novo as in any other equitable action.

8. **Schools and School Districts.** By the enactment of section 79-403, R. S. Supp., 1955, authorizing the board to set off land from one school district and attach it to an adjoining district, whenever after public hearing it deems it just and proper and for the best interests of the petitioner or petitioners so to do, the intention of the Legislature was that the board in making such determination should predicate it upon educative interests of the petitioner or petitioners and not on their mere personal preference based upon noneducational reasons.

APPEAL from the district court for Webster County: STANLEY BARTOS, JUDGE. *Reversed and dismissed.*

Richard A. Dier, for appellant.

William H. Meier, for appellees.

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

CHAPPELL, J.

Thirteen named freeholders, who severally owned 16 described quarter sections of farm lands located in reorganized Bladen school district No. R-31 of Webster County, originally filed a petition with a board consisting of the county superintendents, county clerks, and county treasurers of Webster and Franklin Counties, seeking under section 79-403, R. S. Supp., 1955, to have certain lands set off from the Bladen district and attached to reorganized Campbell school district No. R-13 of Franklin County. After due notice and hearing by such board, it failed to agree, and the freeholders, hereinafter called plaintiffs or designated by name, appealed to the district court. Hereinafter the Bladen school district will be called defendant or Bladen district, and Campbell school district will be called Campbell district.

Plaintiffs' "In Equity Petition on Appeal," first described the lands respectively owned by each plaintiff in the Bladen district; and then alleged that said lands adjoin Campbell district, that the territory proposed to be attached has children of school age residing therein with their parents or guardians, and that said children are each more than 2 miles from the Bladen schoolhouse and at least ½ mile nearer the Campbell schoolhouse, measured by the shortest route possible on section lines or traveled roads open to the public. The reasons alleged by plaintiffs in their petition for the proposed change were that: (1) Their described real estate was closer to the Campbell schoolhouse than it was to the Bladen schoolhouse; (2) that said real estate was within the trading area of Campbell and not within that of Bladen; and (3) that plaintiffs and occupants of said real estate prefer the town of Campbell and the Camp-

bell school over any other town or school, and desire to have their children, residing on or who may hereafter reside thereon, attend Campbell school. After reciting the procedure which had been had before the board and its failure to agree, about which there is no dispute, plaintiffs incorporated their original petition in their petition on appeal and alleged that it was just and proper and for the best interests of petitioners that said lands be transferred from Bladen district to Campbell district. They prayed for such judgment and equitable relief.

Defendant's answer alleged that plaintiffs' described lands were located in the Bladen district, which has been a reorganized and consolidated Class II school district for more than a year prior to the filing of plaintiffs' petition, and is and has been operating as such since June 1954; and that Bladen district has installed and operated school bus transportation service to Bladen schools since its reorganization and has offered and continues to offer such services to any and all school-age children residing on all the lands described in plaintiffs' petition which were legally included in Bladen's reorganized school plan by more than 70 percent petitions of former rural districts Nos. 59 and 38. Defendant then denied generally and prayed for denial of plaintiffs' petition and costs. Plaintiffs' reply thereto denied generally.

Requests for admissions were filed by both plaintiffs and defendant, and answers thereto were respectively filed. Subsequently, plaintiffs' motion for summary judgment was overruled, and after hearing on the merits, judgment was rendered which set off from Bladen district five described quarter sections of land upon which children of school age resided, and attached them to Campbell district, but refused to so set off other described lands as sought by plaintiffs, and ordered each party to pay his own costs. Thereafter, motions for

new trial filed by both plaintiffs and defendant were overruled.

Therefrom defendant appealed to this court, assigning some eight alleged errors, the effect of which was to assert, insofar as important here, that the judgment was not sustained by the evidence but was contrary thereto and contrary to law. We sustain those assignments. On the other hand, plaintiffs cross-appealed, assigning in effect, so far as important here, that the trial court erroneously construed and applied the statute and erred in refusing to find and adjudge that it was just and proper and for the best interests of plaintiffs to set off all the lands described in plaintiffs' petition from Bladen district and attach them to Campbell district. We conclude that plaintiffs' cross-petition has no merit because the trial court erred in setting off any of plaintiffs' described lands from Bladen district and attaching them to Campbell district.

As summarized, the record discloses the following situation: Plaintiffs' lands are all located in Bladen district and generally extend along the western border thereof to its southern line. From north to south such lands include all of Section 27, and three quarter sections in Section 34, all in Township 4 North, Range 12 West of the 6th P. M.; and all of Section 3, three quarter sections in Section 10, and the west half of Section 15, all in Township 3 North, Range 12 West of the 6th P. M. The west border of such sections adjoins the Campbell district's east border.

Mrs. Irvin L'Heureux owns the east half of Section 27, which does not adjoin Campbell, and no children of school age reside thereon. Mrs. L'Heureux and her husband, Joe H. L'Heureux, live in the town of Campbell. He owns the southwest quarter of Section 10 which adjoins Campbell district, but no children of school age reside thereon.

Henry Eckhardt owns the west half of Section 27, and the northwest quarter of Section 34, which ad-

join Campbell district. He lives on the southwest quarter of Section 27, and one grandson of school age resides thereon with him.

Charles P. Kral and Mrs. P. Kral own the southeast quarter of Section 34 and the northeast quarter of Section 3, which do not adjoin Campbell district, and no children of school age reside thereon.

Anna Kuhlman owns the southwest quarter of Section 34 which adjoins Campbell district, and two children of school age reside thereon.

Rose Roy owns the northwest quarter of Section 3 which adjoins Campbell district, and one child of school age resides thereon.

Ben H. Wessels and Emma Wessels own the south half of Section 3, the west half of which adjoins Campbell, but no children of school age reside on their land.

Rudolph Betz and Mrs. Rudolph Betz own the northeast quarter of Section 10, which does not adjoin Campbell district but has one child of school age residing thereon.

When this proceeding was filed, Wilella Wilson owned the west half of Section 15, which adjoins Campbell district. Since that time, however, Ardner Hanson has purchased the southwest quarter, where he resides with four children of school age, and he rents the northwest quarter of Section 15.

Concededly, plaintiffs' lands were each more than 2 miles from both the Bladen and Campbell schoolhouses, and at least ½ mile or more nearer the Campbell schoolhouse than the Bladen schoolhouse, but as hereinafter observed, that fact was not controlling as a reason for granting the relief sought by plaintiffs.

As shown by evidence adduced in plaintiffs' behalf, the reasons relied upon by them to obtain relief were: (1) They usually did their trading and banking in the town of Campbell; (2) with one exception, it was their post-office address, with rural route delivery; (3) they were on the Campbell telephone exchange; (4) with one

exception, they attended church at Campbell; (5) they preferred to have their children attend school at Campbell; (6) in case of fire, although plaintiffs generally belonged to the Bladen rural fire district, they would call the Campbell fire department, because it would take longer to call the Bladen fire department by going through two telephone exchanges; and (7) in the Bladen reorganization proceedings, although they then lived in rural school districts Nos. 59 and 38, they desired to attend Campbell and did not sign the petitions therefor, although most of them had previously sent their children to Bladen district, which concededly now has an accredited Class II school, giving instruction from kindergarten to and including the 12th grade.

None of the plaintiffs or their witnesses criticized or complained about or personally objected to the transportation, leadership, administration, condition, or efficiency of Bladen schools. In fact, they admitted that Bladen district offered efficient bus transportation service to and from its school, and operated a good and satisfactory educational institution. Plaintiffs simply preferred Campbell district, whose board gave their children free bus transportation and free tuition.

In the light of such evidence, we are required to construe and apply section 79-403, R. S. Supp., 1955. In that connection: "The fundamental principle of statutory construction is ascertainment of the intent of the legislature." State ex rel. Thayer v. School District, 99 Neb. 338, 156 N. W. 641.

In State ex rel. Douglas County v. Drexel, 75 Neb. 614, 106 N. W. 791, cited with approval in Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217, this court held: "The object of the court in construing an act of the legislature is to ascertain the intention of the lawmakers. That intention, when ascertained, will prevail over the literal sense of the words used."

In Hevelone v. City of Beatrice, 120 Neb. 648, 234 N. W. 791, this court held that: " 'In the exposition of

statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.' Kelley v. Gage County, 67 Neb. 6." See, also, Central Power Co. v. Nebraska City, 112 F. 2d 471.

In State ex rel. Johnson v. Consumers Public Power Dist., 142 Neb. 114, 5 N. W. 2d 202, this court held: " 'That which is implied in a statute is as much a part of it as that which is expressed.' 59 C. J. 973."

In Howell v. Fletcher, 157 Neb. 196, 59 N. W. 2d 359, this court held: "In construing a statute the legislative intent may be gathered from the reason for its enactment."

In Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240, quoting with approval from 82 C. J. S., Statutes, § 323, p. 593, this court said: " 'In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.' "

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

"Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions."

In that connection, section 79-403, R. S. Supp., 1955, provides in part: "Any freeholder or freeholders may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, ask-

ing to have any land described therein set-off from the district in which it is situated and attached to some other district. The petition shall state the reasons for the proposed change and show: (1) That the land therein described is owned by the petitioner or petitioners; (2) that the land adjoins the district in which it is to be attached; (3) that the territory proposed to be attached has children of school age residing thereon with their parents or guardians; and (4) that they are each more than two miles from the schoolhouse in their own district, and at least one half mile nearer to the schoolhouse in the adjoining district, which distance shall be measured by the shortest route possible upon section lines or traveled roads open to the public * * *. The petition shall be verified by the oath of the petitioner or petitioners. The board may, after a public hearing on the petition, thereupon change the boundaries of the districts so as to set-off the land described in the petition and attach it to such adjoining district as is called for in the petition whenever they deem it just and proper and for the best interest of the petitioner or petitioners so to do. Notice of the filing of the petition and hearing thereon before the board shall be given at least ten days prior to the date of such hearing, by one publication in a legal newspaper of general circulation in such district, and by posting a notice on the outer door of the schoolhouse in each district affected thereby, which notice shall designate the territory to be transferred; Provided, that the petitions requesting transfers of property across county lines shall be addressed jointly to the county superintendents of the counties concerned, and the petitions shall be acted upon by the county superintendents, county clerks, and county treasurers of the counties involved as one board. Appeals may be taken from the action of such board, or when such board fails to agree, to the district court of the county in which the real estate is located within twenty days after entry of such

action on the records of the board by the county clerk of the county in which the real estate is located or within six months after the petition is filed and the board fails to agree, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county."

Other questions are raised and discussed with relation to construction and application of said section, but, as we view it, they need not be discussed because decision depends upon construction and application of that section in three respects to the undisputed pertinent facts appearing in the record. In that connection, we are required to determine only three propositions, to wit: (1) The nature of proceedings before the board and the capacity in which it is required to act; (2) the manner and character of the hearing upon appeal to the district court and this court; and (3) the primary factors to be considered in determining whether or not it is "just and proper and for the best interest of the petitioner or petitioners," to set off the land described in plaintiffs' petition from the Bladen district and attach it to the Campbell district.

With respect to propositions (1) and (2) aforesaid, section 79-403, R. S. Supp., 1955, provides: *"The board may,* after a public hearing on the petition, thereupon change the boundaries of the districts so as to set-off the land described in the petition and attach it to such adjoining district as is called for in the petition whenever *they deem it just and proper* and *for the best interests of the petitioner or petitioners so to do."* (Italics supplied.) It will be noted that such action of the board is not a mandatory duty or obligation, but depends upon whether the board, after hearing, deems "it just and proper and for the best interest of the petitioner or petitioners so to do."

In other words, as stated in Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497, and applicable here: "In gen-

eral, the word 'may,' used in statutes will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory. See, Lansdown v. Faris, 66 F. 2d 939; Rowenhorst v. Johnson, 48 S. D. 325, 204 N. W. 173."

Also, said section provides that: "Appeals may be taken from the action of such board, or when such board fails to agree, to the district court * * * *in the same manner* as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county." (Italics supplied.) Such manner of appeal is provided by sections 23-135 to 23-137, R. R. S. 1943.

In Campbell Co. v. Boyd County, 117 Neb. 186, 220 N. W. 240, this court, in construing and applying such sections, together with what is now section 27-1305, R. R. S. 1943, concluded that the allowance or disallowance of a claim by the county board was the exercise of a quasi-judicial power, and that an appeal therefrom brought the action to the district court for trial de novo as "though the action had been originally instituted in such court."

In Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17, this court said: "It will therefore be observed that the personnel of the board is not a test of the jurisdiction of the courts to review the orders made, but rather the nature of the power exercised by that board."

Section 25-1104, R. R. S. 1943, provides: "Issues of law must be tried by the court, unless referred as provided in section 25-1129. Issues of fact arising in actions for the recovery of money or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided."

In that connection, the case at bar is not an action for "the recovery of money or of specific real or personal property." As held in Lett v. Hammond, 59 Neb. 339,

80 N. W. 1042: "The nature of an action, whether legal or equitable, is determinable from its main object as disclosed by the averments of the pleading and the relief sought."

In the light of the foregoing, we conclude that the board provided for by section 79-403, R. S. Supp., 1955, was required in the case at bar to exercise a quasi-judicial power, equitable in character. Thus, on appeal to the district court, the cause was triable de novo there as in any other original equitable action. Feight v. State Real Estate Commission, 151 Neb. 867, 39 N. W. 2d 823, is distinguishable in some respects, except in principle. In such respect, it supports the foregoing conclusions by analogy. It is elementary, therefore, that upon appeal to this court the cause will be tried de novo in this court.

We turn then to proposition (3). In that connection, we conclude that in the enactment of section 79-403, R. S. Supp., 1955, authorizing the board to set off lands from one school district and attach it to an adjoining district, whenever after a public hearing it deems it just and proper and for the best interests of the petitioner so to do, the intention of the Legislature was that the board in making such determination should predicate it upon the convenience of transportation of children of school age to schools, and the educational welfare and needs of petitioners' children, and not the mere personal preferences of petitioners based upon noneducational reasons. That section and others in pari materia deal with schools in order to promote their proficiency in the education of petitioners' children of school age, and not the secular business affairs of petitioners. In other words, the best interests of the petitioner or petitioners means the best educative interest of petitioner or petitioners and not the best noneducational interest of petitioner or petitioners.

Section 79-403, R. S. Supp., 1955, has been in our statutes in one form or another since 1909. It is classified

in the statutes under "Provisions Applicable To All Schools." In the light of subsection (4) thereof, the act was historically used by Class I rural school district patrons having children of school age, when they each lived more than 2 miles from the schoolhouse in their own district, and at least ½ mile nearer the schoolhouse in the adjoining district, where travel thereto and therefrom was performed on foot, horseback, or by family transportation. The proceedings at bar concern two reorganized districts wherein lands involved are located several miles from either schoolhouse, with little difference in distance between them. Both districts provide satisfactory pick-up and delivery bus service for pupils in their districts. The record shows without dispute that the difference in travel distance from plaintiffs' lands to one schoolhouse or the other was not a controlling factor in determining plaintiffs' right to the relief sought by them. We conclude that the factor of access to and transportation of plaintiffs' children to schools was of no controlling significance.

In that regard, we conclude that the Legislature did not intend, in this modern highway and transportation age, to enact a statute concerned with schools, distances, and education of pupils for the sole purpose of making convenient allocations of land to school districts based upon individual preferences or secular business reasons of owners having nothing to do with educational efficiency. No witnesses criticized the leadership, management, curricula, or efficiency of the Bladen schools. As a matter of fact, all witnesses approved it as entirely satisfactory. Generally, those who previously had their choice of schools either contracted with Bladen for elementary pupils, or, under the free high school tuition law, voluntarily sent their children to Bladen schools when they could have chosen any other school in the area. The common statement of all plaintiffs' witnesses in the hearing at bar was simply that they now "prefer" Campbell instead of Bladen, which was insufficient to support

a grant of the relief sought by plaintiffs.

The Legislature has placed great emphasis upon the reorganization and consolidation of numerous inefficient and costly small school districts. Bladen and Campbell districts are two examples of that forward progress in eliminating Class I elementary rural school districts which contract with other districts for elementary education and obtain free high school education elsewhere. Bladen was one of those districts which, in completing its reorganization, included in it the districts which had formerly contracted for their grade school education with Bladen town school district or obtained free high school education for their children there. Class I rural school districts Nos. 59 and 38, in which plaintiffs' lands were located before Bladen was reorganized, each executed petitions by more than 70 percent of their respective legal voters requesting such reorganization. True, plaintiffs did not sign such petitions, but under the statute they were bound thereby, and they now seek to escape their personal and economic responsibility to Bladen district, by taking advantage of section 79-403, R. S. Supp., 1955, as soon as it became legally effective as amended, without supporting their petition with any controlling educational factors relating to the convenience, necessity, or welfare of the few pupils concerned.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and plaintiffs' petition is dismissed. All costs are taxed to plaintiffs.

REVERSED AND DISMISSED.

DAVID J. RAILE, APPELLEE, V. P. C. TOEWS, APPELLANT, IMPLEADED WITH CHARLES WILSON, DOING BUSINESS AS WILSON CONSTRUCTION COMPANY, ET AL., APPELLEES.
84 N. W. 2d 199.

Filed July 12, 1957. No. 34198.

1. **Negligence: Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury.
2. **Trial.** If there is any evidence which will sustain a finding for the party having the burden of proof in a cause, the trial court may not disregard it and direct a verdict against him.
3. **Negligence.** Where two or more independent contractors, or a general contractor and one or more subcontractors, are engaged in work on the same premises, it is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor, and an employee of one contractor may recover against another contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee.
4. **Trial: Appeal and Error.** If it does not appear from the record that an incorrect instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it, the giving of the instruction must be considered prejudicial error.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Reversed and remanded.*

Chambers, Holland, Dudgeon & Hastings and *Brogan & Brogan*, for appellant.

Hutton & Hutton and *Frederick M. Deutsch*, for appellees.

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

SIMMONS, C. J.

This is an action for damages for personal injuries. Plaintiff was an employee of the defendant Wilson who was the supplier of ready mixed concrete to defendant

Toews. Defendant Toews was the contractor building an elevator. Defendant Wilson and his insurance carrier are joined as parties, they having paid workmen's compensation to plaintiff, and here seek subrogation. We will refer to Toews as the defendant.

Issues were made involving negligence and contributory negligence. Trial was had. At the close of all of the evidence, defendant moved for a directed verdict on the grounds that plaintiff had failed to establish evidence of defendant's negligence and that the evidence showed plaintiff was guilty of contributory negligence as a matter of law. The motion was overruled. The matter was submitted to the jury and a verdict was returned for the plaintiff.

By motion for judgment notwithstanding the verdict or for a new trial, defendant presented the question of error in not sustaining the motion for a directed verdict and error in the giving of instructions. The trial court overruled the motion. Defendant appeals.

We reverse the judgment of the trial court and remand the cause for a new trial.

The first question presented is that of the sufficiency of the evidence to take the case to the jury. That in turn is directed at two particular questions of fact to which we shall refer presently. We recite the evidence subject to the established rule that: " 'In testing the sufficiency of evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.' " Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

Defendant was engaged in building a grain elevator. The material used was concrete. The plan of construction was that of pouring concrete into forms and then raising the forms as the elevation increased. At the time of the accident the elevator was some 70 or 80 feet high.

The accident happened about 10 o'clock at night.

There were lights on top of the elevator and around the top where the finishers were working. There were no lights at the bottom of the elevator, save a light from an office building door some 20 or 30 feet from the place of the accident. The ready mixed concrete was elevated to the top of the elevator in two-wheeled vehicles variously referred to as mud buggies, wheelbarrows, or carts. We shall call them buggies. The loaded buggy was attached to a cable and elevated by means of a winch. When the buggy reached the top it was swung around onto a platform, detached, and taken to be emptied. An empty buggy was then attached and lowered to the ground for reloading. The direction of elevating and lowering of the buggies was in charge of an employee of defendant who worked on the ground near a platform. His name was Matthies. We shall refer to him by name.

Defendant Wilson supplied the ready mixed concrete. It was brought to the elevator in a drum mounted on a truck to which was attached a chute for unloading the concrete. Plaintiff drove the loaded truck to the elevator and placed it in position for unloading. The procedure was for Matthies to place an empty buggy in position for loading. Plaintiff then operated a lever that elevated the drum so the concrete flowed out by force of gravity. When they were ready to fill a buggy, plaintiff, standing at the rear of the truck, put the chute in position over the buggy and pulled a lever that opened the drum so that the concrete flowed into the buggy. The buggy was then pulled to the top, and another buggy reloaded.

Plaintiff's evidence is that on signal of Matthies an empty buggy was brought down during the time that the buggy on the platform was being filled; that Matthies signaled for it to come down; and that when it neared the ground he pulled it to one side, removed the cable, attached it to the loaded buggy, and signaled for it to be pulled up. Matthies' testimony is that the empty

buggy was brought down, guided to position by him, and then filled.

Plaintiff's testimony is that Matthies had left his post at the loading platform and had gone to the office to get an extension cord light so as to illuminate their place of work. Matthies testified that he was close by when the accident happened, and witnessed it.

It is conceded that an empty buggy being lowered to the ground struck plaintiff on the head and caused the injuries involved in the litigation.

Plaintiff testified that at the time he was injured an empty buggy had been placed in position on the platform and he was behind the truck in a proper place putting the chute into position or actually starting the unloading of the concrete into the buggy when he was hit. Defendant's evidence is that there was no buggy there.

The first precise question presented by the defendant is: "Was there a buggy on the platform being loaded by plaintiff at the time?"

Here defendant invokes the rule stated in Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551, and since followed, that: "In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

Plaintiff invokes the rules restated in Burhoop v. Brackhan, *supra,* that: "Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. * * * If there is any evidence which will sustain a finding for the party having the burden of proof in a cause the trial court may not disregard it and didect a verdict against him."

There is evidence as to the practice involved which

is recited above. Defendant's evidence is that the normal procedure was to have the extra empty buggy at the top. There is also evidence that the practice at times was to have an extra empty buggy at the bottom. The fact question here does not turn on normal procedures. Rather the fact question turns on the evidence as to what was being done at the time of the accident. As to that, the evidence presented a clear-cut question of fact for the jury, and not the court, to decide.

On the premise that there was no buggy on the platform, the second question presented by defendant is: "Was plaintiff standing on the platform, or did he step onto it an instant before the accident?" The evidence as to that also was in direct conflict. This again presented a clear-cut question of fact for the jury, and not the court, to decide. The trial court did not err in overruling the motion for a directed verdict.

Plaintiff pleaded some eight specific allegations of negligence of defendant and his employees. The trial court submitted the issue of negligence to the jury in this language: "In lowering a wheelbarrow into an area where he worked, without providing sufficient light to enable him to see it and without giving him any warning."

The defendant denied negligence, and alleged contributory negligence in six specific matters. The trial court submitted these issues of contributory negligence to the jury in this language: "(a) In failing to maintain a lookout for his own safety; (b) In failing to see the wheelbarrow being lowered; (c) In unnecessarily moving from a place of safety into a position of danger."

No complaint is made as to the above instructions.

Complaint is made as to instruction No. 7 which is as follows:

"The defendant Toews and his employees were required to anticipate the presence of workmen in the area where wheelbarrows or 'mud buggies' were lowered,

and were charged with knowledge of the dangers incident thereto.

"The defendant Toews was not an insurer of the safety of such workmen. However, they were his invitees on the premises and it was the duty of Mr. Toews and his employees to exercise every reasonable precaution for their safety, and to exercise ordinary care in providing sufficient light at night so that workmen could see dangerous moving objects, in warning them of danger, and in avoiding an accident, if possible, as should a person of ordinary prudence under like circumstances."

The rule is: "Where two or more independent contractors, or a general contractor and one or more subcontractors, are engaged in work on the same premises, it is the duty of each contractor, in prosecuting his work, to use ordinary and reasonable care not to cause injuries to the servants of another contractor, and an employee of one contractor may recover against another contractor for injuries caused by the negligence of the latter contractor, or of his employees acting within the scope of their employment, in the performance of a duty owed by such contractor to the injured employee." Rumsey v. Schollman Bros. Co., 156 Neb. 251, 55 N. W. 2d 668.

Defendant's attack upon the instruction goes to the last sentence. Defendant contends that: "Instruction No. 7 advised the jury that the defendant was required to: (1) exercise every reasonable precaution for plaintiff's safety, (2) provide sufficient light at night so that workmen could see dangerous moving objects, (3) warn the plaintiff and others of danger, and (4) avoid an accident, if possible."

Plaintiff contends that: "We think that the ordinary grammatical meaning of Instruction No. 7 is as follows: '* * * it was the duty of Mr. Toews and his employees * * * to exercise ordinary care (1) in providing sufficient light at night so that workmen could see dan-

gerous moving objects, (2) in warning them of danger, and (3) in avoiding an accident, if possible * * *.'"

It will be noted plaintiff reads out of the instruction the words "to exercise every reasonable precaution for their safety." The above is an independent clause joined by the conjunction "and" to the remainder of the instruction. Clearly it requires the defendant Toews "to exercise every reasonable precaution" without condition, explanation, or limitation. See Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622. It allowed the jury to speculate as to any precaution which might occur to them was a reasonable one which the defendant did not exercise. So construed it was obviously prejudicial as not limiting the jury to consider only those reasonable precautions that were within the issues of negligence presented.

The remainder of the instruction is subject to the reasonable construction that it is all within the scope of one independent clause. It required the defendant "to exercise ordinary care (1) in providing sufficient light at night so that workmen could see dangerous moving objects, (2) in warning them of danger, and (3) in avoiding an accident, if possible, as should a person of ordinary prudence under like circumstances." The parts, numbered (1) and (2) by us, are within the issues of negligence submitted to the jury. That part of the instruction is not criticized.

That part of the instruction, numbered (3) by us, puts the burden on the defendant to exercise ordinary care in avoiding an accident, if possible. As such it is subject to the same criticism that is pointed out above as to the first independent clause and was prejudicial.

There is no essential difference in the instruction here given and that held to be prejudicially erroneous in Fick v. Herman, *supra*. For the prejudicial error in the instruction the judgment must be reversed and the cause remanded for a new trial. The rule is: "If it does not appear from the record that an incorrect

instruction to the jury did not affect the result of the trial of the case unfavorably to the party affected by it the giving of the instruction must be considered prejudicial error." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

There is one other phrase in the instruction that should be mentioned. Referring to the "workmen" of whom plaintiff was one, the court said "they were his (Toews') invitees on the premises." The right of plaintiff to be on the premises or his status there were not issues. It might be argued that the expression put an added burden of care on the defendant. Under the circumstances shown here, the language should be omitted in any similar future instruction.

For the reasons here given, the judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

CARTER, J., participating on briefs.

GEORGENE SMALLCOMB, APPELLANT, V. O. DAROL SMALLCOMB, APPELLEE.
84 N. W. 2d 217

Filed July 12, 1957. No. 34200.

1. **Appeal and Error.** The function of assignments of error is to set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.
2. ———. The court rules do not contemplate nor authorize assignments of error to be made in appellant's reply brief.
3. ———. Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, 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.
4. **Divorce.** In awarding custody of a child, the primary con-

cern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents.

5. ———. Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody.

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

Robert B. Conrad and *Dryden & Jensen,* for appellant.

Nye & Wolf and *Robert L. Haines,* for appellee.

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

SIMMONS, C. J.

Plaintiff in this action sought a divorce from the defendant on the ground of mental and physical cruelty, the custody of a minor child of the parties, child support, and alimony. Defendant by answer and cross-petition sought a divorce from plaintiff and the custody of the child.

Issues were made and trial was had. The court dismissed plaintiff's petition, granted a divorce to defendant, awarded the custody of the child to the defendant, with rights of visitation by plaintiff, and custody at fixed times. It awarded plaintiff $500 permanent alimony and attorney's fees. Plaintiff appeals.

We affirm the judgment of the trial court.

At the outset we are confronted with a direct challenge by appellee in his brief to the sufficiency of appellant's brief in that it contains no assignments of error.

Section 25-1919, R. R. S. 1943, provides: "The Supreme Court shall by general rule provide for the filing of briefs in all causes appealed to said court. The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous; but no petition in error or other

assignment of errors shall be required beyond or in addition to the foregoing requirement. The Supreme Court may, however, at its option, consider a plain error not specified in appellant's brief."

The rules of this court provide:

"a. Brief of appellant, plaintiff in error, or plaintiff in an original action. 1. Order and Contents of Brief. The brief shall contain the following matters in the order herein set forth: (1) Index; (2) Statement of questions involved; (3) Statement of the case; (4) Assignment of errors; (5) Propositions of law; (6) Statement of Facts; and (7) Argument." Rule 8a 1.

"Assignments of Error. Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned." Rule 8a 2(4).

Plaintiff in her reply brief sets out the following assignments of error: "(1) That the lower court erred in failing to grant plaintiff and appellant a divorce; (2) That the lower court erred in granting defendant a divorce on his cross-petition; (3) That the lower court erred in failing to award custody of the minor child to the plaintiff and in awarding custody of said minor child to defendant; and (4) That the lower court erred in failing to award plaintiff an adequate amount of permanent alimony."

The function of assignments of error is to set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.

The statute requires them. Our rules both by outline and specific rule, as above quoted, require them to be a part of the appellant's brief.

Rule 8b contains the comparable requirements for an appellee's brief and for obvious reasons makes no reference to assignments of error.

Rule 8c provides that a reply brief shall be prepared in the same manner as the brief of appellee. In general just as the appellee's brief is in answer to appellant's brief, so the reply brief is in answer to appellee's brief. Clearly the court rules do not contemplate nor authorize assignments of error to be made in appellant's reply brief.

We have held that: "A point raised for the first time in the reply brief will not be considered by the appellate court." De Lair v. De Lair, 146 Neb. 771, 21 N. W. 2d 498.

It must be held that assignments of error made for the first time in a reply brief must be held to be insufficient.

Plaintiff urges here that she set out in her brief the grounds assigned as error in her motion for a new trial. We have held that such a recital "is wholly insufficient as an assignment of errors in this court." Labs v. Farmers State Bank, 135 Neb. 130, 280 N. W. 452.

Plaintiff further urges that her assignments of error are contained in her argument. As to that we have held that we are not required to consider assignments of error made only by way of argument. Vanderlippe v. Midwest Studios, 137 Neb. 289, 289 N. W. 341.

Plaintiff cites Cowan v. Cowan, 160 Neb. 74, 69 N. W. 2d 300, and asserts that no separate assignments of error were made there. An examination of the brief of appellant reveals that to be true. However, the sufficiency of the brief was not raised there by appellee, nor did we raise it on our own motion.

Plaintiff further relies on section 25-1925, R. R. S. 1943, providing that appeals to this court in equity shall be tried de novo. However, that act clearly contemplates assignments of error for it provides that this court shall "retry the issue or issues of fact involved in the finding

or findings of fact *complained of* * * * and upon trial de novo of *such question or questions of fact,* reach an independent conclusion * * *." (Emphasis supplied.)

The established rule is: "Under section 25-1919, R. S. 1943, and Revised Rules of the Supreme Court, 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." Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. We held under the rule that "under the statute and the rule of this court the decree of the district court should be affirmed for want of assignment of error unless from examination of the record and briefs there is a plain error which if regarded would necessitate a reversal and if disregarded would impose unjust results or consequences."

Clearly under the statute and our rules we have the right to note plain error, although not assigned.

Considering the nature of this action and the fact that the custody of a minor child is involved, we have examined this record to determine whether or not there was plain error which, if regarded, would necessitate a reversal and, if disregarded, would impose unjust results or consequences.

We have reviewed the evidence subject to the equity rule that "when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

Plaintiff relies on the rule that: "Any unjustifiable conduct on the part of a husband or wife which destroys the legitimate ends and objects of matrimony may constitute extreme cruelty." Spencer v. Spencer, 158 Neb. 629, 64 N. W. 2d 348.

The argument here is devoted largely to the weight

of the evidence and the credibility of the witnesses.

The parties hereto were young people in college when they were married in October 1952. They had no resources. The parents of both, by loans and gifts, assisted them in a financial way. Plaintiff became pregnant shortly after the marriage.

Defendant was industrious and moved from job to job and place to place. He was engaged in tenant farming on irrigated land when plaintiff took their baby and went to the home of her parents. This action for divorce followed.

There is evidence that defendant was subject to blackouts or fainting spells; that he was prone to abuse plaintiff when in a violent temper; and that on occasion he physically abused and used vile language toward the plaintiff.

We have examined this evidence, largely in conflict, and have concluded that defendant's conduct did not destroy this marriage and that a denial of a divorce to the plaintiff was not plain error. We do not deem it necessary to recite the evidence in detail.

Defendant's evidence, which the trial court obviously believed, is that plaintiff was given to a primary purpose of seeking her own pleasures in her own way. She became addicted to the use of intoxicating liquors and sought the company of others of like mind and desires. She had company in the home for that purpose. Defendant at times joined with her but as the reluctant participant. Whenever the necessities of caring for the home and the child, or assisting her husband in his duties, conflicted with her desire for pleasure in the association of others, her pleasure usually controlled her actions.

The evidence is quite persuasive that she was likewise addicted to the use of vile language directed at her husband and her child, and that she used it without restraint in public places and in the presence of others.

These things repeatedly done and said finally resulted

in the attrition that destroyed the legitimate ends and objects of this marriage. We here again do not deem it necessary to set out in detail the evidence. The trial court's decree granting the defendant a divorce was not a plain error nor does it impose unjust results or consequences.

This brings us to the question of the custody of the child. The child, a boy, was 3½ years of age at the time of the trial. The statutory rule is: "Upon pronouncing a sentence or decree of nullity of a marriage and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain. * * *." § 42-311, R. R. S. 1943.

We restated the rules applicable in Koerwitz v. Koerwitz, 162 Neb. 411, 76 N. W. 2d 264, as follows: "In awarding custody of a child, the primary concern of the court in its sound discretion is the best interest and welfare of the child, having due regard for the rights of fit, proper, and suitable parents. * * * Children of tender years are usually awarded to the mother unless it is shown that she is unsuitable or unfit to have such custody."

The evidence is that before the trial the child was in the custody of the plaintiff for the first 5 days of each week and the other 2 days was in the custody of the defendant. Plaintiff and the child lived with her parents in a modern home. The good character of the maternal grandmother is not questioned. She is a teacher and necessarily absent from home. She testified that plaintiff and the child were welcome to remain and be cared for in her home. The maternal grandfather did not testify. There is evidence that the child at times has been left with relatives and friends while the mother was absent for her own reasons. There is no particular

showing of the spiritual standards of the maternal grandparents' home.

The defendant lives with his parents in a modern home. Both paternal grandparents testified that the child and the defendant were welcome in the home. The paternal grandparents are shown to be active in religious, civic, and youth work. Witnesses testified as to the high standards of the paternal grandparents' home, and as to the good character and high standards of the defendant and of his religious and civic work. There is credible evidence of the deep attachment of the defendant for the child, and the child's attachment for the defendant and his desire to be with the defendant.

There is persuasive evidence in the record that the plaintiff has throughout the child's life often put her own desires ahead of his best interests. For instance, over the objection of the defendant, she took him to a night ball game when the baby had a severe case of diaper rash. She and the baby returned home late at night. There is evidence that on several occasions she left home during the day, leaving the child with the defendant. He would be compelled, in order to do his farm work, to take the child with him into the fields, around irrigation ditches, and around and on power-driven machinery. Plaintiff knew of the dangers yet was unwilling to stay home to keep the child from them.

There is credible evidence that the child has learned to use and does use some of the vile expressions of the mother, although not knowing their meaning or import.

The trial court placed the custody of the child where his surroundings, teachings, and care would be conducive to a proper training and establishment of physical, mental, and moral standards. It cannot be said that the decision to do so was error.

This brings us to the question of alimony. It was stipulated that all household goods should be awarded to the plaintiff. In addition the court allowed alimony in the sum of $500, with $100 payable at once and the

balance payable on or before January 1, 1958. In addition defendant was charged with the costs of the proceedings, and an attorney's fee of $300 in the trial court.

When the parties were married they had no property other than personal items. Plaintiff's and defendant's parents gave or loaned them money at times. Some of this went into living expenses and some into the purchase of furniture and household equipment. The furniture and household equipment have been awarded to plaintiff.

Defendant purchased machinery when he began his farming operations. He appeared to have been making some headway financially when, in the midst of the growing season, plaintiff took the child and left the home. The evidence is without dispute that the machinery is encumbered by mortgage for more than its value. Defendant has a small equity in an automobile that he requires in his employment. He is not shown to have other property. He has debts, contracted during the marriage relationship for which his creditors are not making pressing demands.

He was employed at the time of the trial on a commission basis. Again, without dispute, it appears that his earnings are hardly large enough to meet current expenses including the payment of child support pending the disposition of this case.

It is in evidence, without dispute, that he does not have the assets to pay the $500 alimony awarded by the court.

It appears that plaintiff has been awarded substantially everything that defendant has by way of property, and yet wants more.

It cannot be said that the determination as to alimony was plain error.

We have determined this cause in the way we are required to do in the light of the way it is presented here. It may be said, however, that had it been pre-

sented here under proper assignments of error the conclusion would have been the same on the matters here considered.

Plaintiff seeks an allowance of attorney's fees in this court. All of the costs in the trial court, including a substantial attorney's fee, have been taxed to the defendant. An affidavit of plaintiff's attorneys filed in this court recites that the defendant has advanced the costs of this appeal, shown elsewhere to have been $378. It further appears that from October 28, 1955, to December 31, 1956, defendant paid temporary support money in the total sum of $520. The notice of appeal was filed here in January 1957. There is no showing as to payments of child support since the appeal was lodged here. Plaintiff filed here a motion for the custody of the child. She later filed a dismissal of the motion on the ground that the child custody had been arranged between the parties.

We have held: "Where the record in a divorce case discloses that the wife's attorney has been allowed an adequate fee for services in the trial court; where the wife appeals and the husband has been required to pay the costs of appeal and support the wife during its pendency; and where no reasonable justification for the appeal appears, an allowance of a fee to the wife's attorney will be denied in this court." Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 208. See, also, Sell v. Sell, 148 Neb. 859, 29 N. W. 2d 877.

In accord with the above rule, the motion for the allowance of an attorney's fee in this court is denied.

The judgment of the trial court is affirmed.

AFFIRMED.

CARTER, J., participating on briefs.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1957

PETER BITTER ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
85 N. W. 2d 302

Filed October 4, 1957. No. 34195.

1. **Municipal Corporations.** A finding by a board of equalization, levying special assessments, that the lands were specially benefited to the full amount of the assessment is tantamount to a finding that such benefits are equal and uniform, permitting the adoption and use of a zone formula.
2. ———. In the absence of a showing that special benefits found by a board of equalization to have accrued to property in an improvement district in which an alley has been paved are excessive or unreasonable in amount, all things considered, a finding by the board on the basis that the paving has added to the value of the property a sum equal to the proportionate cost of the improvement is not so unreasonable as to render the assessment void.
3. ———. In the absence of legislation defining a method for ascertaining benefits to property accruing from a public improvement made by a municipality, any method of reaching a substantially just determination of the special benefits is permissible.
4. ———. The basis for a special assessment is benefit to the property affected by the public improvement made. An assessment may not be arbitrary or unreasonable but the law does not require that it correspond exactly to the benefit conferred on the property. Substantial and not precise accuracy is contemplated in the determination of special benefits.
5. ———. In making special assessments for benefits received it

is presumed that authorities arrived at the amounts thereof with reference alone to the benefits accruing to the property assessed and that the owners are required to contribute to the cost of the improvement only in proportion as their property is specially benefited thereby.

6. ———. There is a presumption of law that all real estate within an improvement district receives some degree of benefit from the paving of an alley therein.

7. ———. A property owner who attacks a special assessment as void has the burden of establishing its invalidity.

8. **Appeal and Error: Taxation.** In error proceedings the findings and conclusions of the board of equalization, which acts judicially, have the weight and conclusiveness of the verdict of a jury.

APPEAL from the district court for Lancaster County: PAUL WHITE, JUDGE. *Affirmed.*

Max Kier, for appellants.

Jack M. Pace and *Norma VerMaas,* for appellee.

George H. Brasier, pro se, amicus curiae.

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

BOSLAUGH, J.

The city of Lincoln, a city of the primary class with a home rule charter, created an alley paving district consisting of the part of the east-and-west alley north of and adjacent to Lot 15 in Block 1, Cahn, Metcalf, and Farwell's Subdivision between the east curb line of Twelfth Street and the east line of Eva Place extended south and including Lots 1, 2, and 3 in Block 18, Riverside Addition, and the west 210 feet of Lot 15, Block 1, Cahn, Metcalf, and Farwell's Subdivision in said city. The work contemplated to be and which was accomplished in the district was the grading, curbing, guttering, and paving of a 16-foot roadway in the alley.

The north 45 feet of Lot 1, Block 18, Riverside Addition, was owned by John Koehler, subject to an executory contract for the sale of the west half thereof. The south 5 feet of Lot 1 and the north half of Lot 2 in said

Block 18, adjoining and south of the John Koehler property, was owned by Peter Bitter and Amalia Bitter. Between that property and the north line of the alley which was paved was the south half of Lot 2 and all of Lot 3 in Block 18 of Riverside Addition.

Appellants filed with the city objections to any special assessments against the property within the district on account of the construction made in the alley. A hearing was held by the city council. The objections were overruled. Assessment was made against the real estate in the district benefited on account of the cost of the paving and thereafter the board of equalization of the city equalized the assessment and distributed the tax upon the several tracts of property within the paving district. A petition in error was filed by appellants in the district court to test the validity of the special assessments made on their real estate by the city of Lincoln on account of the paving of the alley. The district court heard the matters presented by the petition in error, concluded that there was no error in the proceedings had by the city council, and dismissed the petition in error. This appeal is from the action of the district court dismissing the error proceedings and denying a new trial.

Appellants challenge the legality of the special assessments made on their real estate by the assertion that it is an established principle that a blanket formula for the imposition of special assessments upon an area, zone, or frontage basis is illegal and cannot be sustained without a previous finding by the municipal authorities that the property within the area or zone is equally and uniformly benefited.

An engineer of the city, who was familiar with matters concerning the district and who had performed the engineering work in reference to the improvement made, supervised the computation of proposed assessments on account of the cost thereof. A report of proposed assessments was prepared and submitted to the city council

by him. The cost of the paving was divided over all the property in the district. The property was divided into six zones with a decrease of percentage of the cost assigned to each of the zones as the distance increased away from the improvement. The zone nearest the improvement was assigned 33⅓ percent of the total amount assessed, the second zone 20 percent, the third zone 16⅔ percent, and the last three zones 10 percent each. This is the formula used by engineers generally and used by the city of Lincoln in distributing the benefits to property from an improvement made in such a district as the one concerned in this case. The engineer knew the facts important to the matter. He knew that the amount assessed to any property should not exceed the benefit accruing to the property by virtue of the improvement made in the district. He acted to comply with that limitation. It was his judgment that the assessments proposed by him and set out in his report against any tract of the property did not exceed the benefit to the property by reason of the improvement made. The resolution of the city council assessing the cost of the improvement on the property in the district contains the following: "That the cost of the improvements in Alley Paving District No. 252 * * * be and the same is hereby assessed upon the property in said district described in the proposed distribution of Assessment attached to this resolution * * *; that each piece and parcel of property described is specially benefited in the amount set forth therein, and no property is taxed more than the special benefits accruing thereto by reason of said improvements; * * *."

The resolution of the board of equalization recites in part: "* * * that said Board of Equalization, after reviewing said assessments and after hearing evidence with respect thereto found and determined that each separate piece of property in said district was specially benefited on account of said alley paving to the extent and in the amount of the assessment therefor so made

by the Council * * *; that said assessment and schedule so made by the Council were approved and adopted by the Board of Equalization as the equalized assessments in said district; * * *." An appropriate report of the conclusions and actions of the board of equalization was made to and it was approved and adopted by the city council.

Appellants confidently rely, to sustain their contention that the special assessments made on their property are illegal because appellee did not find that the benefits were equal and uniform, upon Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734. Appellants have misconceived the purport of that decision. The opinion in that case shows that all the property in the improvement district involved in that case was assessed a uniform rate per front-foot. There was nothing to show any finding by the city that the benefits accruing to the abutting property were equal and uniform throughout the district. The statute applicable in that instance, referred to in the opinion, contained a provision that "in cases where the council sitting as a board of equalization, shall find such benefits to be equal and uniform, such assessment may be according to the foot-frontage." The opinion contains the following: "That property shall be assessed according to the benefits specially accruing is mandatory. * * * But absolute accuracy, of course, can not be expected, and the determination of the extent of the benefits must therefore be left to some tribunal, and the statute plainly says that it shall be lodged in the council sitting as a board of equalization, after due notice to the owners. * * * There is no reason for holding that the finding contemplated by the statute as the basis for an assessment according to the foot-frontage shall be in the exact language of the statute. We are certain that the council, in the ordinance referred to, after due notice, specifically found as a fact that the property abutting on the district was specially benefited to the full amount assessed against each

tract of land. It is certain that the question of the extent of the benefits was determined by the board after deliberation and a hearing. * * * It seems that the statute in this regard has, in the case at bar, been fully complied with, and the finding of the trial court upon this point can not be sustained under the record." A headnote of that case states: "Where it affirmatively appears of record that the council in levying the special assessment took into consideration the question of the extent of the benefits, and, preliminary to the levy, formally and specifically found that each parcel of land is specially benefited to an amount equal to the tax assessed against it, it is immaterial that each parcel has been assessed an equal amount per front foot, as a finding that the benefits are equal and uniform need not be in the exact language of the statute."

The determination in that case is that a finding that each parcel of land is specifically benefited in an amount equal to the tax assessed against it is tantamount to a finding that the benefits are equal and uniform throughout the district. The finding in the present case was that each piece or parcel of property described is specially benefited in the amount of the assessment thereon and "no property is taxed more than the special benefits accruing thereto by reason of said improvements." A method for ascertaining benefits to property resulting from a public improvement is not contained in any legislation applicable to cities of the class of Lincoln.

In Murphy v. Metropolitan Utilities Dist., 126 Neb. 663, 255 N. W. 20, it is stated: "A finding by a board of equalization, levying special assessments, that the lands are specially benefited to the full amount of the assessment is tantamount to a finding that such benefits are equal and uniform, warranting the adoption of the foot front rule."

It is argued by appellants that the municipal authorities proceeded from the erroneous belief that the

whole cost of the improvement should necessarily be recovered from the property in the improvement district; that because of this they adopted a formula of distribution of costs by dividing the depth of the property into zones and assigning a decreasing percentage of the cost to each zone as the distance increased away from the improvement; and that the property of the appellants was accordingly assessed a percentage of the whole cost in conformance with the zone in which the particular tract of real estate was located without regard to the benefits which accrued from the improvement. The error of this method of procedure is, appellants say, obvious and fatal.

The record does not sustain this argument. On the contrary, it exhibits a study, consideration, and deliberation by the persons and bodies acting for the city to ascertain and evaluate the benefits to the property resulting from the improvement of the alley. The record of the city recites that only benefits were assessed and that the amount thereof in each instance was at least equal to the amount of the assessment. The fact that a zone system was adopted and used and that the total amount of the assessments was equal to the cost of the improvement does not establish that benefits were not considered and determined or that the assessments were illegal.

In Chicago & N. W. Ry. Co. v. City of Albion, 109 Neb. 739, 192 N. W. 233, it is said: "Unless there are circumstances which show that the special benefits found by a board of equalization to have accrued to certain property abutting upon a street which has been paved are excessive and unreasonable in amount, all things being considered, a finding by the board which is based upon the idea that the paving has added to the value of the lots a sum equal to the proportionate cost of the improvement is not so unreasonable as to justify setting aside the assessment for that reason alone." In the opinion it is said: "The city engineer

testified that he computed the schedule of assessment according to a zoning system with six zones, so as to provide enough money to pay for the improvement. It is not contended by the appellant that the assessment was not properly made if such a basis of assessment is justifiable. That special assessments can only be based upon special benefits to the property assessed, and that such an assessment beyond the special benefits conferred would be a taking of private property for public use without just compensation, as appellant urges, is settled law in this state. * * * Of course, without a finding of benefits the assessment was unauthorized. But, in the case at bar, the board specifically found the benefits. It is true that the special benefits to all the property in the district has been found to equal the cost of the paving, but this fact alone is not sufficient to avoid the assessment. The benefits derived, under like conditions, from the paving of a street are usually under a zoning system, in proportion to the frontage and area of the lot assessed, and so with respect to the cost of paving. * * * There seems to be little use for the valuation required by the statute (applicable in that case) unless it means that the board shall ascertain the value of the property before and its value after the improvement, and assess the difference as the special benefit. But the statute does not so require in direct terms and any method of reaching a substantially just appraisement of the special benefits may be supported."

The basis and justification for a special assessment are benefits to the property affected. An assessment may not be arbitrary, capricious, or unreasonable but the law does not require that a special assessment correspond exactly to the benefits received. Precise accuracy is not required and the determination of the extent of benefits must be committed to some tribunal. Legislation has delegated it to the city council in its capacity as a board of equalization after notice to the property owner. Benefits capable of easy demonstration

and mathematical exactness are not necessary to support an assessment. The most any officer or any tribunal can do in this regard is to estimate the benefits to each tract of real estate upon as uniform a plan as may be in the light afforded by available information. Morse v. City of Omaha, *supra;* Chicago & N. W. Ry. Co. v. City of Omaha, 154 Neb. 442, 48 N. W. 2d 409; Petersen v. Thurston, 161 Neb. 758, 74 N. W. 2d 528.

The special assessments concerned in this litigation have support of the presumption that the municipal authorities exercised the power given them; that they performed the duties imposed upon them by law; and that the amount of the special assessments were arrived at with reference only to the benefits which accrued to the properties affected. In Medland v. Linton, 60 Neb. 249, 82 N. W. 866, the court said: "In making special assessments for benefits received it is presumed that the authorities arrived at the amounts thereof with reference alone to the benefits accruing to the property assessed, and that the owners are required to contribute to the cost of the improvement only in proportion as their property is specially benefited thereby." See, also, Chicago & N. W. Ry. Co. v. City of Omaha, *supra.*

Likewise, validity of the assessments is aided by the presumption of law that all real estate is benefited to some degree from the improvement of a street or alley on which it abuts or from a like improvement made in a district of which the property assessed is a part. Whitla v. Connor, 114 Neb. 526, 208 N. W. 670; Chicago & N. W. Ry. Co. v. City of Omaha, *supra.*

A property owner who attacks a special assessment as void has the burden of establishing its invalidity. Munsell v. City of Hebron, 117 Neb. 251, 220 N. W. 289; Chicago & N. W. Ry. Co. v. City of Omaha, *supra;* LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455.

There was evidence before the city council of bene-

fits to the real estate within the alley paving district resulting from the improvement of the alley. The engineer who did the engineering work incident to the improvement and who was fully advised of all matters concerning it and of the entire situation furnished the city council, under oath, a statement of his judgment of the benefits which accrued to the property within the district from the paving constructed therein. He was also a witness at the hearing before the city council after objections had been filed by appellants protesting the proposed assessment of their property and before the assessment was made or the board of equalization had acted, and he at that time testified that none of the assessments proposed to be made against the several parcels of property in the district exceeded the benefits to the property.

There was evidence that the paving of the alley provided a means of facilitating traffic through it at all times in all kinds of weather and under all conditions; that it very materially improved an unsatisfactory drainage problem because the vicinity was quite level and the drainage was poor; that there frequently had been water pools in the alley that did not drain and the paving remedied that situation; and that there was a bad dust situation in dry periods when dust from the alley was an annoyance to the homes in the district, complaint had been made to the city concerning it, and that the dust from the alley was eliminated by the improvement. The evidence of appellants offered on this issue consisted of statements of conclusions that the property assessed was not benefited by the paving.

The record shows that the owners of a majority of the front footage of the property in the district petitioned and requested the city council to pave the alley and to assess the cost thereof to the respective properties.

In error proceedings the findings and conclusions of the board of equalization, which acts judicially, have the weight and conclusiveness of the verdict of a jury.

Dodge County v. Acom, 72 Neb. 71, 100 N. W. 136; Hoesly v. Department of Roads & Irrigation, 143 Neb. 387, 9 N. W. 2d 523.

Appellants have not established that the special assessments contested herein were made by the municipal authorities without evidential integrity or that the assessments resulted from the adoption of any inapplicable principles of law.

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

AFFIRMED.

DONALD A. STEWART, APPELLEE, V. L. N. RESS, STATE ENGINEER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.
85 N. W. 2d 260

Filed October 4, 1957. No. 34196.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. For original opinion see 164 Neb. 876, 83 N. W. 2d 901. *Opinion Modified. Motion for rehearing overruled.*

Clarence S. Beck, Attorney General, and *Ralph D. Nelson*, for appellants.

Stewart & Stewart and *Raymond K. Calkins*, for appellee.

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

BOSLAUGH, J.

The statute declares that the revocation of the license to operate a motor vehicle shall be for a period of 1 year from the date of the latest conviction of the licensee. § 39-7,129. R. S. Supp., 1955. The date of the last convic-

tion of appellee was September 11, 1956. The order of revocation of the license of appellee was for a period of 1 year from that date. The opinion incorrectly considered the license of appellee revoked on October 1, 1956, the date it was surrendered by him. The period of the revocation of the license remaining is 8 calendar months and 12 days from and after the rendition of the judgment to be rendered herein by the district court instead of 9 calendar months and 2 days as stated in the opinion and it is corrected and amended accordingly.

OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES J. FITZGERALD, RESPONDENT.

85 N. W. 2d 323

Filed October 4, 1957. No. 34205.

1. **Attorney and Client.** In granting a license to practice law it is on the implied understanding that a party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
2. ———. The purpose of a disciplinary proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice.
3. ———. Misconduct of an attorney, indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment.
4. ———. The oath required by section 7-104, R. R. S. 1943, obligates lawyers taking the same to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe established standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar.
5. ———. In general it may be stated that a conviction of a

felony or misdemeanor involving moral turpitude, as such term is defined by the statutes, is conclusive evidence warranting disbarment.

Original Action. *Judgment of suspension.*

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

Kennedy, Holland, DeLacy & Svoboda, for respondent.

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

WENKE, J.

This is an original proceeding brought by the State on the relation of the Nebraska State Bar Association praying for disciplinary action against the respondent, James J. Fitzgerald. The charges against respondent are that: "* * * during and for the years 1947, 1948, 1949, 1950, 1951, 1952, 1953, and 1954, (he) failed to file with the United States of America, or any office or branch thereof, or with the United States Treasury Department, Internal Revenue Service, any return, report, or information relating to or concerning his income, earned or reportable, during said years; that the said James J. Fitzgerald had an income for each of said years which he was required by law to report to the said United States Treasury Department, Internal Revenue Service; that on or about the 5th day of January, 1956, the said James J. Fitzgerald was charged in the United States District Court for the District of Nebraska, sitting at Omaha, Nebraska, with failure to make the income tax returns, as aforesaid, to which he entered a plea of nolo contendere; that upon a hearing he was fined the sum of $750.00 on account thereof."

Respondent admits these charges to be true but claims he was not thereby charged with nor guilty of any act involving moral turpitude.

"In granting a license to practice law it is on the implied understanding that the party receiving it shall in

all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts." State ex rel. Attorney General v. Burr, 19 Neb. 593, 28 N. W. 261. See, also, State ex rel. Nebraska State Bar Assn. v. Palmer, 160 Neb. 786, 71 N. W. 2d 491.

"The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the public interest whether he should be permitted to practice." State ex rel. Wright v. Sowards, 134 Neb. 159, 278 N. W. 148. See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583; State ex rel. Nebraska State Bar Assn. v. Palmer, *supra*.

While it is clear that the offenses committed were committed by the respondent in his capacity as a private individual, and not in any professional capacity, however, we have held that if such misconduct indicates moral unfitness it justifies our taking action thereon. See, State ex rel. Sorensen v. Scoville, 123 Neb. 457, 243 N. W. 269; State ex rel. Wright v. Sowards, *supra*. As said in State ex rel. Sorensen v. Scoville, *supra*: "Misconduct of attorney, indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment."

Section 7-104, R. R. S. 1943, requires: "Every attorney upon being admitted to practice in the Supreme Court or district courts of this state, shall take and subscribe an oath substantially in the following form: 'You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability.' "

We said in State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra*, that: "Such an oath requires lawyers to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe estab-

lished standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar." See, also, State ex rel. Nebraska State Bar Assn. v. Palmer, *supra.*

In the Rules Creating, Controlling and Regulating Nebraska State Bar Association it is provided by Article X thereof, as to professional conduct, that: "The ethical standards relating to the practice of law in this state shall be the canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court."

Canon 29 thereof provides in part that: "He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

And canon 32 provides in part that: "*He must also observe* and advise his client to observe *the statute law,* though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen." (Emphasis ours.)

Respondent, who is now 49 years of age, was graduated from Creighton law school in 1932 and was admitted to the practice of law in this state on June 3, 1932. Upon being admitted he immediately began the practice of law in Omaha and has continued to do so except for a period of 4 years, beginning May 9, 1942, during which time he served in the armed forces of his country. During his years of practice respondent served as deputy county attorney of Douglas County for a period from 1935 to 1940 and as county attorney thereof from 1947

to 1951, having been elected in 1946 for a 4-year term beginning on January 9, 1947.

On January 27, 1947, respondent suffered a coronary occlusion and entered a hospital because thereof on January 29, 1947. He remained in the hospital until February 15, 1947, when he was released to return to his home with instructions to remain there and rest. This he did until in May 1947. Thereafter, in June 1947, he returned to his office for an hour or two a day but gradually increased the length thereof until in the fall when he returned to full duty. However, at all times during this period, he avoided excitement, overexertion, or anything of a nature that would tend to excite, tire, or overburden him. Respondent, because of this illness, failed to file a report of his income for 1946, due March 15, 1947, with the Bureau of Internal Revenue although he had a taxable income to report for that year.

After respondent commenced working full time he went down to see the people in charge of the Internal Revenue Service in Omaha but instead of making an application to obtain an extension of time in order to file his income tax report due March 15, 1947, based on the fact that he was ill and unable to file a report at the time it was due, he gave them a hypothetical case of a doctor client, using the same facts as his own as an example. Those in charge of the Internal Revenue Service would not assure respondent that if he filed a delinquent tax return for the doctor and paid all taxes, penalties, and interest assessed thereon that there would be no criminal prosecution or publicity in connection therewith and that the doctor would just have to take his chances with what would happen. Thus not being given the assurance by those in charge of the Internal Revenue Service that he could avoid criminal prosecution, and the publicity that would result therefrom if he filed a delinquent income tax report for 1946 respondent, because he was then county attorney, felt he could not afford to take any chance that this would happen

to him and did not file his income tax report for 1946 and thereafter failed to file reports of his income for 1947, 1948, 1949, 1950, 1951, 1952, 1953, and 1954 which were due respectively in 1948, 1949, 1950, 1951, 1952, 1953, 1954, and 1955 although he had substantial income subject to income tax for each of those years.

Nothing further developed until sometime in 1955 when respondent was called by those in charge of the Internal Revenue Service in Omaha to explain his failure to file income tax reports as required by section 145(a) of the Internal Revenue Code of 1939, Title 26 U. S. C. A., § 145 (a), and section 7203, Internal Revenue Code of 1954, 26 U. S. C. A., § 7203. This section makes it a misdemeanor, punishable by a fine of not more than $10,000, or imprisonment for not more than 1 year, or both, for any person required by law to make a federal income tax return to willfully fail to make the same. Respondent, in order to avoid prosecution and the publicity that would arise therefrom, tried to buy his way out of the difficulty he found himself in as a result of what he had done by offering to pay the government's figure of what it claimed he then owed for the years he had not reported his income (some $77,000) if no criminal action was taken against him, but this offer was refused by those in charge.

On January 5, 1956, an information was filed against respondent in the United States district court for the district of Nebraska containing three counts. The third count charges as follows: "That during the calendar year 1954, JAMES J. FITZGERALD who was a resident of the City of Omaha, Douglas County, Nebraska, within the District of Nebraska, had and received a gross income of $14,240.88, that by reason of such income he was required by law after the close of the calendar year 1954, and on or before April 15, 1955, to make an income tax return to the District Director of Internal Revenue for the Internal Revenue Collec-

tion District of Nebraska, at Omaha, Nebraska, within the District of Nebraska, stating specifically the items of his gross income and any deductions and credits to which he was entitled; that well knowing all of the foregoing facts, he did wilfully and knowingly fail to make said income tax return to the said District Director of Internal Revenue or to any other proper officer of the United States." Counts I and II are the same except they relate to the years 1952 and 1953 respectively and show a different amount of gross income, that of 1952 being $9,851.77 while that for 1953 being $14,097.26.

On a plea of nolo contendere respondent was fined $250 on each count, which he paid. The record establishes and respondent admits that he is guilty of the charges filed against him.

Respondent contends that what he did does not involve moral turpitude and therefore it is not a proper basis for discipline. A discussion of what is meant by the phrase "Moral Turpitude" can be found in 58 C. J. S. at page 1200. There are cases holding as respondent here contends, as evidenced by State v. McKinnon, 263 Wis. 413, 57 N. W. 2d 404; Kentucky State Bar Assn. v. McAfee, —— Ky. ——, 301 S. W. 2d 899. On the other hand there are cases that come to the opposite conclusion. See, In re Means, 207 Or. 638, 298 P. 2d 983; Rheb v. Bar Assn. of Baltimore, 186 Md. 200, 46 A. 2d 289; In re Burrus, 364 Mo. 22, 258 S. W. 2d 625; In re DePuy, 10 N. J. 282, 90 A. 2d 19. As stated in In re Burrus, *supra:* "We think it quite clear and, accordingly, hold that his intentional failure to make returns as the law required constituted conduct involving moral turpitude within the meaning of both the statute, § 484.240 RSMo 1949, V.A.M.S., and our Rule 4.47." Without discussing the issue at length we also think it is clear that to knowingly and willfully fail to make income tax reports, as required by federal statutes, involves moral turpitude even though the statute only classifies it as a misdemeanor.

We said in State ex rel. Wright v. Sowards, *supra:* "In general, it may be stated that a conviction of a felony or misdemeanor involving moral turpitude as such term is defined by the statutes is conclusive evidence warranting disbarment." And in State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra,* we said: "Observance of its provisions (statute) by lawyers is mandatory, and flagrant violation thereof, as in the case at bar, is to be considered a gross offense in disciplinary proceedings despite the fact that in criminal prosecutions a violation thereof is legislatively defined as a misdemeanor punishable by fine."

We think it is significant that over a period of 8 years respondent did not make a voluntary disclosure of his offenses to anyone until he was called by those in charge of the Internal Revenue Service. Considering everything involved we come to the conclusion that respondent must be disciplined for what he knowingly and willfully did for by doing so he violated both the oath he took on being admitted to the practice of law and the canons of ethics governing his conduct after his admission.

The evidence shows that respondent has been fully cooperating with those in charge of the Internal Revenue Service in an endeavor to ascertain the correct amount of tax he owes for the years involved and that he intends to pay the full amount thereof, together with penalties and interest assessed against him, when that amount has been established. There is no evidence before us that respondent has ever breached his duty as a lawyer nor is there any evidence that he has ever been guilty of any other wrongdoing as a private citizen.

In view of the facts herein set forth, and all the circumstances disclosed by the record relating thereto, we think the ends of justice will be properly served by suspending respondent from the further practice of law, same to go into effect 30 days after our judgment rendered herein becomes effective. If, at the end of

1 year from the effective date of his suspension, respondent makes an affirmative showing, sufficient to satisfy this court, that he has fully complied with our order of suspension and that he will not, in the future, engage in any practices offensive to the legal profession then he will be reinstated and allowed to engage in the practice of law, however, if he fails to do so then the suspension herein provided for is to become permanent. Judgment of suspension accordingly. All costs of this proceeding are taxed to respondent.

JUDGMENT OF SUSPENSION.

SIMMONS, C. J., participating on briefs.

FLOYD LEISTRITZ, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

85 N. W. 2d 318

Filed October 11, 1957. No. 34155.

1. **Criminal Law: Evidence.** A conviction may rest on the uncorroborated evidence of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.
2. **Indictments and Informations.** When words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements of the offense, they may be treated as surplusage and entirely disregarded.
3. **Larceny: Indictments and Informations.** The allegation in an information charging cattle stealing under section 28-510, R. R. S. 1943, that the animal alleged to have been stolen had a specific value is surplusage and does not have the effect of changing the charge from cattle stealing to grand or petit larceny.
4. **Larceny.** When the animal alleged to have been stolen is killed as a means of making its theft possible, the crime of cattle stealing is established the same as if it was alive at the time of its asportation.
5. **Criminal Law: Trial.** An instruction which does not purport to set out all the essential elements of an offense will not be held to be prejudicially erroneous when by another instruction

the whole case is properly covered and the essential elements necessary to be established are set out, and when there is no inconsistency in the two instructions.

ERROR to the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

Charles A. Fisher, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for defendant in error.

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

CARTER, J.

The defendant was convicted of cattle stealing under section 28-510, R. R. S. 1943. He claims error in that the evidence is insufficient to sustain a conviction and that the trial court erred in giving certain instructions and failing to give others requested by him.

The evidence of the State shows that on the night of February 5, 1956, defendant Leistritz together with Maurice O'Connor and George Piihl went upon the ranch lands of the Lakeside Ranch Company pursuant to a previous agreement and feloniously killed and carried away a yearling steer belonging to the company. O'Connor and Piihl testified for the State and in effect stated that they, together with Leistritz, shot and killed the steer, hog-dressed it at the place of the killing, loaded it in a truck, and conveyed it to the home of Piihl. On the enclosed back porch of the Piihl home they completed the skinning and quartering of the animal and divided the meat. The evidence of the two accomplices as to the dressing and quartering of the steer at the Piihl home was fully corroborated by Sara Jean Piihl, who saw the three of them dressing and quartering the beef on the enclosed porch of the Piihl home. The evidence was sufficient to sustain the finding of the jury.

The evidence of the two accomplices unequivocally shows the defendant to have been a participant in the

stealing of the steer. The rule is: "A conviction may rest on the uncorroborated evidence of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused." Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151.

The defendant complains of the failure of the trial court to give his requested instruction No. 2 which is to the effect that the information charges the offense of grand larceny under section 28-506, R. S. Supp., 1955. The defendant asserts that it was error not to instruct that the jury could find the defendant guilty of the lesser offenses of grand or petit larceny. The information charged that the defendant did "unlawfully, feloniously steal, take and carry away one hereford steer, branded Bar Shoe on left side, the personal property of the Lakeside Ranch Co., of the value of $100.00, * * *."

Section 28-510, R. R. S. 1943, the cattle-stealing statute, provides in effect that whoever steals any cow, steer, bull, heifer, or calf of any value shall be punished as therein provided. It is contended that in alleging the value of the steer to be $100, the charge is brought under the section on grand larceny and not under the cattle-stealing statute. There is no merit to this contention. The allegation in the information that the steer had a value of $100 is an allegation that the steer had some value under the cattle-stealing section. The averment that the steer had a specific value of $100 is mere surplusage and does not have the effect of changing the charge from cattle stealing to grand larceny. The rule in this state is: When the words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential elements of the offense, they may be treated as surplusage and wholly disregarded. Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588; Buthman v State, 131 Neb. 385, 268 N. W. 99.

Defendant contends that the evidence does not show

that a steer was stolen; that the most the evidence shows is that the carcass of a steer was taken and carried away. In this respect the evidence of the two accomplices is that defendant held a spotlight on the steer while O'Connor shot it. This same situation was dealt with in McIntosh v. State, 105 Neb. 328, 180 N. W. 573, 12 A. L. R. 798. We there said: "On this state of facts it is suggested that the circumstances do not show the stealing and carrying away of the steer; that there was no possession by the accused of the steer as a live animal. The testimony shows a clear and unmistakable intent on the part of the accused to steal the steer and sell the meat. To aid himself in carrying out this purpose, he shot and killed the steer, took possession of the carcass, dragged it same distance from the spot, where, after severing the head from the body, he became apprehensive of detection, and fled. We think the facts bring the case within the inhibition of the statute. Of course, if the steer had been accidentally or recklessly killed, and the carcass had been found by the defendant and feloniously stolen, such facts would not be a stealing of the steer within the meaning of the statute." We shall not labor this question further except to say that when a steer is killed as a means of making its theft possible, the crime of cattle stealing is complete, the same as if it had been loaded on a truck alive and carried away. The shooting was but the manner chosen to obtain possession. The defendant being an accomplice by assisting in the act is as guilty in law as the person doing the shooting.

The defendant strenuously argues that the court erred in giving instruction No. 8 dealing with the asportation of the steer. The court by this instruction told the jury in part: "Among other things to constitute a larceny, the taker must reduce the cattle to his complete control, and there must be a taking or a removal, however slight, after the same is under the complete control of the taker. However, where one or more persons form an

unlawful and felonious intent to steal a beef animal, of value, and to use the meat, and to aid in such felonious purpose, shoot and kill such animal, and in furtherance of such felonious intent, hog dress it and then remove the carcass from the spot where killed, that would constitute a taking and carrying away such as is contemplated by the Statute, and it would be immaterial that the animal was not removed before it was killed, and if you believe from the evidence beyond a reasonable doubt that at the time and place charged, one Maurice O'Connor together with George Piihl or with George Piihl and the defendant went to the pasture in question, with a common unlawful, felonious intent to steal a beef animal from said pasture, and to use the meat or a part of it, and personally deprive the owner of said animal, and to aid in such common purpose shot and killed a beef animal, of value, and afterward in furtherance of such felonious intent hog dressed, and later removed it from the spot, all without the owners consent, that would constitute a taking and carrying away such as is contemplated by the Statute."

It is urged that the court erred in stating to the jury "and if you believe from the evidence beyond a reasonable doubt that at the time and place charged, one Maurice O'Connor together with George Piihl or with George Piihl and the defendant went to the pasture in question, with a common unlawful, felonious intent to steal a beef animal from said pasture" in that it infers that a felonious taking by O'Connor and Piihl would be a taking by the defendant. We point out that that instruction as a whole must be considered in considering this point. The quoted sentence of the instruction begins with the words: "However, where one or more persons form an unlawful and felonious intent to steal a beef animal, * * * and to aid in such felonious purpose, shoot and kill such animal, and in furtherance of such intent, * * * remove the carcass from the spot where killed, * * * and if you believe * * * one Maurice O'Con-

nor together with George Piihl or with George Piihl and the defendant * * * to aid in such common purpose * * * that would constitute a taking and carrying away such as is contemplated by the Statute." The jury could hardly have been misled by this instruction. It in effect instructs that if the three conspired to steal the steer, and in carrying out the conspiracy the two confessed accomplices, or the three acting in concert, feloniously carried away the steer, the requirements of the statute as to the asportation of the animal have been met. We think the instruction considered as a whole, although it could have been written with more clarity, is not prejudicially erroneous.

But, irrespective of the foregoing conclusion, there is another reason why the instruction is not prejudicially erroneous. There is ample evidence in the record that defendant aided and abetted in the stealing of the steer, which the jury evidently believed. The two accomplices testified that the hog-dressed steer was taken to the home of Piihl. They testified that the three of them put it on the enclosed back porch where they skinned, dressed, and quartered it. Sara Jean Piihl, the 10-year-old daughter of Piihl, testified that she was awakened during the night by a noise from the back porch. She got up without turning on the light and looked out the kitchen window onto the porch. There she saw her father, O'Connor, and the defendant. She saw the beef and the hide, fully corroborating the testimony of O'Connor and her father. The trial court instructed the jury that one who aids and abets another in the commission of a crime is equally guilty. It is fundamental that an aider and abettor need not necessarily be a party to the killing or carrying away of a stolen steer. The asportation of the animal by any one or more of them under such circumstances would constitute a sufficient asportation as to all.

Instruction No. 8 states in effect that if the two accomplices, or the two accomplices and the defendant,

went to the pasture with a common, unlawful, felonious intent of all three of them to steal a beef animal, and to use the meat or a part of it, and to aid in such purpose, shot, killed, and dressed it out, it would constitute a sufficient asportation of the animal.

The trial court made the rule of law abundantly clear by instruction No. 9. By that instruction the court in part told the jury: "You are further instructed that mere presence at the commission of a crime without aiding, abetting or procuring its commission with unlawful intent, is not sufficient to establish the guilt of such party, and even though you may believe from the evidence beyond a reasonable doubt that Maurice O'Connor, and George Piihl may have stolen the animal in question, at the time and place alleged, and that the defendant was present at the time, and that after the animal was shot and killed, he assisted in butchering it out and took some of the meat, yet, before you could find the defendant guilty of the crime charged herein you must be convinced by the evidence beyond a reasonable doubt among other things, that the defendant formed and shared with the others a common felonious intent and plan to steal a beef animal and assist therein before the animal was shot and killed. If you entertain a reasonable doubt thereto, then you should give the defendant the benefit of such doubt and acquit him of the charge made."

Instructions No. 8 and No. 9 make it clear that a felonious taking and carrying away by O'Connor and Piihl would constitute a sufficient asportation as to the defendant only if defendant was a party to a plan to steal a beef animal and participated in it subsequently in some manner with the felonious intent to aid and abet the crime. The jury could not have been misled by the language of instruction No. 8 when it was read in connection with instruction No. 9. See McIntosh v. State, *supra.*

Under his plea of not guilty the defendant relied

primarily upon an alibi as a defense. His testimony was that he left the company of O'Connor and Piihl in the late afternoon and returned home. His evidence is that he attended a motion picture show in Alliance that evening. He said there was no conversation with O'Connor and Piihl about taking, killing, or butchering a beef. He denied any connection with the crime. He produced evidence in support of his alibi which raised a question of fact for the jury on that issue. The trial court properly instructed on the alibi as a defense. The jury determined the issue of fact thus raised in favor of the State. The findings of the jury being supported by competent evidence, its conclusions must be accepted by this court. The trial court did not err in overruling defendant's motion for a directed verdict and in submitting the issues of fact to the jury.

We have examined other alleged errors in the instructions and we find them to be without merit. The instructions tendered by the defendant were either covered by instructions given by the court or were properly refused by the trial court as incorrect statements of the law under the evidence adduced. Since there is no prejudicial error in the record, the judgment of the district court is affirmed.

AFFIRMED.

MICHAEL DANZE, A MINOR, BY WILLIAM DANZE, HIS FATHER AND NEXT FRIEND, APPELLANT, V. JOHN F. STANGE, APPELLEE.
85 N. W. 2d 295

Filed October 11, 1957. No. 34197.

1. **Witnesses: Appeal and Error.** A failure or refusal of the district court to comply with the requirement of section 25-1237, R. R. S. 1943, that before testifying the witness shall be sworn, may not be properly assigned as error if timely objection was not made thereto.
2. **Trial: Appeal and Error.** A prerequisite to review on appeal of alleged improper conduct of and statements by a trial judge in

the presence of the jury is by timely objection thereto at the trial.

3. **Appeal and Error.** The alleged errors which may be considered on appeal are those that appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by timely objection.

APPEAL from the district court for Douglas County: WILLIAM A. DAY, JUDGE. *Affirmed.*

Kelley & Grant and *Schrempp & Lathrop,* for appellant.

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellee.

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

CARTER, J.

This is an action brought by William Danze, as father and next friend of Michael Danze, a minor, for damages for personal injuries sustained when Michael Danze was struck and injured by defendant's automobile. The jury returned a verdict for the defendant and the plaintiff has appealed.

No contention is advanced that the case was not one for the jury or that the jury was not properly instructed by the court. Plaintiff makes three assignments of error pertaining to the conduct of the trial which will be dealt with in the order of their presentation in plaintiff's brief.

The evidence shows that Michael Danze was a child about 6½ years of age at the time of the accident, and about 8½ years of age at the time of the trial. At the time he was called as a witness the trial court interrogated him as to his qualifications as a witness, including his understanding of the necessity for telling the truth, and the penalty for not so doing. Plaintiff's attorney inquired if the oath had been administered. The trial court stated: "* * * No, I don't think you

swear a child like that, you just ask them if they know what to tell —." Plaintiff's counsel proceeded without making objection.

It is clear that plaintiff's counsel acquiesced in the court's ruling. The applicable statute, section 25-1237, R. R. S. 1943, requires that an oath be administered. When a party waives this provision of the statute by failing to object, he may not subsequently, after taking his chances on a favorable verdict, assert the failure to comply with the statutory provision as prejudicial error. Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151; Fetty v. State, 119 Neb. 619, 230 N. W. 440; City of O'Neill v. Clark, 57 Neb. 760, 78 N. W. 256.

The second assignment of error is that the trial court improperly commented upon the credibility of certain evidence and the witness giving the testimony. This assignment is based on the court's statement, hereinbefore quoted, when it declined to administer the oath to Michael Danze, and the following statement made in the record in sustaining an objection to evidence that defendant was friendly with all the boys living in the neighborhood where the accident occurred: "A man might be an angel and still have an accident that might be his fault, or he could be the other kind and never have an accident that was his fault. All those things just don't prove or disprove any of the issues in this case. No doubt Mr. Stange is a nice man." The contention is that these statements tend to improperly discredit the evidence of Michael Danze and to improperly increase the credibility of defendant's evidence with the jury. Irrespective of any merit in plaintiff's contention, the record shows that no objection was made to the statements complained of. Under such circumstances a party may not, after a verdict is returned, assign such as error. Objection to improper statements of a trial judge is a prerequisite to a review of such matters in this court. Bolio v. Scholting, 152 Neb. 588,

41 N. W. 2d 913; Morrow v. State, 146 Neb. 601, 20 N. W. 2d 602.

The plaintiff in his third assignment of error complains that the trial court orally instructed the jury contrary to section 25-1115, R. R. S. 1943. The record shows that in overruling an objection by defendant to the competency of Michael Danze as a witness because of his tender years, the court said: "Well, that's one of the things, Mr. Tierney, we are faced with in these cases, and the jury will have to take into consideration his age and so forth and his apparent ability to remember and not remember the occurrences referred to in his evidence, and then they will give that testimony such weight as they think it is entitled to receive under all the circumstances of the case." The record shows that defendant's counsel, and not plaintiff's counsel, objected to the form of the court's ruling as being an instruction to the jury. The court then said: "Well, I think that your objections maybe (interrupted) prompted that explanation. I don't mean to instruct them at this time."

Plaintiff's counsel made no objection to the foregoing statements. This precludes their assignment as error by him. The rule is: The alleged errors which may be considered on appeal are those that appear in the record of the proceedings which resulted in the verdict and judgment about which complaint is made and which are called to the attention of the trial court by timely objection. See Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170.

The assignments of error being without merit, the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

CHARLES WERNER, BY AND THROUGH HIS SISTER AND NEXT FRIEND, DELORES LEE BROWN, APPELLEE, V. WALTER GRABENSTEIN, APPELLANT.

85 N. W. 2d 297

Filed October 11, 1957. No. 34215.

1. **Negligence: Trial.** An issue concerning gross negligence must be decided from the facts of each case.
2. ———: ———. An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at different conclusions.
3. ———: ———. When the evidence is resolved most favorably to the existence of gross negligence and thus the facts are determined, the inquiry of whether they support a finding of gross negligence is one of law.
4. **Automobiles: Negligence.** A guest, to recover damages from a host for injury received by the guest while riding in a motor vehicle operated by the host, must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon and that it was the proximate cause of the accident and injury.
5. ———: ———. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty.
6. ———: ———. A finding of gross negligence is justified if there is evidence of imminence of danger which was apparent to or known by the operator of an automobile and he was timely cautioned by the guest concerning the manner of his operation of the automobile but he persisted in his negligent operation thereof and if there is evidence that the operator was heedless of the consequences which might ensue by his negligent operation of the automobile consisting not only of rate of speed but of other conditions, known to the operator, which enhanced the peril.

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

Frank M. Johnson and *Healey, Davies, Wilson & Barlow*, for appellant.

Stewart & Stewart, for appellee.

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

BOSLAUGH, J.

This appeal is from a judgment in favor of appellee and against appellant for damages resulting from injuries sustained by appellee while a guest in a pick-up truck owned by appellant while it was being operated by his son Gary Grabenstein under conditions which rendered appellant responsible for the actions and omissions of his son. A motion for a directed verdict was made at the conclusion of the evidence by appellant because, as he asserted therein, the evidence was not sufficient to sustain a finding that Gary Grabenstein, hereafter referred to as Gary, was guilty of gross negligence in the operation of the motor vehicle involved at the time of the accident. The motion was denied and the issue of gross negligence was submitted to the jury. It found for appellee. Appellant moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The motion was overruled and judgment was rendered on the verdict. The validity of the judgment is the subject of this appeal and the sole contention made in this court is that the evidence is insufficient to sustain a finding adverse to appellant on the issue of gross negligence.

The accident involved occurred late in the afternoon of July 1, 1953. Appellee was 14 and Gary was 15 years of age. They and all the persons concerned in the happenings which resulted in this litigation were and have continued to be neighbors, friends, and intimates except the father of appellee who died after the accident. La Vonne Grabenstein, mentioned herein as LaVonne, was a younger sister of Gary. Appellee and Gary were and have continued to be very close friends. In the vernacular, they were "pals."

Appellee, Gary, and LaVonne were at the time of the accident riding in a G.M.C. three-quarter ton, 1950 model pick-up truck owned by appellant and maintained in such circumstances as to be subject to the family car doctrine at the time important to this case. It was equipped

with snow or mud tires which are sometimes in the record spoken of as "knobby" tires. The truck was in good and usable condition. It could be operated on a highway at a speed of 45 miles per hour without difficulty but at this speed the motor turned over very rapidly because of the ratio of the gears. It was geared for power and not for speed. It was almost impossible for the truck to operate at 60 miles per hour. This was done only once to the knowledge of its owner and that was on U. S. Highway No. 30, a hard-surfaced road.

The truck was not carrying a load. Gary was seated in the truck to the left and operated it. LaVonne was to his right, and appellee was on the extreme right of the seat of the truck. They traveled north on a county graveled road, the graded portion of which was about 25 feet in width and the traveled part of it was about 20 feet. There was some loose gravel on the traveled portion and there was a ridge of gravel along each side of the road near the outside edge of the graded portion. It was a clear, hot, and dry summer day. The vehicle in which the persons were riding was the only one on the highway which they were using immediately before and at the time of the accident. The condition of the road was described as rough because it had alternating small valleys and elevations on its surface, giving it the effect of a washboard surface referred to in the record as "washboardy." The road, as it extended north from where the truck entered it for the trip which ended in the accident, for a distance of about one-half mile, crossed a bridge and creek, went over or along a slough, and had several quite sharp S curves in it. The truck was operated over this part of the road at a speed of from 40 to 45 miles per hour. Thereafter for a distance of about, but probably somewhat less than, one-half mile the road extended straight north to an intersection with an east-and-west county road. When the truck entered this part of the road it was traveling about 40 to 45 miles per hour and the rate of speed was increased so that in ap-

proximately one-fourth of a mile a speed of 65 miles per hour had been attained. At that time the truck was 300 or 400 yards from the intersection mentioned above and it was swerving from one side to the other in the road. Gary then said the speed of the truck was 65 miles per hour and appellee verified the correctness of this statement by glancing at the speedometer. Appellee was frightened because of the speed, the condition of the road, and the action of the vehicle. He protested by saying to Gary that he had better slow down because he was going too fast. Gary did not heed the protest of appellee and LaVonne said to Gary that he should slow down or she would tell Dad and he would be mad. The speed of the truck was not decreased and it continued to go from one side of the road to the other. Appellee said a second time to Gary that he should slow down but Gary made no effort to decrease the speed of the truck. Immediately after the last protest or warning of appellee to Gary the truck struck the right or east ridge of gravel along the road. The truck then moved to the west and struck the ridge of gravel on the left of the road, and then returned to the right side of the road. The truck was then swaying, bouncing around, and zigzagging on the road. It was then that appellee lost consciousness or, as he stated, "blacked out." His next remembrance was that he was sitting on the ground east of the road about 20 feet in an alfalfa field. He was seriously injured.

Gary testified that due to the "washboardy" condition of the road the truck swerved and bounced. It was empty and, to make it worse, it had "knobby" tires. It started sliding, hit the right side of the road first, swerved to the left side of the road, and then back across the road. By that time he did not have any control over the truck and it went into the ditch. The truck went off the road to the east and came to rest on its side.

It was 254 feet from skid marks on the left or west side of the road to where it went off the road on the east side. There was evidence that while making the

trip from the place of the accident to the hospital Gary said repeatedly that he would never drive again and LaVonne said that Gary should not have done it and that he was driving too fast. LaVonne said at the place of the accident that she had told Gary not to drive so fast and that she would tell his Dad. Gary lived within a half mile of the north-south road on which the accident happened, was familiar with it, and knew its condition. He knew it was rough or, as he said, "washboardy," that there was loose gravel on it, and that there was excess gravel along both sides of the road. He knew that when a pick-up truck is not loaded it is hard to control in the road and especially so when the surface of the road is rough.

The circumstances of the cause require that in considering and deciding the issue of gross negligence the evidence relating to it be viewed most favorably towards appellee and that he have the benefit of any reasonable inference deducible therefrom. Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184. It is because of this that only the evidence tending to establish the existence of gross negligence has been noticed in the foregoing recitation and that evidence contradictory of it has been disregarded.

An issue concerning gross negligence must be decided from the facts of each case. Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547; Kiser v. Christensen, 163 Neb. 155, 78 N. W. 2d 823. An issue of gross negligence is for the jury if the evidence relating thereto is conflicting and from which reasonable minds might arrive at conflicting conclusions. Morris v. Erskine, 124 Neb. 754, 248 N. W. 96; Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716. When the evidence is resolved most favorably to the existence of gross negligence, and thus the facts are determined, the inquiry of whether or not they support a finding of gross negligence is one of law. Ottersberg v. Holz, 159 Neb. 239, 66 N. W. 2d 571. A guest, to recover damages from a host for injury received by the

guest while riding in a motor vehicle operated by the host, must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon and that it was the proximate cause of the injury. Calvert v. Miller, 163 Neb. 501, 80 N. W. 2d 123. Gross negligence within the meaning of the motor vehicle guest statute means great and excessive negligence or negligence in a very high degree. It indicates the absence of slight care in the performance of duty. Calvert v. Miller, *supra.*

Decisions of this court have quite plainly indicated matters that should be found to justify a conclusion of gross negligence. In Thurston v. Carrigan, 127 Neb. 625, 256 N. W. 39, it is said: "In the cases of Morris v. Erskine, supra (124 Neb. 754), Gilbert v. Bryant, 125 Neb. 731, Swengil v. Martin, 125 Neb. 745, and Sheehy v. Aboud, 126 Neb. 554, wherein the guest was permitted a recovery, the imminence of danger was apparent to the driver and he was cautioned by the guest, but persisted in his negligent driving. The facts in each of those cases disclose that the driver was at least heedless of the consequences which might ensue by his reckless operation of the car, which involved, not only the rate of speed, but included other conditions which enhanced the peril and which were open to the driver." The quoted language is strikingly pertinent to the present case. The evidence referred to above discloses that the driver of the truck had knowledge of the imminence of danger. He was thrice cautioned by the other occupants but he persisted in his negligent driving. He had an abundant opportunity to desist from his recklessness. The facts indicate quite clearly that he was heedless of the consequences that might and did quickly ensue from his acts and omissions that should be characterized as grossly negligent. These involve not only rate of speed but other matters such as repeated warnings and requests that he reduce the speed of the truck because he was going too fast, adverse conditions of the road, and the nature of

the vehicle he was operating. These were all known to the driver and they enhanced the perils to which he subjected his guest.

A reference to this in negative form appears in Lemon v. Hoffmark, 132 Neb. 421, 272 N. W. 214: "In the case at bar the facts disclose that the existence of danger, if any, was not apparent to the driver of the car; no protests were made to her by her guests in the manner of operation of the car; there was not a continuous course of negligent driving, nor did the driver persist in driving negligently; the driver was not heedless of the consequences nor conscious of the peril; the speed of the car was moderate."

Gummere v. Mudd, 139 Neb. 370, 297 N. W. 622, reviewed many cases decided by this court and denied the existence of gross negligence in the case then under consideration. However, it is there said: "Authorities relied upon by plaintiff for reversal all disclose the ever present imminence of danger visible to, known by, or made known to the driver, together with a persistence in negligence apparently heedless of the consequences thereof; evidence of negligence far in excess of any appearing in the case at bar and from which different minds might reasonably draw different conclusions as to the factual question of gross negligence." This basis of deciding the absence or the existence of gross negligence has been recognized in the later cases of Paxton v. Nichols, *supra,* and Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593.

Morris v. Erskine, *supra,* the first case which arose under the motor vehicle guest statute to reach this court, considered these facts: Defendant was driving an automobile on a graveled highway and plaintiff was a guest in the car. Defendant increased his speed to 60 or 65 miles per hour in overtaking and passing a motorcycle which made something of a race of it. Plaintiff admonished defendant to drive more slowly and that he was driving too fast. Defendant disregarded

the admonition, increased his speed, and passed the motorcycle but in doing so lost control of the automobile to some extent. It skidded from one side of the road to the other. Plaintiff requested defendant to decrease his speed, and to stop and let plaintiff out. This was disregarded. Defendant completely lost control of the automobile and it ran into an embankment on the left side of the road, turned over, and injured the plaintiff. The court concluded: "We think the facts as delineated are sufficient to require the submission to the jury of the question as to whether defendant was, under the circumstances, guilty of gross negligence, and their finding upon that question, based on conflicting evidence, will not be disturbed."

Larson v. Storm, 137 Neb. 420, 289 N. W. 792, contains the following: "In returning from the dance they followed Mr. Kalb's car, which was going about 35 to 40 miles an hour, but after several miles, when they reached the top of the hill, the defendant increased his speed, and ran around his uncle and went down the hill. The plaintiff complained, and she said she told him he was driving too fast, and should slow down; * * * she was frightened. She testified that the defendant turned his head, and kept looking at her as he crossed the bridge at 50 to 55 miles an hour; that he failed to make the slight turn at the end of the bridge, and lost control of the car * * *; that his speed was not slackened, and when the right front wheel hit the end of the projecting cement pipe the car bounced up, the door flew open, and she was thrown out onto the frozen ground and injured." This court said: "We have set out the substance of the evidence, which was conflicting, but on which the jury found against the defendant on the question of fact and returned a verdict for the plaintiff. The question of gross negligence is for the jury where the evidence relating thereto is conflicting, and from which reasonable minds might draw different conclusions."

In Sterns v. Hellerich, 130 Neb. 251, 264 N. W. 677, it is stated: "Adolph was driving the car at night on a curving road down a steep hill and approaching a narrow bridge, of which he was aware, at a speed of 50 miles an hour, when he had been warned that there was a dangerous place in the road ahead. He chose to disregard the warning and continued the reckless driving, with the disastrous results indicated. We think that, under the circumstances, the question of gross negligence was one for determination by the jury." See, also, Kovar v. Beckius, 133 Neb. 487, 275 N. W. 670; Sautter v. Poss, *supra*.

The conclusion is obvious and inescapable. The evidence is sufficient to sustain a finding of danger, visible to, known by, and made known to the driver of the truck, accompanied by a persistence of negligent driving of the truck, heedless of admonitions and protests, and without regard of the consequences that might be and were suffered by the guest. The proof permitted the jury to find an absence of slight care in the performance of the duty the driver of the truck owed to appellee. The evidence supports a finding of gross negligence.

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

AFFIRMED.

IN RE APPLICATION OF LAWRENCE PRIBYL FOR WRIT OF HABEAS CORPUS.

STATE EX REL. LAWRENCE PRIBYL, APPELLANT, V. LLOYD FRANK, SHERIFF OF BUFFALO COUNTY, NEBRASKA, APPELLEE.

85 N. W. 2d 328

Filed October 11, 1957. No. 34216.

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. **Homicide: Automobiles.** By section 28-403.01, R. R. S. 1943, it is provided that whoever shall cause the death of another without malice while engaged in the unlawful operation of a motor vehicle shall be guilty of a crime to be known as motor vehicle homicide.

3. ———: ———. Where the evidence on a preliminary hearing on a charge of motor vehicle homicide shows the motor vehicle was being driven at a rate of speed greater than is reasonable and proper, or at a rate of speed in excess of the limit fixed by law where the accident occurred, and that the motor vehicle was being driven by the person charged, it is sufficient to hold such person for trial in the district court.

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

Dryden & Jensen, for appellant.

Clarence S. Beck, Attorney General, and *Ralph D. Nelson,* for appellee.

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

CARTER, J.

In this action the relator filed a petition for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by Lloyd Frank, Sheriff of Buffalo County, Nebraska. The trial court denied the writ and relator appeals.

The record shows that on October 24, 1956, relator was charged with the crime of motor vehicle homicide. He was given a preliminary hearing in the county court of Buffalo County. Upon the evidence presented, the county court found that the crime of motor vehicle homicide was committed and that there was probable cause to believe that the relator committed it. He was thereupon bound over to the district court. It is the contention of the relator that the evidence was insufficient to hold the relator for trial in the district court and that the trial court erred in not so holding.

It is not questioned that the sufficiency of the evidence adduced at a preliminary hearing to hold an accused to answer for a crime with which he is charged may be tested in a habeas corpus proceeding. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357.

The evidence at the preliminary examination was substantially as follows: Ted Mills testified that he was 24 years of age and a student at the Kearney State Teachers College. On October 22, 1956, between 7 and 7:20 o'clock p.m., Mills and the deceased, Vera Marie Bartu, started south across the street south of Case Hall. Mills stated that he wanted to look up a couple of matters in the library. The deceased stated that if he was going to do some work she would get a couple of books. Mills proceeded into the street and, when he stated it would take only a few minutes, the deceased followed him. Mills stated that he heard a "bang as the shocks of a car hit rock bottom as they hit the dip at the end of the block." He said " 'watch out for the car' and then the car was right there, it came roaring down the street and hit her." Mills testified that in his opinion the car was travelling in excess of 45 miles per hour. This was in excess of the maximum speed limit at the place of the accident.

Dr. O. R. Hayes testified that he arrived at the scene of the accident shortly after its occurrence. He examined the body of the deceased at the place of the accident and subsequently at the mortuary. He testified that she was dead when he arrived at the scene of the accident. He testified further that deceased had suffered a compound comminuted fracture of both bones of the right lower leg, a comminuted fracture of the left lower leg, a comminuted fracture of the left upper leg, a fracture of the spine at the level of the lower rib margin, a neck fracture which was a pulverized mass of bones in the neck, and minor scratches on the hands and lower arms. He testified that this was an instantaneous death resulting from trauma which created numerous fractures

of the cervical spine and a severance of the spinal cord. The evidence as to speed and the nature of the injuries sustained by the deceased is sufficient to sustain the order of the county court holding the defendant for trial on the offense charged.

The rule is stated in Jahnke v. State, 68 Neb. 154, 94 N. W. 158, as follows: "It is the rule in this jurisdiction that while the question of the sufficiency of the evidence introduced at a preliminary examination to hold an accused to answer for a crime with which he is charged may be raised and tried in habeas corpus proceedings, yet where it appears that the court had jurisdiction, that an offense had been committed, and there is testimony tending to show that the accused committed the offense, the court will not weigh the evidence further to see whether it was sufficient to hold the accused on the ground of probable cause. It is not necessary in such cases that the evidence should be sufficient to support a verdict of guilty, or show guilt beyond a reasonable doubt." See, also, Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328.

In Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588, we said: "When a person drives a vehicle upon a public thoroughfare at a speed greater than is reasonable and prudent, and in excess of a speed allowed by law for that location, and death of another is caused as a result of the violation, the driver of the vehicle is guilty of manslaughter. The State is not required to show the precise and exact speed of the vehicle, but it is sufficient if it proves that it was in excess of the legal rate, contrary to the law pertaining to the operation of it within the territory embracing the place where the unlawful act took place, and death was caused by the unlawful act." This rule is applicable under the motor vehicle homicide statute. Birdsley v. Kelley, *supra*.

The evidence upon which the county court relied is sufficient on which to base a finding that Vera Marie Bartu came to her death in consequence of the operation

of relator's automobile on a public street at a rate of speed greater than is reasonable and proper or a rate of speed in excess of the limit fixed by law at the place where the accident occurred. Within the meaning of the law a crime was proved. The evidence shows that relator was the driver of the car. This is sufficient evidence to sustain a finding that relator probably committed the crime.

The trial court properly denied the petition for a writ of habeas corpus and the judgment of the district court is therefore affirmed.

AFFIRMED.

EMIL H. MUELLER ET AL., APPELLANTS, V. EUGENE P. KEELEY, APPELLEE.
85 N. W. 2d 309

Filed October 11, 1957. No. 34218.

1. **Trial.** By statute, upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.
2. **Trial: Judgments.** A general finding that judgment should be for a certain party warrants the conclusion that the court found in his favor all issuable facts.
3. **Sales.** In a contract to sell or a sale of exactly described goods there is no warranty of fitness for any particular purpose other than that purpose for which the article is ordinarily or generally sold even though the buyer states that he is buying for some such particular or extraordinary purpose, if the buyer does not rely upon the judgment or representation of the seller that the goods are fit for such particular or extraordinary purpose.
4. ———. Whether or not the defects of a machine amount to a breach of warranty is ordinarily a question of fact where the evidence is conflicting or is reasonably susceptible of more than one inference.
5. ———. Unless there is a definite condition to that effect, the

buyer is not obliged, as a condition precedent to recovery on a warranty, to allow the seller to remedy defects. If, however, the contract so stipulates, no liability for a breach of warranty attaches until the seller has had an opportunity to remedy defects.

APPEAL from the district court for Cherry County: EARL L. MEYER, JUDGE. *Affirmed.*

Charles A. Fisher and *Dean L. Donoho*, for appellants.

William B. Quigley and *Healey, Davies, Wilson & Barlow*, for appellee.

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

MESSMORE, J.

The plaintiffs, Emil H. Mueller and Charles J. Mueller, brought this action in the district court for Cherry County against Eugene P. Keeley, defendant, for breach of a warranty agreement. By stipulation of the parties a jury was waived and trial had to the court. The court found generally in favor of the defendant and against the plaintiffs and made a specific finding that the plaintiffs, by use of the machine, the subject of a contract between the plaintiffs and the defendant, had waived their right to rely upon rescission of the contract. Judgment was entered in favor of the defendant, and plaintiffs' action was dismissed. Plaintiffs filed a motion for new trial which was overruled. From the order overruling the motion for new trial, the plaintiffs appealed.

The plaintiffs' amended petition alleged in substance that on or about November 4, 1953, the plaintiffs and defendant entered into an agreement which recited that on or about May 25, 1953, the defendant sold and delivered to the plaintiffs a tractor equipped with a gravel loader and that said tractor and loader failed to perform as intended by the parties. Referring to the contract of November 4, 1953, between the parties, it stated that in consideration of the plaintiffs' forbearance to rescind the

sale and file suit the prayer of which would be to recover the purchase price for the tractor, the defendant agreed that he would, on or before November 14, 1953, install on said tractor a hydraulic loader equipped with a bucket of at least 7/8 cubic yard capacity and make such other modifications, changes, and repairs as the defendant deemed necessary for the operation of the tractor in plaintiffs' gravel operations; said tractor was to be delivered complete with the foregoing installations, modifications, changes, and repairs to the plaintiffs not later than November 14, 1953; and all expenses of such modifications, repairs, and delivery were to be borne by defendant who was, upon delivery, to pay the plaintiffs the sum of $165 to cover the cost of repairs already incurred by the plaintiffs. The defendant was to warrant the tractor and loader as if they were new, repairing them and reimbursing plaintiffs for repairs as is customary in the purchase of new tractors and loaders. The agreement further provided that if the equipment failed to perform satisfactorily in the customary and ordinary manner the defendant was to refund to the plaintiffs $5,100 and their old tractor and loader in as good condition as said tractor and loader stood when the sale was consummated. The plaintiffs agreed that they would give the tractor and new loader a fair trial in the customary and ordinary operation of their sand and gravel business for a period of 15 days, keeping the same serviced during the trial period according to the operation manual furnished by the defendant, the trial period to commence the first working day after the return of said tractor and loader to the plaintiffs. If the equipment as modified was not delivered to the plaintiffs by December 1, 1953, the defendant was to refund $5,400 and return plaintiffs' old tractor to the plaintiffs. Plaintiffs further alleged that the equipment with the modifications and repairs deemed necessary by the defendant was delivered to plaintiffs on or about November 16, 1953; and that the tractor and loader failed to perform satisfactorily in

the customary and ordinary manner as follows: (1) The shaft that drives the hydraulic pump broke; (2) one of the hydraulic hoses swelled and had to be replaced and another of the hoses leaked; (3) the gears of the tractor were hard to shift and would grind while shifting; (4) the hinge pins holding the loader were not of suitable material and the same had worn excessively; and (5) three stud bolts twisted off and two stud bolts stripped off the chain casings. The plaintiffs further alleged that more than 10 days had elapsed since the ending of the trial period and plaintiffs had not been paid the sum of $5,100, nor had their old tractor been returned; that the fair and reasonable value of the old tractor was $2,500 and the same was indispensable to plaintiffs and unobtainable elsewhere without considerable expense; that plaintiffs were ready, willing, and able to return to defendant the tractor that was the subject of the agreement; that on or about December 5, 1953, the defendant was orally notified that said tractor and loader had failed to perform satisfactorily in the customary and ordinary manner as provided for in said agreement; and that on December 12, 1953, the defendant was orally informed to the same effect. The plaintiffs prayed for judgment against the defendant for the sum of $7,600, interest, and costs.

The amended answer of the defendant admitted the execution of the warranty agreement; specifically denied that the equipment failed to perform satisfactorily and that the defendant was notified of such nonperformance; and also contained a general denial of the allegations pleaded in the plaintiffs' amended petition, except for certain admissions. The amended answer also alleged that the defendant performed fully all of the terms of the warranty agreement and plaintiffs failed to meet the terms of that agreement in that (a) they failed to notify the defendant within 10 days after the 15-day trial period that the equipment did not perform satisfactorily; and (b) they failed to give the equipment a fair trial, in that

they used it to do work in excess of the normal and customary manner of use of such equipment. The answer further alleged that the equipment furnished under the contract was fully capable of performing the work which it was agreed it would do; that it can and did perform the types of operations it was warranted to perform; and that whatever breakage, wear, and tear occurred was usual, normal, and expected in the operation of all heavy machine equipment, and was due to no defect in the machine. The answer further alleged that if there was failure to perform in the customary and ordinary manner it was due to the plaintiffs' carelessness and neglect in operation of the machine and in using it to perform work which the equipment was not warranted to perform and work not classified in the ordinary and customary operation of a gravel business, including use of the equipment to perform a kind of work that could only be performed by a dragline; that since the date of plaintiffs' receipt of the equipment in November 1953, plaintiffs had kept said equipment in their possession at their gravel pit, using the equipment continuously during that period of time for the purpose of loading gravel; that by reason of such constant use the equipment had subsequently depreciated in value; and that the value thereof was substantially less than it would have been at the close of the trial period in December 1953, or January 1954. The prayer was for a dismissal of the plaintiffs' case and costs.

The plaintiffs' reply was in effect a general denial of the affirmative allegations of the defendant's amended answer.

The record discloses that the plaintiffs are partners in a sand and gravel business at Hanover, Kansas. The defendant, Eugene P. Keeley, is an equipment and machinery dealer at Valentine, Nebraska. In May 1953, the plaintiffs and defendant entered into an agreement by the terms of which the defendant was to take the plaintiffs' 1947 or 1948 model Hough loader valued

at $2,350, and in addition the plaintiffs were to pay the defendant $5,600, the defendant in turn was to deliver to the plaintiffs a new Harris tractor and a Laird front-end loader. In connection with this agreement, the plaintiff, Emil Mueller, met the defendant in May 1953, and prior to entering into the agreement the defendant visited the scene of the plaintiffs' gravel operations, both the river operation where gravel is stock piled and the dry pit operation from which gravel is taken or excavated. Subsequent to the sale of the equipment to the plaintiffs they became dissatisfied with the operation of the equipment. As a result, an attorney was employed by the plaintiffs to represent their interests. This attorney prepared an agreement on November 4, 1953, which has heretofore been referred to in the pleadings. Broadly speaking, the agreement provided that in consideration of the plaintiffs' forbearance from taking legal action to rescind the previous sale or the contract made in May, the defendant would make certain modifications deemed necessary for the proper operation of the tractor in plaintiffs' gravel business, and deliver the equipment as modified by November 14, 1953, with a warranty the same as for new equipment. If the equipment, as modified, failed to perform satisfactorily in the customary and ordinary manner during a 15-day trial period in which the plaintiffs were to give the equipment a fair trial in the customary and ordinary operation of their business, the defendant was, within 10 days, to refund the sum of $5,100 and return the plaintiffs' Hough tractor in as good condition as when it was traded.

Prior to the acceptance of the agreement, the plaintiffs' attorney submitted to the defendant a document which is the modification contract dated November 4, 1953, in which appeared the following language: "* * * fails to perform satisfactorily in the customary and ordinary operations of the sand and gravel *excavation* and loading carried on by said first party" as a condition to the refund by the defendant. The defendant objected

to the language, and the plaintiffs' attorney agreed to delete the following language: "* * * operations of the sand and gravel excavation and loading carried on by said first party (plaintiffs)," and insert instead the word "manner" thus deleting the word "excavation." After the agreement was signed, modifications called for in it were made. Defendant's mechanic who worked on heavy equipment was sent to Hanover, Kansas, to make the modifications which included changing the motor, installing a new compound rear end on the tractor, putting on the loader, and putting wrist pin bolts on the wheels. This mechanic was assisted by a representative of the Harris Manufacturing Company.

Upon completion of the modifications, the equipment was delivered to the plaintiffs at their place of business on November 16, 1953, and the trial period was to begin the next day. During the trial period, the equipment was operated in one of the dry pits leased by the plaintiffs. No stock pile of gravel is maintained in the dry pits. Gravel is customarily excavated by hitting the pit with the edge of the bucket to loosen the gravel so that it may be loaded. This type of operation subjects the equipment to much more wear and tear and abuse than use of it at a stock pile.

One of the plaintiffs, Emil Mueller, testified that there was no change in the type of his gravel operations after the original purchase of the machine until November 4, 1953; that he gave the machine a fair trial in the customary and ordinary operations of his business in the dry pit; that the equipment was used to scoop out gravel from the bank of the pit and load it on trucks; and that it would be easier on the machine to load loose sand out of the stock pile than to dig it out of the dry pit because the material is not set. He further testified that during the trial period, about the fourth day, the shaft broke on the hydraulic pump which is mounted on the front of the tractor, due to misalignment, and broke off a second time and was welded on and re-

aligned. To do this work took the rest of the day. One of the hydraulic hoses swelled and had to be replaced, and one leaked. The replacement of the hose cost $4.69, and is considered a minor item. There is further testimony that the gears on the tractor shifted hard and would grind while shifting. An employee of the plaintiffs testified that the gears were hard to shift. A mechanic testified that in March or April 1954, the gears in the transmission were worn out and had to be replaced. Emil Mueller testified that the hinge pins, where the bucket hinges on the loader for dumping, had worn excessively; that the gears on the bucket had worn grooves into the pin; and that in the spring of 1954, on the recommendation of the plant manager of the Harris Manufacturing Company, one of the original pins was replaced by a cast-hardened pin furnished by the company. Emil Mueller further testified that during the trial period stud bolts twisted off in the chain cases; and that when the bolts were loose or missing the brace on the loader starts to work away, throwing stress on the other bolts, and something has to be done or it would fall off and ruin the machine.

Schultz, an employee of the plaintiffs who operated the equipment in question, testified that the studs in the chain cases had to be tightened, and would stretch, allowing the oil to leak out; and that during the trial period he replaced 15 to 20 studs, having trouble with some of them when they broke off before being replaced. A mechanic testified that he took a few bolts out of the chain cases once; that to do so he had to weld a piece onto the bolts to get them out; and that the bolts stretch if too much pressure is exerted on them.

Schultz further testified that after the 9th day of the trial period, the Harris tractor and loader were taken to the river plant where they were used for loading, and a crane or dragline was used in the dry pit.

The attorney for the plaintiffs prepared the instrument dated November 4, 1953. On December 5, 1953, he had

a conversation with the defendant. He took along a letter he had received from the plaintiffs and read to the defendant the complaints of the plaintiffs with reference to the equipment. These complaints appear in the pleadings, and have been previously referred to in the testimony. The defendant made certain observations with reference to the complaints, as to what should be done to cure these defects, and stated he would do so. Just before Christmas 1953, this attorney had a conversation with the defendant to the effect that the plaintiffs refused to accept the defendant's offer to repair the machine in the manner that he had suggested; they wanted their tractor returned and their money back. The defendant said he would not comply with this request.

On January 11, 1954, the plaintiffs went to Valentine, Nebraska, contacted the defendant, and told him that they wanted their tractor returned to them and also wanted the money returned to them as provided for in the contract. The defendant refused to do this.

The record also discloses that during the course of the use of the equipment by the plaintiffs, they had certain repairs made on it, but they did not notify the defendant of the amount of these repairs or say anything to him about them.

The plaintiffs retained the equipment in their possession at all times and used it occasionally in an emergency to load gravel, according to their testimony, not in excess of 150 hours.

The defendant testified that the plaintiffs' attorney, in December 1953, communicated to him some of the complaints of the plaintiffs; that while it was claimed there was some talk of settlement, there was no such talk on the occasions when he met plaintiffs' counsel; that on January 11, 1954, the plaintiffs came to his showroom and asked him to settle the matter according to the terms of the agreement; and that he informed them that he had performed his part of the agreement

and if they had anything coming it would be on a warranty basis. That was all that was said. No demand was made on him for repairs to the equipment from the date of the warranty agreement. In December 1954, he drove to Hanover, Kansas, and examined the tractor. He could tell that it had been used by the shiny surface of the bucket. He further testified that the fair market value of the tractor and loader, from a resale point of view, was $2,000. He further testified that the standard rental on such equipment as the Harris equipment is $632 per month. There is also evidence that the rental value of such equipment would be $500, $550, or $600 per month. The defendant further testified that the reason for his insistence in having the language heretofore set out deleted from the modification agreement of November 4, 1953, and why he told the plaintiffs' attorney he would not stand for that language being in the agreement was because the machine would not properly perform in a dry pit operation. That was his opinion on November 4, 1953, when the agreement was consummated.

A witness engaged in the business of highway, sewer, and water main construction testified that his work requires the use of heavy equipment such as draglines, auto patrols, loaders, blades, and practically all such equipment used in moving dirt and gravel. He further testified that he went to Hanover, Kansas, with a photographer on June 3, 1955, and looked over the Harris equipment at the gravel operations of the plaintiffs. The Harris tractor was in a shed. He looked it over and noticed that it had been used that day, or within 24 hours. It had rained two days previous, and he was able to follow the tracks of the tractor where it had been backed into the shed. From his observation, it looked like the tractor had loaded three or four loads of gravel, and he believed it to be in normal operating condition. This witness further testified that the customary and ordinary operation for a four-wheel tractor

and loader in the gravel business would be for loading stock piled material, either dirt or gravel, any loose material, and could not be used for excavation successfully nor to dig material not broken loose. To do so would be hard on the Harris equipment.

Defendant's mechanic testified that he was engaged in mechanical work on heavy equipment and was acquainted with the Harris equipment. He had assembled and disassembled these tractors and was familiar with the loaders. He went to Hanover, Kansas, in November 1953, and was there a week, changing the motor and putting a compound rear end in the tractor which constituted a completely new installation. He also put wrist-pin bolts into the wheels. He was assisted by a representative of the Harris Manufacturing Company. He admitted having a conversation at one time with the plaintiffs' employee Schultz, wherein he told Schultz that the tractor would be unsuccessful in that gravel pit. The machine was first delivered to the plaintiffs in May or June 1953.

A witness employed by the Department of Roads and Irrigation as an engineer testified that he was acquainted with and knew about heavy equipment; that he had observed the use of heavy equipment in gravel pits and knew the general work of excavating and loading gravel; and that the customary and ordinary use of four-wheel front-end loading equipment in connection with gravel operations is to load when the gravel is taken out of the bank, and the loading is generally from a stock pile. The stock pile is gravel either pumped out and stocked up by the trucks, or stock piled by a dragline. He further testified that they have used the four-wheel front-end loader type in a gravel pit in loose gravel. In some coarse gravel pits this type of equipment would not work, but it can be used in loose gravel and to load out the stock piles into trucks.

The only assignment of error which need be considered

is that the judgment of the trial court is contrary to the evidence and the law.

The plaintiffs contend that the trial court was laboring under a misconception of the law by treating the plaintiffs' action as one in rescission instead of an action for damages for breach of contract, the first being an action in equity triable to the court and the latter being an action at law triable to a jury. In the instant case a jury was waived and trial was had to the court.

The plaintiffs cite Rasmussen v. Hungerford Potato Growers Assn., 111 Neb. 58, 195 N. W. 469, as follows: The two remedies of damages and rescission are inconsistent, the former proceeding upon affirmance, and the latter upon disaffirmance of a contract. See, also, Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131.

It will be observed in the instant case that there is a substantial conflict in the testimony on the several issues raised in the pleadings of the respective parties. The trial court made the following findings: "Now on this 3rd day of December, 1955, after due consideration of and deliberation upon the pleadings and all of the evidence introduced in this action, the court finds generally in favor of the defendant and against the plaintiffs and specifically finds from the evidence that the plaintiffs by use of the machine in question have waived their right to rely upon recision (sic)."

Section 25-1127, R. R. S. 1943, provides: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

In the instant case no request was made by the plaintiffs for a specific finding of fact.

In Lancaster County v. Fitzgerald, 86 Neb. 676, 126

N. W. 141, the court said: "The general finding was sufficient to support the judgment. No special findings were requested by either side. In Moody v. Arthur, 16 Kan. 419, 429, Mr. Justice Brewer, after disposing of another branch of the case, uses this language: 'This really disposes of the case, for, in respect to the second question, it may be said that no special findings of fact were demanded, and that, while the court does find specially certain facts, it prefaces them with a general finding that "the allegations, all and singular, contained in the answer of the said defendants are true"—so that, whether the facts specially mentioned in the findings are of themselves sufficient to support the decree is practically immaterial, the court having covered all with a general finding.'"

The trial court made a general finding in favor of the defendant on all the pleaded issues and all of the evidence addressed thereto. Such a finding resolves all disputed facts in favor of the defendant, which includes (1) whether the damage to the equipment resulted from the ordinary and customary use of such equipment for which its use and performance was warranted, or whether it resulted from more severe and abusive use than that contemplated by the warranty; (2) whether the items of damage claimed to amount to breaches were minor items of repair which should be normally expected in the operation of such equipment; and (3) whether the plaintiffs complied with the provision of the warranty contract permitting defendant an opportunity to repair any defects which might appear, before plaintiffs could insist on a refund and the return of their machine. All of the above disputed facts were resolved in favor of the defendant by the trial court by a general finding which was in no way influenced by any claimed misconception of the law. We hold that the plaintiffs' contention is without merit.

The evidence discloses that the machine in question was referred to by the plaintiffs and other witnesses as

a loader. The customary and ordinary use of this type of machine is to load gravel from stock-piled material. When counsel for the plaintiffs presented the contract dated November 4, 1953, to the defendant on November 3, 1953, the defendant objected to its terms and insisted that the word "excavation" be deleted from the agreement which was done and the word "manner" inserted in its place. As testified to by the defendant: "Mr. Donoho on about the 3rd of November came in our office and talked about this agreement, and I told him what I would do, and what I wanted to do, and he came back on the 4th day of November with this agreement and I read it over, and I told him that I had explained to him the day before that I would not go along or sign the contract if the tractor was used in the future for gravel excavation purposes in a dry pit." The evidence discloses that the excavation of gravel was the type of use the plaintiffs gave the machine and that type of usage is what caused the breakage and wear that took place during the trial period of the machine and thereafter. The plaintiffs were well acquainted with the function of a loader. They owned one and knew of its proper use.

The rule is stated in 46 Am. Jur., Sales, § 351, p. 536, as follows: "In a contract to sell or a sale of exactly described goods * * * there is no warranty of fitness for any particular purpose other than that purpose for which the article is ordinarily or generally sold even though the buyer states that he is buying for some such particular or extraordinary purpose, if the buyer does not rely upon the judgment or representation of the seller that the goods are fit for such particular or extraordinary purpose." See, also, subdivisions (1) and (4) of § 69-415, R. R. S. 1943, Uniform Sales Act.

In the light of the evidence, the trial court could find, as it did, that any breakage or wear to the loader was occasioned by excessive, abusive, and strenuous use beyond that use for which the machine was warranted. It

is apparent from the evidence that it was not warranted for excavation of gravel in dry gravel pits.

The question arises as to whether or not the defects of the machine complained of by the plaintiffs amounted to a breach of the warranty agreement. This is a question of fact. The rule is: "Ordinarily, it is a question of fact * * * whether or not there has been a breach of warranty where the evidence is conflicting or is reasonably susceptible of more than one inference." 77 C. J. S., Sales, § 369, p. 1308.

The evidence discloses that in heavy machinery such as the machine in question breakage and wear and tear are normally incident to the operation. Several witnesses so testified.

As to the items claimed as breakage which the plaintiffs contend amounted to a breach of the contract, there was testimony that such items were common to all heavy earth-moving equipment, were minor, and were avoidable by proper care and operation on the part of the users. With reference to the complaint that the shaft driving the hydraulic pump broke, these repairs were made by the plaintiffs and did not require the services of a mechanic. The cost of such pumps is about $4, and such breakage is of a minor nature.

With reference to the swelling of the hydraulic hoses, this is a minor defect and so admitted by the plaintiffs.

With reference to the complaint that the gears would grind and were hard to shift, several witnesses testified that grinding of the gears is a common characteristic of equipment of this type and is in no sense fatal to the operation of such machine. However, new gears were placed in this equipment by the defendant's mechanic as heretofore shown by the evidence. The evidence also shows that gears on this type of equipment are, in most cases, hard to shift.

As to the hinge pins holding the loader, it appears that two or three pins were replaced after delivery of the machine for the trial period, and that two of these

were furnished free at the defendant's instance. Such pins cost about 60 cents and can be replaced in 10 or 15 minutes. The evidence shows that these hinge pins are subject to wear, and such an item is minor and a defect to be expected.

As to the stud bolts in the chain cases coming loose and some of them being twisted or sheared off, the evidence shows that such bolts must be kept tight like any other bolts, and if they become loose they will eventually shear off. These bolts, according to the testimony, are wearing parts, cost about 10 cents each, and can be replaced in 10 or 15 minutes if the difficulty is located in time.

Under such a factual situation, the trial court could find, and did find by a general finding, that no breakage or wear to the machine took place beyond that which plaintiffs reasonably should anticipate in the operation of heavy equipment of this sort. The machine was warranted only to perform satisfactorily and in the ordinary and customary manner as such machine should be used. Such a warranty is not to be breached by proof that the machine suffered certain items of wear and breakage such as would be experienced in normal use of any such equipment. The trial court found upon sufficient evidence that the equipment did in fact perform in the manner warranted. This finding is sufficient to sustain the judgment.

In the instant case the defendant was told about the complaints of the plaintiffs with reference to the machine. In this connection, the defendant proposed that certain repairs be made which he believed would cause the machine to render proper performance. The plaintiffs declined the offer and refused to permit the defendant to repair any of the claimed defects that might appear in the machine, and insisted upon payment of $5,100 and return of their old tractor. The defendant informed the plaintiffs that he would deal with them on a stand-

ard warranty basis. The plaintiffs refused the defendant's offer in this respect.

In the instant case the contract provided in part: "Said second party (defendant) further agrees that he will warrant both the tractor and loader as if the same were a new loader and tractor *repairing and reimburseing (sic) said first party for repairs either to the tractor or loader or both in the same manner and fashion as is customary in the purchase of new tractors and loaders. * * * In the event that said tractor and loader or either of them then fails to perform satisfactorily in the customary and ordinary manner, * * **" then defendant was to refund $5,100 and return the old tractor. (Emphasis supplied.) Defendant offered to make repairs under the warranty as previously stated. This offer was rejected by the plaintiffs who thereafter retained and used the machine, causing to it additional depreciation and wear.

The rule is stated in 77 C. J. S., Sales, § 340, p. 1235, as follows: "Unless there is a definite condition to that effect, the buyer is not obliged, as a condition precedent to recovery on a warranty, to allow the seller to remedy defects. *If, however, the contract so stipulates, no liability for a breach of warranty attaches until the seller has had an opportunity to remedy defects, * * *.*" (Emphasis supplied.) See, also, Sandwich Mfg. Co. v. Feary, 40 Neb. 226, 58 N. W. 713.

In such a circumstance, plaintiffs are barred from any claim as a breach of contract. Considering this action as an action for damages for breach of contract, we conclude that the general finding of the trial court in favor of the defendant resolved in his favor all disputed issues of fact, and such finding is sufficient to support the judgment of the trial court.

The plaintiffs contend that the trial court tried this action as one in rescission when in fact it is an action at law for the recovery of damages. While we have not considered this action as one in rescission, which is an

equity action, even in an action for rescission the plaintiffs would be barred to recover under the contract for the reason that the plaintiffs at all times have exercised dominion over the equipment and continued to use it for their own purposes after the breakage and defects about which they complain. This retention and use by the plaintiffs is inconsistent with the claim necessary to a rescission action. Such use and consequent depreciation in the value of the property renders it impossible to place the parties in status quo. See Annotation 77 A. L. R. 1178.

For the reasons given in this opinon, the judgment of the trial court is affirmed.

AFFIRMED.

KEITH R. BEYL AND CALVIN C. EATON, PLAINTIFFS IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
85 N. W. 2d 653

Filed October 18, 1957. No. 34160.

1. **False Pretenses.** To support a conviction for obtaining money or property by false pretenses as defined by section 28-1207, R. R. S. 1943, the State must adduce competent evidence that the owner relied upon such representations believing them to be true, and was induced thereby to part with his money or property.
2. **Conspiracy.** In a charge of conspiracy under section 28-301, R. R. S. 1943, the State is required to prove an unlawful conspiracy to commit a felony or to defraud the State, and the doing by one or more of the conspirators of an overt act to effect the objects of the conspiracy.
3. ———. Where the overt acts tend to establish a scheme or plan to commit a felony or to defraud the State, they may be properly shown as evidence of a preexisting unlawful conspiracy.
4. **Appeal and Error.** The Supreme Court may reverse a judgment of the district court, in a criminal case, in part and affirm it in part where the legal part is severable from that which is illegal.

ERROR to the district court for Dawson County: ISAAC

J. NISLEY, JUDGE. *Affirmed in part, and in part reversed and dismissed.*

William S. Padley, for plaintiffs in error.

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

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

CHAPPELL, J.

Counts I and II of an information each separately charged that on or about June 4, 1956, Keith R. Beyl and Calvin C. Eaton, hereinafter called defendants or by name, unlawfully and feloniously obtained money from Burns, O'Connor and Skinner, a partnership hereinafter called the company, by specified false pretenses with intent thereby to cheat and defraud. Counts III and IV of the information each also separately charged that on or about the same date said defendants unlawfully and feloniously conspired with intent to commit a felony and thereby obtain money from said company by specified false pretenses and overt acts to effect the object of the conspiracy.

At conclusion of the State's evidence, defendants moved to dismiss counts I and II for the reasons that the State had failed to prove that the false pretenses alleged to have been committed by defendants were relied upon by the company, whereby it parted with the amount of $156.06 as alleged in each of said counts, and had failed to prove that the loads of grain alleged to have been sold to the company in each of said counts actually weighed 6,370 pounds less than the amount paid therefor by the company. At the same time, defendants moved to dismiss counts III and IV for the reasons that the State had failed to prove any of the elements of conspiracy as between defendants, or that there was any relationship between them in connection with the alleged misrepresentations, and that for want

of reliance thereon the crime of obtaining money by false pretenses had not been committed, consequently no conspiracy existed. No ruling was made upon such motions at that time, but they were overruled at conclusion of all the evidence, and the cause was submitted to the jury upon all four counts. Thereafter, it returned a verdict finding: "* * * said defendants guilty of obtaining money by false pretenses in Count One and Two of the Information as they stand charged. We further find said defendants guilty of conspiracy in the Third and Fourth Counts of the Information as they stand charged. We further find that at the time of the alleged offense the said defendants obtained property of the value of One Hundred fifty-six and 06/100 Dollars., in Count I and in Count II."

Subsequently, defendants' motion for new trial was overruled and judgment thereon was rendered, whereby each defendant was sentenced on each of counts I and II, and on each of counts III and IV. Therefrom defendants prosecuted error to this court, assigning in substance that there was error as follows: (1) In the admission and rejection of certain evidence; (2) in the refusal and the giving of certain instructions; and (3) that the verdict and judgment were not sustained by sufficient evidence and were contrary to law. We sustain assignment (3) with relation to counts I and II, but conclude that otherwise the assignments should not be sustained.

We summarize the material and relevant evidence adduced by the State, which discloses the following: On June 4, 1956, the company was engaged in farming and cattle feeding on a section of land located about 7 miles northeast of Lexington. At that time it was feeding about 4,000 head of cattle. Dennis O'Connor, Sr., was a partner and the resident company manager. His son, Dennis O'Connor, Jr., was a general employee of the company. The two other partners lived in Kansas City, Missouri. The company owned a grain elevator con-

taining a Fairbanks-Morse Registering Beam scale, a residence, and certain other improvements located in about the center of the section. Sketches of the elevator, prepared by a civil engineer, photographs of Eaton's truck used in the afternoon of June 4, 1956, and pertinent portions of the elevator, its weighing scale, and office, together with related weighing tickets made on June 4, 1956, and two extra disk weights belonging to Beyl which were alleged to have been used by defendants in order to unlawfully obtain credit for excess weights of and payment for barley sold to the company, appeared in the State's evidence.

On June 4, 1956, defendants each were and had been for several years engaged in the buying, hauling, and selling of grain with their own trucks. The company, by oral agreement with defendants, was buying barley for feeding purposes from them at $2.45 a hundredweight, provided it tested 50 pounds per bushel. Such grain was weighed at, stored in, and paid for at the company's elevator. Prior to June 4, 1956, defendants had already delivered and sold about 19 loads to the company. In doing so, defendants had been coming out to the elevator to sell grain for 2 or 3 years. During the last year, prior to June 4, 1956, they had come there together, either by bringing their grain in two separate trucks or by both of them bringing it with one truck.

On June 4, 1956, Dennis, Jr., was operating the elevator, weighing trucks, and unloading grain in the elevator. On that date, about 11:30 a. m., defendants, each driving his own truck loaded with barley, approached the elevator. Eaton's truck, driven by him, was ahead. Beyl's truck, driven by him, followed Eaton's. Thereupon Eaton drove his truck into the elevator and stopped. It will be noted that he stopped his truck with the two front wheels thereof up on the scale platform. The grain in Eaton's truck belonged exclusively to him. After stopping, he loosened the tarp over the grain and handed Dennis, Jr., a sample of barley for

testing its weight per bushel. Beyl then remained with Dennis, Jr., watching him make the test, which took about 5 minutes, but Eaton got off his truck, then walked around in front of it toward the scale room and out of sight. After the test was made and found to meet specifications, it was Beyl who drove Eaton's truck up on the scale for weighing the gross, and Dennis, Jr., went around into the scale office to do so. At that time he saw that two extra disk weights of a different type and color than the seven weights usually and properly hanging on the beam rod had been placed under the top weight thereof on the contour balance rod at the south end of the scale beam. Such extra weights were there when he took and stamped the gross weight on the tickets, which were made in triplicate, but he didn't then say or do anything about it. He then walked out of the scale office, and Eaton's truck was backed up over the pit for unloading, whereupon Eaton said: " 'We got a pretty good jag on.' " After Dennis, Jr., had started the elevator motors, he and Eaton unloaded and cleaned out the trailer. Dennis, Jr., then got down off the truck, pulled it back up on the scale, cleaned up around the pit, and went back to weigh the empty truck. However, in weighing the tare, he noticed that the two extra disk weights had been removed from the contour balance rod and that the seven weights usually and properly there were in their normal position again. He then stamped the tare on the weight tickets, wrote the net weight thereon, and gave Eaton the first copy. The tickets showed a gross weight of 56,360 pounds, less a tare weight of 17,760 pounds, leaving a net weight of 38,600 pounds of barley.

There is ample competent evidence that as a result of the two extra disk weights being so placed on the contour balance rod before the gross was determined but removed thereafter before the tare was taken, Eaton received a ticket credit for a net of 6,370 more pounds of barley at $2.45 a hundred than his truck actually

contained. For such excess he was subsequently paid $156.06 by the company.

In that connection, the evidence clearly supports the conclusion that Eaton was the only person who would gain by so placing and removing the two extra disk weights. He was also the only defendant who could have placed them on the contour balance rod of the scale. It is not so clear who removed them, but it appears that Beyl was absent during the unloading, and the whereabouts of defendants was not clearly shown while Dennis, Jr., was cleaning up around the pit and drove Eaton's truck up on the scale platform to take the tare. After the tare was taken, Eaton's truck was pulled out of the way and a straight truck of hay belonging to the company was weighed. Up to that time, however, no one had been present at the elevator except Dennis, Jr., and defendants. When the hay truck backed out, Beyl drove his truck up and they went through a comparable procedure in testing his barley, weighing the gross, unloading it, and weighing the tare. However, during that procedure there were no weights on the contour balance rod except the usual and proper ones during the weighing of the gross load, and nothing improper was seen with regard to the second load, which belonged exclusively to Beyl.

When defendants left the elevator they said they would be back after dinner with another load. Thereafter, Dennis, Jr., told his father what had happened during the morning, and, with the father consenting, Dennis, Jr., called the sheriff, whereupon the deputy sheriff and county attorney drove out to the elevator, where they arrived at about 1:30 p. m. There they met Dennis, Jr., and awaited the arrival of defendants. At about 3 p. m. both defendants came back together in the truck belonging to Eaton, which was loaded with barley belonging exclusively to him, although it appears that some of it may have belonged to Beyl as a result of previous transactions between them. In the mean-

time, Dennis, Jr., had bored two peep holes about the size of a nickel in the south wall of a north storage bin wall, through which the scale office, the scale, and what subsequently happened therein and adjacent thereto, could be and was clearly observed by the deputy sheriff. Shortly before defendants' arrival, Dennis, Jr., in the presence of the deputy sheriff and county attorney, examined and saw that the scale was balanced.

The deputy sheriff was in the scale office when he realized that defendants, both of whom he knew, were approaching the elevator with Eaton's truck. Thereupon the deputy sheriff walked out of the scale office into the storage bin where the peep holes had been bored. While there, looking through one of the peep holes, he saw Eaton's truck driven by Eaton coming from the south almost to the elevator, and saw him pull up and stop with part of his truck in the elevator. It will be noted again that he drove his truck up with the two front wheels thereof on the scale platform. The deputy sheriff then saw Beyl get out and come around in front of the truck, then walk into the scale office. He didn't see where Dennis, Jr., was at that time, but knew that he was out there some place. In that connection, Dennis, Jr., testified that Eaton drove his truck into the elevator and partly up on the scale platform as he did in the morning, then loosened the tarp over the grain and gave Dennis, Jr., a sample of barley for testing the weight per bushel, and that during the testing, which met the specifications and took about 5 minutes, Eaton stayed with him but Beyl walked around in front of Eaton's truck toward the scale office and out of his sight. After the testing, Dennis, Jr., walked around to the scale office and Eaton drove his truck up on the scale. Dennis, Jr., then weighed the gross while Beyl was standing behind him. When such gross was taken, Dennis, Jr., saw that the same two extra disk weights had been placed on the contour balance rod, but unlike their position with the first load they had then been

placed under the two top weights of the seven usually and properly thereon. After taking the gross, Beyl said: " 'We got almost as much on here as we had this morning.' " Dennis, Jr., then went around and turned on the elevator motors while Eaton backed his truck over the pit and Dennis, Jr., and Eaton unloaded the truck. After unloading, Dennis, Jr., swept up the pit and Eaton drove his truck up on the scale again, where, in the presence of the deputy sheriff, the county attorney, and Beyl, Dennis, Jr., weighed the tare. In doing so, he again saw that the two extra disk weights had been removed from the contour balance rod. He then stamped and prepared the weight tickets in triplicate, which showed a gross of 45,770 pounds and a tare of 14,310 pounds, with a net of 31,460 pounds, as a result of which Eaton again received a ticket credit for a net of 6,370 more pounds of barley at $2.45 a hundred than his truck actually contained. For that excess he was also subsequently paid $156.06 by the company.

With reference to that load, the deputy sheriff testified that, looking through the peep hole prior to taking the gross, he actually saw Beyl enter the scale office, take the two extra disk weights out of his right coverall pocket with his right hand, and with his left hand place them on the contour balance rod under the top weights of the seven usually and properly thereon. Further, before the tare was taken the deputy sheriff actually saw Beyl slip back into the scale office and remove the two extra disk weights from the contour balance rod and place them back into his right coverall pocket. Thereupon, the deputy sheriff walked out of the storage room toward the scale office and, meeting Beyl there by the door, took such extra weights out of Beyl's right coverall pocket, whereupon Beyl admitted that "They were his"; that he had them "Quite a while * * * for about ten years." He denied that he had used them that day but said "he had them in case he needed them." The deputy sheriff then marked such weights by putting an "X"

and his initials "J. R." in about the center of the bottom of each with a red pencil, and kept them in his possession for safe keeping. Upon proper foundation, they were offered and received in evidence. There was also competent evidence that they were the same weights as were used in weighing the gross of the first as well as the third load. In that connection, as stamped thereon, they each weighed 2 pounds and were slotted from the rim to just beyond the center, which made it possible to slide them on the scale's contour balance rod under the weights usually and properly there, which were not slotted but hung on the rod through a hole in the center of each of them. During the events and procedure aforesaid, no one was in or about the elevator except defendants, Dennis, Jr., the deputy sheriff, and the county attorney.

After defendants had received their weight tickets, they walked up to the house of Dennis, Sr., and returned with him to the scale office. There, in the presence of defendants, Dennis, Jr., the deputy sheriff, and the county attorney, Dennis, Sr., figured the amount due each defendant upon the basis of the excess net weights caused by the conduct aforesaid. Thereupon, although Dennis, Jr., an employee of the company, and Dennis, Sr., the manager in charge of the company, both knew that the net weights were wrong and that defendants were falsely claiming too much money by reason of their conduct heretofore recited, Dennis, Sr., prepared, signed, and delivered a company check to Beyl for the second load, and a company check to Eaton for the first and third loads for the full amounts claimed by them, and such checks were subsequently cashed by defendants.

Therefore, without contradiction, the State's evidence affirmatively disclosed that the company, with knowledge of the truth, did not rely upon the false pretenses perpetrated by defendants, and were not induced thereby to make such payments of money to defendants. What induced such payments is not explained, but there was

ample competent evidence that defendants made the false pretenses and misrepresentations as charged with the intent to and that they did actually cheat and defraud the company thereby.

That situation with regard to counts I and II is controlled by Goldman v. State, 128 Neb. 684, 260 N. W. 373, which dealt with a prosecution under what is now section 28-1207, R. R. S. 1943. In that opinion, quoting from 25 C. J. 599, and citing Mason v. State, 99 Neb. 221, 155 N. W. 895, and McDonald v. State, 124 Neb. 332, 246 N. W. 716, this court said: "'It is not sufficient that there is a false pretense; the owner of the property must rely on it; the pretense must be an effective cause in inducing the owner to part with his property. Therefore, if the owner has knowledge of the truth or does not believe the pretense, or, although believing it, yet parts with the property on some other inducement, or investigates it and parts with the property, relying entirely on the results of his investigation, the offense has not been committed. But although the owner makes some investigation of the representations made by the accused to ascertain their truth, yet if he nevertheless would not have parted with the goods but for such representations, believing them true, accused is guilty.'"

Therefore, under the facts and circumstances presented in this case, defendants could not lawfully be convicted of obtaining money by false pretenses as separately charged by counts I and II. Thus, the trial court erred in overruling defendants' motion to dismiss said counts. However, contrary to defendants' contention, instructions Nos. 5, 6, and 11 did separately and specifically instruct the jury with regard to the necessary element of reliance aforesaid by language substantially as requested by defendants in their requested instruction No. 1. In view of our conclusion with regard to counts I and II, such instructions, and instructions Nos. 16 and 18 as well, which related thereto, could not have been prejudicial to defendants as claimed by them, because such distinct

and separate instructions dealt entirely with counts I and II, a distinct and separate crime from that charged in counts III and IV upon which the trial court properly instructed the jury.

Defendants assigned: (1) That the trial court erred in the admission of certain testimony of three named witnesses with regard to testing the scale involved and finding that it was accurate, upon the ground that such evidence was too remote; and (2) that the trial court erred in excluding certain evidence offered by defendants with respect to claimed errors in weighing loads on the same scale prior to and after the alleged crimes. Defendants' first contention related to an inspection of the scale for accuracy made on June 13, 1956, by a trained representative of the company which manufactured the scale, and inspections for that purpose regularly made by two state scale inspectors on April 9, 1956, and again on August 29, 1956. No authority is cited to support defendants' contention with relation thereto, but the controlling general rule is that the admissibility of such evidence is a matter resting largely in the discretion of the trial court and a ruling thereon will not be disturbed unless an abuse of discretion clearly appears. 20 Am. Jur., Evidence, § 249, p. 243; Metropolitan Life Ins. Co. v. Armstrong, 85 F. 2d 187. With regard to defendants' second contention, the record discloses that defendants were permitted to and did fully and in detail adduce evidence regarding their claimed errors in weight on the scale prior to and after June 4, 1956. The evidence excluded was simply a repetition of that already admitted. Neither of defendants' contentions has any merit.

The primary questions remaining then are: (1) Whether or not the evidence adduced by the State was sufficient to support a verdict finding defendants guilty of conspiracy as charged in counts III and IV; (2) whether or not the trial court erred in giving instructions Nos. 8 and 9 which allegedly failed to properly sub-

mit the necessary elements of conspiracy; and (3) whether or not this court may vacate the verdict and reverse the judgment on counts I and II, yet affirm the judgment on counts III and IV.

In connection with the alleged insufficiency of the evidence to support defendants' conviction of conspiracy, they argued that there was no evidence that Eaton committed any unlawful act at any time and no evidence of any collusion, conspiracy, overt act, or intent on his part to commit a crime. We conclude otherwise.

Section 28-301, R. R. S. 1943, provides: "If two or more persons conspire to commit any felony or to defraud the State of Nebraska in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties in such conspiracy shall be fined not more than ten thousand dollars or imprisoned in the penitentiary not more than two years or both." See, also, section 29-2014, R. R. S. 1943, which provides: "In trials for conspiracy, in cases where an overt act is required by law to consummate the offense, no conviction shall be had unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts so alleged be proved on trial; but other overt acts not alleged in the indictment may be given in evidence on the part of the prosecution."

In Platt v. State, 143 Neb. 131, 8 N. W. 2d 849, this court held: "In a prosecution under section 28-301, Comp. St. 1929 (now section 28-301, R. R. S. 1943), the state is required to prove an unlawful conspiracy to commit a felony or to defraud the state, and the doing by one or more of the conspirators of an overt act to effect the object of the conspiracy.

"Where the overt acts tend to establish a scheme or plan to defraud the state, they may be properly shown as evidence of a preexisting unlawful conspiracy."

By analogy, of course, the latter rule applies alike where the overt acts tend to establish a scheme or plan

to commit a felony. In that opinion, this court said: "Defendant urges that there is no evidence in the record sufficient to sustain a finding that a conspiracy existed within the meaning of the statute. The essence of a criminal conspiracy is an unlawful agreement to violate a criminal statute. It is not necessary that direct evidence of a positive agreement to jointly participate in the violation of a criminal statute be produced in order to establish the crime. A criminal conspiracy must necessarily be entered into with the intent to defraud the state or to violate a criminal law and, intent being a matter of the mind, it is rarely possible to prove that element of the crime except by circumstances. * * * The statute contains the provision 'and one or more of such parties do any act to effect the object of the conspiracy.' This requires the allegation of an overt act in the information and proof thereof by evidence beyond a reasonable doubt. We think that an overt act done in furtherance of the conspiracy was alleged and amply proved. The overt acts established by the evidence are proper to be considered by the jury in connection with all the other evidence in determining whether a conspiracy existed, and where, as in this case, the overt acts tend to establish a scheme or plan to accomplish some unlawful object, they may be properly shown as evidence of a preexisting conspiracy. * * * It is urged that a wrongful intent is an essential element of the crime and that the state has failed in its proof on this point. * * * Intent being a frame of mind difficult of discovery by direct evidence, it is usually necessary to determine it by the circumstances and conduct of the person involved rather than by his expressed statements. * * * The defendant urges that one person cannot conspire with himself, and where two persons are tried and one is acquitted, the other must also be acquitted. * * * There can be no question that there must be a degree of dependent criminality between coconspirators to violate a criminal statute in order for a conviction to stand.

In other words, the guilt of both must concur in order to establish the guilt of either." Such statements have application and are controlling here.

That opinion then went on to conclude that when two defendants and no more are charged with conspiracy and tried together under the same evidence, as distinguished from separate trials wherein the evidence might well be different, the failure of proof as to one defendant would amount to a failure of proof as to both, and require acquittal of both. However, contrary to defendants' contention, such latter rule has no application here because there was sufficient proof from which the jury could have concluded beyond a reasonable doubt, as it did, that both defendants were guilty of conspiracy as charged. Also, contrary to defendants' contention, we find that instructions Nos. 8 and 9, given by the trial court, although prolix, did separately, specifically, and clearly submit every element of the crime of conspiracy which the State was required to establish beyond a reasonable doubt. The alleged false pretenses made by defendants, which the State established by competent evidence, were simply overt acts committed by defendants in order to effect the object of their conspiracy. It was not necessary that defendants should be found guilty of the distinct and separate crime of obtaining money by false pretenses in order to convict them of conspiracy to commit such a crime. In other words, the offense of obtaining money or property by false pretenses under section 28-1207, R. R. S. 1943, as separately charged in counts I and II, and the offense of conspiracy to commit a felony under section 28-301, R. R. S. 1943, as separately charged in counts III and IV, are distinct and separate crimes. An acquittal of the first for failure of the State to support the element of reliance by competent evidence does not require acquittal or reversal of conviction of the second if the elements thereof are supported by competent evidence and there is no prejudicial error in submission thereof.

The question then is, having concluded that the evidence was not sufficient to support a conviction of obtaining money by false pretenses as charged in counts I and II, but that the State's evidence was sufficient to support defendants' conviction of conspiracy as charged in counts III and IV, may this court vacate the verdict and reverse the judgment on counts I and II, but affirm the judgment on counts III and IV?

In that regard, Yeoman v. State, 81 Neb. 244, 115 N. W. 784, as modified on rehearing at 81 Neb. 252, 117 N. W. 997, is controlling. Therein, this court said: "This brings us to the question of our power to reverse the judgment of the district court in part and affirm it in part. It is with some hesitation that we have reached the conclusion that this may be done. In 12 Cyc. 937, it is said: 'The appellate court may reverse a judgment of a lower court as to part and affirm as to part, where the legal part is severable from that which is illegal.' This rule, we find, is supported by the decisions of the courts of last resort in many of the states, and it also appeals to sound reason. Now, in the case at bar, each count of the information charges the defendant with a distinct and separate crime; the verdict specifically responds to each of said counts, and a several, separate and distinct judgment appears to have been pronounced upon each of the separate findings of the jury as expressed in their verdict." A like situation is presented in the case at bar.

The record herein discloses sufficient evidence adduced by the State to support a conclusion that both defendants conspired with the intent to commit a felony and thereby obtain money by false pretenses. All of the evidence adduced by the State was clearly and properly admissible to support counts III and IV charging defendants with conspiracy. The overt acts of defendants which were established by the State's evidence were entirely sufficient and proper to be considered by the jury in connection with all other evidence and

circumstances in determining whether or not a conspiracy existed as charged, and where as here such overt acts tended to establish a scheme or plan to intentionally effect the object of the conspiracy and thereby accomplish some unlawful object, they may be and were properly shown as evidence of a preexisting conspiracy to commit a felony.

True, the evidence adduced by defendants conflicted in some material respects with that adduced by the State, but its substance becomes of no importance here in the light of applicable and controlling rules reaffirmed by this court in Birdsley v. State, 161 Neb. 581, 74 N. W. 2d 377.

For reasons heretofore stated, the judgment of the trial court based on counts III and IV should be and hereby is affirmed, but the verdict finding defendants guilty on counts I and II should be and hereby is vacated, the judgment of the trial court based thereon is reversed, and counts I and II are dismissed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

WILLIE WASHINGTON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
85 N. W. 2d 275

Filed October 18, 1957. No. 34175.

1. **Criminal Law.** Subnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question.
2. **Homicide.** Feebleness of mind or will, even though not so extreme as to justify a finding that a defendant is irresponsible, may properly be considered by a jury in determining whether a homicide has been committed with a deliberate and premeditated design to kill.
3. **Criminal Law.** Evidence of the condition of the mind of the accused at the time of a crime is admissible to show absence of any deliberate or premeditated design.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Reversed and remanded.*

Joseph M. Lovely, Adolph Q. Wolf, and *Thomas J. Walsh,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

SIMMONS, C. J.

Defendant was charged with the crime of first degree murder. He was found guilty. The jury fixed the penalty at imprisonment for life. Defendant brings the case here on one assignment of error, to wit: "That the trial court committed reversible error in instructing the jury that they might consider the evidence introduced as to the 'defendant's level or degree of intelligence' solely in connection with their determination of the penalty to be imposed by them in the event they were to find the defendant guilty of murder in the first degree."

We reverse the judgment of the trial court and remand the cause for a new trial.

The issue presented does not require a detailed statement of facts. Defendant, who testified in his own behalf, lived in a two-room apartment at Omaha with one Edith Johnson, not his wife. On the early evening of the night involved, defendant and Johnson had been drinking whiskey and were preparing to play dominoes. One Thompson, hereinafter called the deceased, came to the apartment, knocked, and was allowed to enter. He was boisterous, profane, and obscene. He was asked to leave and refused to do so. Defendant claims that deceased attacked him and cut his hand with some sharp instrument. Defendant got a .22 caliber single shot rifle out of the bedroom and

"put it on" deceased. Deceased then started toward him. Defendant shot him, the bullet entering the head at the apex of the nose. Deceased fell to the floor. Deceased was pulled outdoors onto the porch. Deceased tried to get up. Defendant got the rifle, reloaded it, and shot deceased a second time, the bullet entering the right side of the head. The two wounds caused the death.

Defendant then went to tell some relatives what had happened. Johnson scrubbed the floor to remove blood stains and found the keys to deceased's car. Defendant came back in about 45 minutes. He and Johnson pulled deceased's body along the ground to deceased's car, put it in the car, drove the car to another street, parked it, returned home on foot, and went to bed.

The defense was self-defense.

Defendant offered the testimony of a psychologist who testified that he had given defendant the standard tests; that defendant, who was 39 years of age, had the mental level of a child of 8 years with an intelligence quotient of 50 (100 being normal); and that a person of defendant's level of intelligence would have "inferior thinking capacity and inferior judgment."

The trial court instructed the jury that: "In this connection evidence was produced upon behalf of the defendant pertaining to the defendant's level or degree of intelligence. You are instructed that the defendant's level or degree of intelligence is not a defense and may not be considered by you as a defense to the crime of first degree murder, of second degree murder, or of manslaughter as charged against him in this case; however, such evidence was admitted and may be considered by you solely in connection with your determination of the penalty to be imposed by you in the event you find the defendant guilty of murder in the first degree."

It is the contention of the defendant that the jury was not allowed to consider his mental condition to determine whether or not he acted with the deliberation

and premeditation required to constitute the crime of murder in the first degree.

We have held that a person, though of weak mind, but with sufficient capacity to distinguish right from wrong in respect to the particular act charged, is accountable for his acts. Anderson v. State, 25 Neb. 550, 41 N. W. 357. See Thompson v. State, 159 Neb. 685, 68 N. W. 2d 267.

The rule is stated generally that "* * * subnormal mentality is not a defense to crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question." Annotation, 44 A. L. R. 586. See, also, 26 Am. Jur., Homicide, § 77, p. 209; 40 C. J. S., Homicide, § 4, p. 825.

No evidence is found, expert or otherwise, contending that the defendant at the time of the act charged was unable to distinguish between right and wrong. For cases where that situation existed, see, State v. Roy, 40 N. M. 397, 60 P. 2d 646, 110 A. L. R. 1; People v. Perry, 195 Cal. 623, 234 P. 890; McKenny v. State, 105 Tex. Cr. 353, 288 S. W. 465; Craven v. State, 93 Tex. Cr. 328, 247 S. W. 515; and Jones v. State, 213 Ark. 863, 213 S. W. 2d 974 (where, as here, a plea of insanity was not interposed). See, also, Commonwealth v. Howell, 338 Pa. 577, 13 A. 2d 521; State v. Kelsie, 93 Vt. 450, 108 A. 391; State v. Noel, 102 N. J. L. 659, 133 A. 274.

In this case the defendant took the witness stand and on direct and cross-examination testified in detail to the events of the day, his work, his visits to taverns, his experiences at home, and as to what was said and done before the fatal shooting.

Language in Banks v. State, 133 Tex. Cr. 541, 112 S. W. 2d 745, on motion for rehearing, seems applicable here. It is: "So far as the facts reveal his testimony was clearly and intelligently given, and if accepted by the jury as true made out a complete and perfect defense of accidental killing. It can not be denied that

such defense would have perhaps been impaired if coupled with the defense of insanity. It is scarcely compatible with ordinary experience that one can remember and detail all the circumstances of a transaction, and at the same time be crazy to the extent of being excusable in the eyes of the law."

In Maulding v. Commonwealth, 172 Ky. 370, 189 S. W. 251, the court cited with approval this language: " 'There is no law which will excuse or palliate a deliberate murder on the ground that the perpetrator of it is unlearned, passionate, ignorant, or even of weak mind, unless the weakness of mind amounts to such a defect of reason as to render him incapable of knowing the nature and quality of his act, or, if he does know it, that he does not know it is wrong to commit it.' "

It follows under the evidence here that the trial court did not err in instructing the jury that the defendant's level or degree of intelligence was not a defense.

However, that does not answer the question presented here. The issue here goes to the limitation which the court put upon the evidence of defendant's degree of intelligence in that it could be considered "solely" in connection with the determination of the penalty.

In the instruction defining terms used, the court instructed the jury that: " 'Deliberate and premeditated malice' exists when an intention to take life unlawfully is deliberately formed in the mind and such taking of life is meditated upon before the fatal injury is inflicted. The existence of this frame or condition of mind, if it does exist, being a necessary element for conviction of murder in the first degree, must be found by the jury from the evidence, as any other essential element in the case, that is, beyond a reasonable doubt; and, in passing upon this issue, the jury may consider the evidence as to the acts, language, and conduct of the defendant *in connection with all other facts and circumstances in evidence.*" (Emphasis supplied.)

In the instruction as to intent the court advised the

jury as follows: "In determining the guilt or innocence of the defendant, either of the crime or (sic) murder in the first degree or murder in the second degree, it is for you to determine from *all the facts and circumstances in evidence* whether or not the defendant committed the act complained of, and whether at such time he had such criminal intent." (Emphasis supplied.)

The court also instructed the jury that: "The law presumes the defendant to be innocent until he is proven guilty by the evidence beyond a reasonable doubt. The law allows him to testify in his own behalf and you should fairly and impartially consider his testimony together *with all of the other evidence in this case.* (Emphasis supplied.)

The instructions are not challenged here. The court, having given the jury broad powers in considering all the evidence in these matters, by the challenged instruction took from their consideration, save on the question of the penalty, the uncontroverted evidence of the level or degree of intelligence of the defendant. The question is: Was that prejudicial error?

The record does not present the question as to whether the court should have instructed affirmatively on that issue, but does present the question of the withdrawal from the jury's consideration of that evidence.

In Hopt v. People, 104 U. S. 631, 26 L. Ed. 873, the court said: "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

We cited this case with approval in O'Grady v. State, 36 Neb. 320, 54 N. W. 556, as a "humane" rule.

In People v. Moran, 249 N. Y. 179, 163 N. E. 553, the court of appeals stated the rule as follows: "Feebleness of mind or will, even though not so extreme as to

justify a finding that the defendant is irresponsible, may properly be considered by the triers of the facts in determining whether a homicide has been committed with a deliberate and premeditated design to kill, and may thus be effective to reduce the grade of the offense."

Although there is divided authority on the matter, we adhere to the reasoning of the above rules. See 40 C. J. S., Homicide, § 4, p. 825.

The evidence here discussed was admitted over objection of the State. However, if such evidence is for the consideration of the jury, it is properly admissible, subject to the usual rules. In effect we so held in O'Grady v. State, *supra.* In Latimer v. State, 55 Neb. 609, 76 N. W. 207, 70 Am. S. R. 403, we held: "The doctrine of this court is that while voluntary intoxication is not of itself a complete defense for one who is charged with the commission of a crime, still the evidence that the accused was intoxicated when it is alleged he committed the crime is admissible as a circumstance tending to show that the act of the accused was not premeditated."

In Battalino v. People, 118 Colo. 587, 199 P. 2d 897, the court held that evidence of mental derangement short of insanity was admissible, not for the purpose of seeking an acquittal, but to prove absence of deliberate or premeditated design. The court held that the basis of the admissibility is the relevancy to deliberation and premeditation. It quoted with approval from 26 Am. Jur., Homicide, § 105, p. 229, as follows: "However, evidence of insanity, or rather, evidence of the condition of the mind of the accused at the time of the crime, together with the surrounding circumstances, may be introduced, not for the purpose of establishing insanity, but to prove that the situation was such that a specific intent was not entertained—that is, to show absence of any deliberate or premeditated design." See, also, Becksted v. People, 133 Colo. 72, 292 P. 2d 189; People

v. Baker, 42 Cal. 2d 550, 268 P. 2d 705; Hernandez v. State, 43 Ariz. 424, 32 P. 2d 18.

We conclude that the trial court erred in giving the instruction here considered. That the error was prejudicial is self-demonstrative.

The judgment of the trial court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ERNEST E. WIECK, ADMINISTRATOR OF THE ESTATE OF TRESA I. WIECK, DECEASED, APPELLANT, V. ERNEST BLESSIN, APPELLEE.

85 N. W. 2d 628

Filed October 18, 1957. No. 34213.

1. **Appeal and Error.** The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision.
2. **Appeal and Error: Evidence.** In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.
3. **Automobiles.** The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.
4. ———. 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.

5. **Death: Damages.** In an action by the legal representative of a deceased brought in behalf of the widow or widower and next of kin, the trial court should submit to the jury the question of the amount of the pecuniary loss, if any, which the evidence, with reasonable certainty, shows they have suffered.
6. **Husband and Wife: Negligence.** In an action by plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant.
7. **Automobiles: Negligence.** The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery.

APPEAL from the district court for Adams County: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Bruckman & Brock, for appellant.

Madgett & Hunter and *Gross, Welch, Vinardi & Kauffman*, for appellee.

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

WENKE, J.

This is an action brought in the district court for Adams County by Ernest E. Wieck as administrator of the estate of Tresa I. Wieck, deceased, against Ernest Blessin. The purpose of the action is to recover damages from defendant for the exclusive benefit of the widower and next of kin of the decedent. The right to do so is based on the claim that decedent's death was caused by acts of negligence with which the defendant is chargeable under the family purpose doctrine as it relates to automobiles. Such an action is authorized by sections 30-809 and 30-810, R. R. S. 1943. Defendant pleaded,

among other defenses, that Ernest E. Wieck, driver of the car in which decedent was riding, was guilty of negligence in the operation thereof which caused the accident, the resulting injury, and death of decedent.

Trial was had and after both sides had rested the defendant moved for a directed verdict, which motion the trial court sustained and thereupon dismissed the action. Plaintiff then filed a motion for new trial, which was overruled. This appeal was taken therefrom. In view of the action taken by the trial court we will review the evidence adduced by both sides in accordance with the principles applicable in such situations, that is: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614.

Ernest E. Wieck and Tresa I. Bobzine were married on May 15, 1953. No children were born to this marriage. Both worked at the Hastings Navy Ammunition Depot but lived on a farm southeast of Kenesaw, Nebraska. At the time of her death Tresa I. Wieck was 42 and her husband 45 years of age.

Tresa I. Wieck was killed in an automobile accident while riding in a car, a 1949 Tudor Chevrolet, owned and, at the time of the accident, operated by her husband. Decedent left as her sole heirs at law her husband, Ernest E. Wieck; her father, Henry Bobzine; and her mother, Hattie Bobzine. Ernest E. Wieck was appointed administrator of decedent's estate by the county court of Adams County, Nebraska, and, after he had qualified therefor, letters of administration were issued to him by that court on July 20, 1955. He is the duly appointed, qualified, and acting administrator of her

estate. Decedent's father died on October 22, 1955, which was prior to the commencement of this action on December 27, 1955.

The accident in which decedent was killed occurred in the southwest corner of the intersection of two public roads located at the common corner of sections 25, 26, 35, and 36, in Wanda Township, Adams County, Nebraska. The accident happened about 5:15 p.m. on Sunday, December 19, 1954, when a car, a 1951 Fordor Ford owned by appellee and being driven by his son, Harold Blessin, ran into the right side of the car in which decedent was riding with her husband. Just prior to the accident the Wieck car approached the intersection from the north while the Blessin car approached it from the west. After the collision the Wieck car traveled in a southeasterly direction some 75 feet, coming to a stop on its top in a field located southeast of the intersection. The Blessin car traveled east a distance of some 50 feet before coming to a stop on its wheels in the ditch located along the south side of the east-west road east of the intersection. As a result of the collision decedent was thrown from the car in which she was riding and, as already stated, death resulted therefrom.

Both north-south and east-west roads approaching the intersection were 44 feet wide. However, the graveled surfaced portion of the east-west road was 28 feet wide whereas that of the north-south road was 24 feet wide. It was still daylight at the time of the accident and visibility was good. To the northwest of the intersection was a pasture, across which visibility was open, whereas to the northeast was a set of farm buildings with evergreen trees along the fence, the trees coming clear up to the corner, thus making visibility to the east impossible until a car coming from the north had entered the intersection.

The foregoing gives a general picture of the situation involved. We will discuss the evidence more in detail as it relates to the various propositions herein discussed.

Appellee contends that appellant's simple recitation of some of the statutory grounds for a new trial are wholly insufficient as assignments of error to meet the requirements of the statute and our rules relating thereto and therefore present no question for review here. See, § 25-1919, R. R. S. 1943, and our rule of procedure 8a2(4). Appellant's assignments of error are as follows:

"Abuse of discretion by which the plaintiff was prevented from having a fair trial.

"That the said finding, order, judgment and decree of the court is not sustained by sufficient evidence.

"That said finding, order, judgment and decree of the court is contrary to law.

"Error of law occurring at the trial and excepted to by the plaintiff."

It is true that appellant's assignments of error are an almost verbatim repetition of four of the grounds specified by section 25-1142, R. R. S. 1943, as grounds for new trial and are couched in the exact words of appellant's motion for new trial. See subdivisions (1), (6), and (8) of the foregoing statute. Generally we have held that doing so does not meet the requirements of the statute and our rules relating thereto. As stated in Labs v. Farmers State Bank, 135 Neb. 130, 280 N. W. 452: "It has been frequently held by the court that compliance with such requirements is necessary. It is required both by rule of court and statute (section 20-1919, Comp. St. 1929) (now section 25-1919, R. R. S. 1943) that 'The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment.' See Federal Land Bank v. Elsemann, 121 Neb. 397, 237 N. W. 288. What is termed 'assignment of errors' in the appellant's brief herein is simply and only a copy of the provisions contained in section 20-1142, Comp St. 1929 (now section 25-1142, R. R. S. 1943), reciting the grounds for new trial therein numbered 1, 2, 3, 5, 6 and 8, in the language of the statute.

This, while perhaps sufficient under the provisions of section 20-1144, Comp. St. 1929 (now section 25-1144, R. R. S. 1943), in the motion for new trial, is wholly insufficient as an assignment of errors in this court." See, also, Smallcomb v. Smallcomb, *ante* p. 191, 84 N. W. 2d 217; Romans v. Bowen, 164 Neb. 209, 82 N. W. 2d 13; Federal Land Bank v. Elsemann, 121 Neb. 397, 237 N. W. 288. As stated in Smallcomb v. Smallcomb, *supra:* "The function of assignments of error is that they set out the issues presented on appeal. They serve to advise the appellee of the questions submitted for determination in order that the appellee may know what contentions must be met. They also advise this court of the issues which are submitted for decision."

However, "It is sufficient, in assigning the grounds for a motion for a new trial, to assign the same in the language of the statute and without further or other particularity." McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639. See, also, Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130; § 25-1144, R. R. S. 1943.

The purpose of a new trial, which appellant sought to obtain from the trial court, is to enable the trial court to correct errors that have occurred in the conduct of the trial. It is a statutory remedy and can be granted by a court of law if the grounds, or some of them, provided therefor by statute exist. See Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772. The ruling of the court on a motion for new trial is subject to review here. Whether the decision was to grant a new trial, or deny one, the questions on appeal are, do the alleged error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining. An order denying a new trial will be scrutinized here with the same care as one granting a new trial. See Greenberg v. Fireman's Fund Ins. Co., *supra.*

Here, in sustaining appellee's motion for a directed verdict and dismissing appellant's action, and also overruling appellant's motion for a new trial, the trial court gave no reasons for its decisions. If, in a situation such as the instant case, the trial court gives no reasons for its decisions then the party appealing therefrom meets the duty placed upon him when he brings the record here with his assignments of error, the same as in the district court, and submits the record for our examination with the contention there was prejudicial error. Under this construction the appeal presents the question of whether or not the evidence adduced, as it relates to the various principles of law applicable thereto, is sufficient to present a case for the jury. However, appellant's assignments of error are not sufficiently definite so as to raise specific questions of law, such as the trial court's rulings on the admissibility of evidence, for as stated in Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112: "In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged." See, also, Joiner v. Pound, 149 Neb. 321, 31 N. W. 2d 100; Bolio v. Scholting, 152 Neb. 588, 41 N. W. 2d 913. As stated in Minick v. Huff, 41 Neb. 516, 59 N. W. 795: "It is no part of the duty of this court to search a record for the purpose of ascertaining if there is error in it. On the other hand, every reasonable presumption will be indulged in favor of the correctness of * * * any ruling of that court, alleged to be erroneous, must be specifically pointed out to be reviewed here." Thus we do not have before us the question of whether or not certain evidence of Lela Verba, Ernest E. Wieck, Emma Kuehn, and LeRoy Sinsel, relating to statements made by Harold Blessin and LaMonte Borchers after the accident, should have been received either as substantive proof, because admissions of an agent, for the purpose of impeachment only, or

not at all. However, in view of what is hereinafter decided, the question of its admissibility, and for what purpose, becomes immaterial for if admissible the evidence would only relate to the question of whether or not all the evidence adduced is sufficient to create a jury question as to whether or not Harold Blessin was guilty of negligence in the operation of his father's car immediately before the accident and, if so, whether or not it was a proximate cause of the accident in which Tresa I. Wieck met her death.

Harold Blessin testified he approached the intersection at a speed of 50 to 55 miles an hour; that at a distance of some 200 yards from the intersection he lifted his foot from the accelerator because he knew that the intersection was rough; that when about 100 feet from the intersection he looked to the left and saw the Wieck car about 90 feet from the intersection; that he immediately applied his brakes but could not stop his car because his tires skidded on the gravel; that he entered the intersection going about 35 miles an hour; and that the front of the car he was driving hit the right side of the Wieck car about center between the wheels. LaMonte Borchers, who was riding with Harold, testified to about the same facts except that he said Harold "slacked off" to about 40 to 45 miles an hour and that he saw the Wieck car about 100 feet from the intersection. Both testified the cars entered the intersection at about the same time.

As to the duty of the driver of a car we have said:

"A driver of an automobile should have his car under such reasonable control as will enable him to avoid collision with other vehicles, assuming that the drivers thereof will exercise due care." Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578.

"Reasonable control by drivers of motor vehicles is such as will enable them to avoid collision with other vehicles operated without negligence in streets or intersections, and with pedestrians in the exercise of due

care." Pongruber v. Patrick, *supra.* See, also, Bear v. Auguy, 164 Neb. 756, 83 N. W. 2d 559.

"The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance." Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

"A vehicle which has entered an intersection and is passing through it at a lawful speed has the right-of-way over a vehicle approaching the intersection from a different direction into its path." Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496.

"One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but he is not thereby relieved from the duty of exercising ordinary care to avoid accidents." Long v. Whalen, *supra.* See, also, Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

We think the factual situation here is comparable with that of the defendant in Burhoop v. Brackhan, *supra.* Therein we stated: "Under the facts disclosed by the record we think that reasonable minds could differ as to whether or not he was negligent and, if so, whether or not such negligence was a proximate cause of the accident. In view thereof both are issues for the jury and the trial court was correct in submitting them." Consequently we find the conduct of Harold Blessin in driving his father's car in the manner that the evidence adduced shows he did presents a question of fact for a jury as to whether or not he was negligent in doing so

and, if so, whether or not it was a proximate cause of the accident.

Appellant seeks to hold appellee liable under the family purpose doctrine. This doctrine is set forth in Linch v. Dobson, 108 Neb. 632, 188 N. W. 227, as follows: "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."

And in Stevens v. Luther, 105 Neb. 184, 180 N. W. 87, we said: "* * * the owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept."

The record shows that the car being driven by Harold Blessin was owned by appellee, purchased by him for the purpose of the family's pleasure, and was generally so used. Harold was born on April 19, 1933, and grew up in his parent's home on the farm and was there as a member of the family until October 8, 1951, when he enlisted in the regular army for a period of 3 years. After he was old enough to do so Harold drove the family car with his father's knowledge and consent, doing so both before he entered the army and whenever he returned home while on furlough. After his discharge from the army on October 8, 1954, Harold returned to the family home and lived there until after December 19, 1954. He became 21 years of age on April 19, 1954, while still in the army. After his return to the home Harold lived there in the same relationship to the family as before,

including the use of the family car, except that his father paid him $100 for picking corn, which extended over a period of about 3 weeks; that he occasionally did odd jobs for neighbors; and that he received $300 mustering-out pay from the army, which mustering-out pay he received in three equal installments of $100 each in November and December of 1954 and January of 1955. On the occasion of the accident he was taking LaMonte Borchers, with whom he had been hunting, to LaMonte's home and was using appellee's car with the latter's knowledge and consent.

We do not think the fact that Harold had become of age is necessarily controlling. See, Linch v. Dobson, *supra;* Stevens v. Luther, *supra.* As stated in Linch v. Dobson, *supra*: "It further appears that Paul was 22 years of age. He was, however, living at home as a member of the family and under parental control. In this case, the father's control over the son and the privilege of the son to the use of the car were, in no particular, different than had the son been a minor." Nor is the fact that the father paid the son for picking corn necessarily controlling. See American Products Co. v. Villwock, 7 Wash. 2d 246, 109 P. 2d 570, 132 A. L. R. 1010. As therein stated: "* * * the fact that the father paid the son wages had no further significance." In Lund v. Holbrook, *supra,* where we held the question of liability under the family purpose doctrine was an issue for the jury, the evidence of the son disclosed the following: "On cross-examination of the son, he testified that he was 22 years of age at the time of the accident; that he lived at home with his father; that he was working for his father at the time of the accident; and that he had driven the car whenever he wanted to ever since his father purchased it." We think the situation here is no different and the evidence on this issue presents a question for a jury.

We come then to the question, for whom can the appellant as administrator maintain this action? Section

30-810, R. R. S. 1943, provides, insofar as this question is involved, that: "It shall be brought by and in the name of his personal representatives, for the exclusive benefit of the widow or widower and next of kin. The verdict or judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained. The avails thereof shall be paid to and distributed among the widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons." It is thus apparent that appellant could bring an action to recover for the benefit of the widower and next of kin, the latter in this case being the decedent's father and mother. The statute goes on to limit the right of those in whose behalf recovery is sought to "the amount of damages which * * * (they) have sustained."

As stated in Tate v. Barry, 144 Neb. 517, 13 N. W. 2d 879: "* * * in an action by the legal representative of a deceased brought in behalf of the widow or widower and next of kin, the trial court should submit to the jury the question of the amount of the pecuniary loss, if any, which the evidence, with reasonable certainty, shows they have suffered." See, also, In re Estate of Lucht, 139 Neb. 139, 296 N. W. 749; Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321; Fisher v. Trester, 119 Neb. 529, 229 N. W. 901. As stated in Fisher v. Trester, *supra:* "* * * the measure of damage is the present worth in money of the contributions having a monetary value of which the preponderance of the evidence shows with reasonable certainty the next of kin have been deprived by the act of the defendant that creates the liability. That which is only probable, estimated or conjectural may not be considered in determining the pecuniary loss."

Being an adult daughter, the decedent's duty to support her parents was limited to that imposed by sections 68-101, R. S. Supp., 1955, and 68-102, R. R. S. 1943.

See Spomer v. Allied Electric & Fixture Co., 120 Neb. 399, 232 N. W. 767. As stated in Spomer v. Allied Electric & Fixture Co., *supra:* "The legal liability of an adult son (here daughter) to support his parents does not extend beyond the terms of the statute." And, as stated in Greenwood v. King, 82 Neb. 17, 116 N. W. 1128: "A clear distinction is made by the authorities between an action instituted for the benefit of the widow and the next of kin upon whom the law confers the right to be supported by the person killed, and those next of kin to whom the law does not necessarily give such right to support."

The evidence shows the Wiecks lived in a home on a farm and rented some of the land adjacent thereto whereon they raised a garden and kept chickens, cows, and hogs. Decedent not only had a substantial income from her work outside of the home but also rendered valuable service in the home. The evidence shows that she worked about 4 hours every day in taking care of the home, a garden, and in helping do the chores in connection with their livestock. However, all of her income and services were used in connection with their home and there is no evidence that she ever actually helped her parents in any way, that is, by either helping them financially or rendering them any service. There is also no evidence to show that the parents were, at the time of decedent's death, or that the mother is now or ever will be in the class to which section 68-101, R. S. Supp., 1955, has application. Thus the only person within the class for which an action may be brought, who the evidence adduced shows has sustained damages because of decedent's death, is her husband, who was driving the car at the time the accident happened. We think the possibility of the mother ever becoming a pauper is so remote and uncertain that it cannot be considered as a proper basis upon which to permit a jury to award her any recovery of damages. See In re Estate of Lucht, *supra.*

The question then arises, since the surviving husband is the only one for whom recovery can be had, was he guilty of contributory negligence, as a matter of law, sufficient to defeat his recovery?

We said in Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551: "In an action by plaintiff for his own benefit to recover for pecuniary injury which he has suffered by reason of the death of his wife, wherein the evidence discloses that plaintiff was guilty of negligence more than slight as a matter of law which proximately contributed to or caused the accident and death, it is the duty of the court to direct a verdict for defendant." See, also, Tucker v. Draper, *supra;* Jones v. Union P. R. R. Co., on rehearing, 141 Neb. 121, 4 N. W. 2d 875.

The evidence shows that as the husband was driving his car south toward the intersection he had a clear view of the east-west road west of the intersection for at least 100 yards; that when about 40 yards (120 feet) north of the intersection he looked to his right (or west) but saw no cars within that 100 yard distance; that he then directed his attention to and looked to his left (or east) where the view of the east-west road east of the intersection was obstructed until he had entered the intersection; that he did not again look to the right (or west) until he heard a noise; that just as he looked the Blessin car hit his car; and that the collision occurred in the southwest corner of the intersection just as the front end of his car was leaving it.

We said in Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491, that: "The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery." See, also, Wendel v. Carlson, 162 Neb. 742, 77 N. W. 2d 212; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290; Nelson v. Plautz, 130 Neb. 641, 265 N. W. 885.

Here appellant admits he could see a car on the east-west road west of the intersection for a distance of at least 100 yards and that, at the speed he was traveling, he was positive he could stop his car within 20 feet but admits he never, from a distance of 120 feet north of the intersection, looked to see if any cars were coming from the west until just at the moment his car was hit. Under our holdings he was guilty of contributory negligence sufficient to defeat any right of recovery which he might otherwise have had.

In view of what we have said and held herein we affirm the trial court's action of dismissing appellant's action and denying him a new trial.

AFFIRMED.

A-1 FINANCE COMPANY, INC., CRETE, NEBRASKA, A CORPORATION, APPELLANT, V. CHARLES A. NELSON ET AL., APPELLEES.
85 N. W. 2d 687

Filed October 25, 1957. No. 34206.

1. **Pleading.** A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded; but does not admit the conclusions of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, as to the effect of the facts, nor allegations of what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law.
2. ———. In passing on a demurrer to a petition, the court must consider exhibits attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant.
3. **Installment Loans.** The design of the installment loan law is

to license and control the business of making installment loans and to restrict the enforcement of collection of illegal loans once they have been made.

4. **Mortgages.** The note is the principal or primary contract or obligation. The mortgage is an incident. In case of conflict, the terms of the note prevail.
5. **Evidence.** The parol evidence rule is one of substantive law as well as of evidence and as a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement.
6. **Usury.** Any loan made by a licensee under the installment loan law in excess of $1,000 wherein an interest rate in excess of 9 percent per annum is contracted for is void and the licensee shall have no right to collect or receive any principal or collect any interest on such loan.
7. ———. 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.
8. ———. Section 45-138, R. R. S. 1943, provides in part: "Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment." Any loan made by a licensee under the installment loan law which fails to conform to this part of the above section is violative thereof and void.
9. **Statutes.** If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Affirmed.*

Dredla & Dredla and *Crosby, Pansing & Guenzel,* for appellant.

Gerald J. Hallstead and *Nelson & Harding,* for appellees.

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

MESSMORE, J.

This is an action brought by the A-1 Finance Company, Incorporated, a licensee under the installment loan law, as plaintiff, against Charles A. Nelson and Hattie Nelson, defendants, in the district court for Saline County, to foreclose a chattel mortgage executed by the defendants in the sum of $5,200, dated February 14, 1953, to secure a promissory note in the same amount executed and delivered to the plaintiff by the defendants on the same date. Defendants filed a general demurrer to the plaintiff's amended petition which was sustained by the court. The plaintiff elected to stand upon its amended petition. The court entered an order dismissing the plaintiff's action. From this order the plaintiff appealed.

The material allegations of the plaintiff's amended petition may be summarized as follows: The plaintiff is a corporation duly organized and existing by virtue of the laws of the State of Nebraska, with its principal place of business at Crete, Nebraska; that on or about February 14, 1953, the defendants, Charles A. Nelson and Hattie Nelson, husband and wife, for a valuable consideration made, executed, and delivered to the plaintiff a promissory note in the amount of $5,200, a true copy of which is attached to the petition and made a part thereof; that said note is on a printed form used by the plaintiff in connection with its installment loan business under sections 45-114 to 45-155, R. R. S. 1943; that originally it was attached to the chattel mortgage which is attached to the petition and made a part thereof; that at the time the defendants executed said note and chattel mortgage it was agreed by and between the parties that the loan should bear interest at the rate of 6 percent per annum, and the chattel mortgage was altered to carry out that agreement; and that the promissory note provided for the repayment of said loan of $5,200 in 24 equal installments of $221.33 each, the first installment being due March 14, 1953, and the final in-

stallment being due February 14, 1955.

The plaintiff further alleged that the agreed and proper rate of interest was 6 percent per annum on the unpaid balance of the principal amount of said loan, and 9 percent per annum upon the balances that were due and delinquent; that on February 14, 1953, defendants made, executed, and delivered to the plaintiff a chattel mortgage as security for the promissory note pledging one 1½-ton Dodge truck and a milk route known as "Roberts Dairy No. 5100" which mortgage was duly recorded in the proper office on December 23, 1954; that under the terms of the said note and mortgage there was due and payable on the 14th day of March 1953, $221.33, and a like amount was due and payable each 14th day of the months succeeding March 14, 1953, to and including February 14, 1955; that the defendants had failed, neglected, and refused to pay the amount due on said mortgage; that the balance after all credits were allowed, was $5,192.31; that under the terms of the said chattel mortgage the plaintiff elected to declare the full amount of the said note and mortgage and interest due and payable at once; and that the plaintiff was the owner and holder of the mortgage and the debt secured thereby and was entitled to foreclose the same for the satisfaction of the debt. The prayer was in the usual and proper form.

The assignments of error made by the plaintiff which are pertinent to a determination of this appeal may be stated as follows: "(1) The trial court erred in sustaining the demurrer filed by the defendants and entering judgment in their favor; (2) the court erred in finding the loan contract to be usurious or tainted with usury; (3) the court erred in the interpretation given the installment loan law and in particular section 45-138, R. R. S. 1943; and (4) the court erred in finding said loan contract void under section 45-138, R. R. S. 1943.

The function of a general demurrer to an amended

petition is as follows. In Gottula v. Standard Reliance Ins. Co., *ante* p. 1, 84 N. W. 2d 179, this court said: "A general demurrer admits all the allegations of fact in the pleading to which it is addressed, which are issuable, relevant, and material, and which are well pleaded; but does not admit the conclusions of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, as to the effect of the facts, nor allegations of what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken, or which are contrary to law." See, also, Brunson v. Ranks Army Store, 161 Neb. 519, 73 N. W. 2d 803; Richter v. City of Lincoln, 136 Neb. 289, 285 N. W. 593.

In passing on a demurrer to a petition, the court must consider the exhibits attached thereto and made a part thereof, if the allegations stated therein either aid the petition in stating a cause of action or charge facts going to avoid liability on the part of the defendant. Gottula v. Standard Reliance Ins. Co., *supra;* Buller v. City of Omaha, 164 Neb. 435, 82 N. W. 2d 578; Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692.

With the foregoing in mind we examine the plaintiff's amended petition with exhibits, true copies of the promissory note and chattel mortgage, attached thereto and made a part thereof, to determine whether or not the trial court erred in sustaining the defendants' demurrer to the plaintiff's amended petition as contended for by the plaintiff.

The note is designated a negotiable note. It is dated February 14, 1953, and is in the amount of $5,200. It recites in part: "FOR VALUE RECEIVED, the undersigned * * * promise to pay to the order of A-1 FINANCE COMPANY INC (Licensee), * * * the principal sum of _ _ Fifty Two Hundred and no/100 _ _ _ Dollars, together

with charges thereon, from the date hereof, until fully paid, at the rate of 3% per month on that part of the unpaid principal balance not in excess of $150.00 and 2½% per month on that part of the unpaid principal balance in excess of $150.00 and not in excess of $300.00 and ¾ of 1% per month on any remainder of such unpaid principal balance, which aggregate amount shall be payable in installments as follows: $221.33 on the 14th day of March, 1953, and a like amount on the 14th day of each succeeding month thereafter, and a final installment of the unpaid principal balance and unpaid charges on Febr. 14, 1955. * * * The lender hereunder is licensed under the laws of the State of Nebraska and the construction, validity and effect of this Note shall be governed by the laws of the State of Nebraska. * * * This Note is secured by ———————— Signature Charles A. Nelson Address Crete, Nebr. Signature Hattie Nelson Address Crete, Nebr."

The chattel mortgage is dated February 14, 1953. At the top of this instrument appears the following: "6% annually." This, standing alone, is meaningless. It is apparently no part of the mortgage. Then the mortgage shows it is made for the principal sum of $5,200 and the charges as stated therein are in accord with one certain promissory note of even date. The mortgage then pledges a 1½-ton Dodge truck and milk route, Roberts Dairy No. 5100. Later in the mortgage reference is made again to the promissory note, and the rate of charges as stated in the promissory note is the same as in the chattel mortgage except that the figures "¾ of 1%" have been circled in pencil with an arrow leading therefrom and pointing to the penciled insertion of the words and figures "6% annually—9% on unpaid due balances."

The plaintiff in the instant case is licensed under the installment loan law, sections 45-114 to 45-158, R. R. S. 1943. The design of this law is to license and control the business of making installment loans and to re-

strict the enforcement of collection of illegal loans once they have been made. Primarily the design, as is apparent, was that the law should have application to the duties and obligations of licensees and the rights and liabilities of those obtaining loans from licensees. See Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122. See, also, Mack Investment Co. v. Dominy, 140 Neb. 709, 1 N. W. 2d 295.

The pertinent section of the statutes here involved is section 45-138, R. R. S. 1943, which relates to installment loans, and loans in excess of one thousand dollars. It provides in part: "No licensee shall directly or indirectly charge, contract for or receive a greater rate of interest than nine per cent per annum upon any loan, or upon any part or all of any aggregate indebtedness of the same person, in excess of one thousand dollars." Certain restrictions and limitations appear in said section as follows: "No licensee shall enter into any contract of loan under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than twenty-one calendar months from the date of making such contract, if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower, or under which the borrower agrees to make payment of principal more than thirty-six calendar months from the date of making such contract, if the contract of loan is secured by a bona fide duly recorded mortgage on real estate owned by the borrower. Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment. When necessary in order to facilitate payment in accordance with the debtor's principal source of income, such a debtor whose principal source of income is from agriculture, stock raising or school teaching, the payment schedule may reduce or

omit installment payments, if at least one half of the credit is to be repaid within the first half of the applicable maximum maturity and if the other payments are increased in such manner that they will be substantially equal or declining in amount and sufficient in the aggregate to retire the loan in the period of twenty-one months or thirty-six months, as hereinabove in this paragraph provided for. Any contract of loan made in violation of this paragraph, 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."

The demurrer admits the contents of the promissory note and chattel mortgage which include the terms, conditions, and interest charges as set forth therein.

There is apparently a conflict to some extent in the promissory note and the mortgage. In this regard the following is applicable.

In Interstate Finance Corp. v. Brink, 232 Iowa 733, 6 N. W. 2d 120, 143 A. L. R. 587, it is held that where there is a conflict between a note and mortgage given to secure it, the former must prevail.

The note is the principal or primary contract or obligation. The mortgage is an incident. In case of conflict, the terms of the note prevail. See Wilson v. Tolles, 210 Iowa 1218, 229 N. W. 724. This doctrine is said to be the general holding. See, also, Smith v. Kerr, 130 Me. 433, 157 A. 314, which cites many supporting authorities to the above effect.

The plaintiff's petition pleads a contemporaneous oral agreement to the effect that the loan of $5,200 payable in 24 monthly installments was to bear interest at the rate of 6 percent per annum. The demurrer does not admit allegations that are irrelevant, immaterial, incompetent, or that are contrary to law. This allegation in the plaintiff's amended petition constitutes an attempt to vary the terms of a written instrument by al-

leging a contemporaneous oral agreement. The oral agreement alleged in the plaintiff's amended petition is an entirely different agreement than that contained in the promissory note and the chattel mortgage.

As stated in 12 Am. Jur., Contracts, § 233, p. 757: "As already intimated, preliminary negotiations cannot be allowed to contradict or vary the terms of the written contract. No parol agreement prior to, or contemporaneous with, a written contract, which tends to vary or contradict either its express provisions or its legal import thereto, can be considered in interpreting it. A parol agreement inconsistent with a written agreement made contemporary therewith is void. Parol understandings, although they induce the making of a written contract, are merged in the writing so that they cannot be used to change the contract or show any intent different from that expressed in the instrument."

And as stated in Perry v. Gross, 155 Neb. 662, 53 N. W. 2d 73: "Also the parol evidence rule is not merely one of evidence. It is one of substantive law as well. As a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement." See, also, Theno v. National Assurance Corp., 133 Neb. 618, 276 N. W. 375; Arman v. Structiform Engineering Co., Inc., 147 Neb. 658, 24 N. W. 2d 723.

It is apparent that the allegation as to the oral contract discloses that it is not a distinct oral agreement as to some collateral matter, nor an agreement as to a condition on which the performance of the written contract is to depend, which are the recognized exceptions to the parol evidence rule. This allegation is without merit.

This court has passed upon the very same question involved in this appeal, that is, where a loan in excess of $1,000 provides for a rate of interest in excess of 9 percent per annum, such a loan is void whether or not the lender is licensed under the installment loan law. In

Powell v. Edwards, *supra*, this court held: "Any loan made by a licensee under the installment loan law in excess of $1,000 wherein an interest rate in excess of 9 percent per annum is contracted for is void and the licensee shall have no right to collect or receive any principal or collect any interest on such loan." See, also, State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N. W. 2d 215; McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1; McNish v. Grand Island Finance Co., 164 Neb. 543, 83 N. W. 2d 13.

The district court in rendering its decision sustaining the demurrer did not state as a reason for the decision the excessive charges as shown by the contract. This court is not limited to the reasons given by the lower court in entering its order.

"A judgment rendered by the district court which is free from error is not rendered invalid by the fact that the court gave an incorrect reason therefor." Powell v. Edwards, *supra*. See, also, Longnecker v. Longnecker, 90 Neb. 784, 134 N. W. 926; Bastian v. Weber, 150 Neb. 709, 35 N. W. 2d 791; Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478.

We might add that the trial court did give a correct reason, other than those here considered, for sustaining the demurrer which will be discussed later in the opinion.

We conclude, for the reasons heretofore set forth, that the trial court did not err in sustaining the defendants' demurrer to the plaintiff's amended petition.

There is another reason why the demurrer should be sustained, and that is that the loan is invalid for the reason that it violated section 45-138, R. R. S. 1943, as hereinafter shown. We repeat a part of the section: "Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment."

The payments of $221.33 monthly provided for in the contract will not retire the loan in 23 payments, so a twenty-fourth payment is provided for in the contract, this being the final installment of the unpaid principal balance and unpaid charges which accrue at the end of the twenty-fourth month. It is apparent that the final installment or payment will be substantially greater than the preceding payments. This constitutes a violation of section 45-138, R. R. S. 1943, and renders the loan void. See State ex rel. Beck v. Associates Discount Corp., *supra.*

The trial court based its decision and held the loan in question to be void for the reason that it called for 24 monthly installment payments in violation of section 45-138, R. R. S. 1943. We have heretofore set out the pertinent provisions of this section. It does provide the maximum charges which may be made on a loan in excess of $1,000, limits the term of the loan specifically to 21 months, and further provides that any contract made in violation of this limitation as shown in said section shall be void. It is evident that the Legislature has determined that the public policy of the state does not permit a licensee, such as in the instant case, to make an installment loan which is not to be performed within 21 months of the date of the making of the loan, or where the loan is not made repayable in approximately equal installments. The courts will not interfere with the public policy thus pronounced by the Legislature.

In considering the statute before us we are required to observe the rule that the policy or impolicy of the statutory provision is the exclusive function of the Legislature and not of the courts. We must accept the statute as we find it and no requirement which is not in the statute will be or can be considered to govern our action. The general rule is that where the language of the statute is unambiguous there is no necessity for construction and courts cannot change the clear language of the statute. See State ex rel. Herman v. City of

Grand Island, 145 Neb. 150, 15 N. W. 2d 341. See, also, Cross v. Theobald, 135 Neb. 199, 280 N. W. 841; Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

As stated in Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602: "If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature."

For the reasons given herein we conclude that the trial court did not err in sustaining the demurrer of the defendants to the plaintiff's amended petition and dismissing plaintiff's action.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

EARL REDDING, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
85 N. W. 2d 647

Filed October 25, 1957. No. 34228.

1. **Witnesses: Evidence.** Statements by an injured person as to the cause of an injury and the circumstances attending its occurrence, made to a physician so long thereafter as not to be a part of the res gestae, are not ordinarily admissible since they are a narration of a past event and hearsay.
2. ———: ———. In a proper case a physician may testify to the injured person's narrative of the history of the injury, which was necessary for the purpose of diagnosis and treatment, where the statements are a part of the description of the injury and inseparable from the patient's complaint with respect thereto.
3. **Appeal and Error.** This court may, at its option, note a plain error not assigned.
4. **Criminal Law.** A criminal statute without a penalty clause is of no force and effect.
5. ———. Where a penal statute fails to provide a penalty, it is beyond the power of a court to prescribe a penalty.
6. **Homicide: Criminal Law.** A criminal statute which fails to

provide a penalty cannot constitute the basis for an unlawful act in a charge of manslaughter.

7. ———: ———. The unlawful act required by the manslaughter statute does not necessarily require proof of a violation of a criminal statute.

ERROR to the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Reversed and remanded.*

Sterling F. Mutz, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

CARTER, J.

Defendant was charged with manslaughter under the provisions of section 28-403, R. R. S. 1943. The jury returned a verdict of guilty and defendant was sentenced to serve 2 years in the Nebraska State Reformatory for Men. The defendant seeks a review of the case in this court by proceedings in error.

The defendant was a man 60 years of age and weighed 175 to 180 pounds. At the time of the alleged crime he was employed as an attendant at the Lincoln State Hospital, a hospital for patients who are mentally ill. The evidence shows that he was the chief attendant in ward A-1, at the time of the alleged offense. One Melvin Watkins was assigned as an attendant in the same ward and assisted the defendant in the performance of his duties. The ward is sometimes called the "untidy ward" because of the inability of some of the patients to control calls of nature. It is the duty of an attendant to see that patients get to bed at night, to get them up in the morning, take them to and bring them back from meals, see that they bathe regularly, change their clothes when necessary, and generally look after their care and welfare. On the day in question there were 39 patients in the ward of which the deceased was one.

The deceased, Charles Copperstone, was a man 76 years of age, about 5 feet 6½ inches tall, and weighed about 122 pounds. He was admitted to the hospital on July 24, 1942. He was suffering from an involutional psychosis and was an inmate continuously until his death. He was a quiet, well-behaved patient and had never caused any trouble. He was not in good physical health. He suffered from many ailments, most of which were the result of his advanced age.

The evidence shows that at or about 9 p.m., on November 1, 1956, the defendant inquired of the deceased if it wasn't about time to go to bed. The deceased said that it was. Defendant asked if he wanted help. The deceased replied that he did because he could not get up from his chair. Defendant reached under deceased's arms from the back, lifted him up, and practically carried him to his room some 10 feet away. Deceased stated he could not undress himself. Defendant undertook to remove his clothing as he lay on the bed. The deceased, for some reason not shown in the record, resisted the efforts of defendant to remove his clothes. About this time the witness Watkins came into the room and turned on the light. Defendant told him that he did not need the light and Watkins turned it off. Watkins testified that as he approached the room occupied by the deceased he heard groans and sounds like blows being struck. He testified also that he saw defendant striking the deceased three or four times with his fist, in the area of the chest, as near as he could tell. He then assisted defendant by straightening the legs of the deceased in order to remove his trousers. After removing his clothes they covered him up and left the room. Watkins testified that as they left the room the defendant said: "Maybe he will take off his clothes by himself the next time."

On November 2, 1956, at about 8 a.m., Dr. T. K. Jones was called to attend the deceased. He found bruises on the chest, the right arm, and shoulder. He was there-

upon sent to the receiving hospital. It was ascertained by X-ray pictures that deceased had several ribs broken on each side. He developed bronchopneumonia. He rested well the first night and the early part of the second. About 4:30 a.m. on November 4, 1956, he suddenly expired. An autopsy was performed which revealed 5 fractured ribs on the left side and fractures of 4 ribs on the right side. There is competent evidence by a physician that the rib fractures and the resulting shock were the precipitating causes of the death of the deceased.

The defendant testified that he had been employed at the hospital for many years, that he had an unblemished record, and that he had strictly complied with all rules during his employment. He testified that as he carried the deceased to his room on the night of November 1, 1956, the latter, suddenly and without warning, resisted going through the door and onto the bed. The deceased became belligerent. He swung his arms and attempted to hold the defendant's hands to avoid being undressed. After his shoes were removed the deceased slid off the bed. Defendant struck him lightly across the buttocks with a shoe. When he got him back on the bed defendant proceeded to remove his shirt. The deceased continued to resist, and defendant pushed him down with his right hand. Defendant stated he may have used his fist. He said he struck deceased lightly with the right hand only with such force as was necessary to get him down on the bed for the purpose of removing his clothing, and without such force as would fracture his ribs. He looked in deceased's room twice during the night and noticed that he appeared to be asleep on each occasion.

The defendant gave a written statement before the trial, which he said was voluntarily given. In the statement he admitted striking the deceased with a shoe on the buttocks or chest. He admitted striking him on the chest once or twice with his hand. He admitted that

as he left the room he told Watkins: "Maybe he will undress himself the next time," or something similar. He said the deceased made him angry when the deceased tried to prevent him from undressing him.

The manslaughter statute, section 28-403, R. R. S. 1943, provides in substance that whoever shall unlawfully kill another without malice, or unintentionally, while the slayer is in the commission of some unlawful act, shall be guilty of manslaughter. The State asserts that the defendant was, at the time, violating section 83-356, R. R. S. 1943, which provides: "Any person taking care of a mentally ill person, and restraining such person, either with or without authority, who shall treat such person with wanton severity, harshness or cruelty, or shall in any way abuse such a person, shall be guilty of a misdemeanor, and shall be liable in an action for damages."

The evidence as to whether or not the defendant was engaged in an unlawful act is in conflict. It clearly raised a question for the jury under proper instructions. The trial court, therefore, correctly overruled defendant's motion for a directed verdict at the close of the State's evidence and at the close of all the evidence.

The defendant complains of the admission of certain evidence to which proper objection was interposed. On direct examination Dr. Jones was asked the following questions and gave the following answers: "Q. You may relate the history that Mr. Copperstone furnished you at that time, Doctor. * * * A. I asked him how he received his injury, and he said that he had been beaten up by two attendants. Q. Did he say when? * * * A. He said he was injured the evening before. That was on the morning of November 2nd. He said, 'I was injured last evening.'" Objection was duly made to each question on the ground that it was hearsay, without foundation, and incompetent. The objections were overruled. Motions to strike the answers were likewise overruled by the trial court.

The evidence was clearly within the hearsay rule. No foundation evidence was offered to bring it within any of the exceptions to the hearsay rule such as being res gestae or a dying declaration. It is urged that it is admissible as a part of the medical history obtained by the physician from the deceased. A statement to a physician is not admissible merely because it is a part of a medical history. Strict limitations have been placed upon the admission of such evidence. The general rule is: Statements by an injured person as to cause of the injury and the circumstances attending its occurrence, made to a physician so long thereafter as not to be a part of the res gestae, are not admissible since they are a narration of a past event. The cases on this subject have been collected in 67 A. L. R. 25 and 80 A. L. R. 1529. There are cases, usually civil rather than criminal, where a physician may testify to the injured person's narrative of the history of the injury, which was obtained for the purpose of diagnosis and treatment, where the statements are a part of the description of the wound and inseparable from the patient's complaint with respect thereto. Under this rule, as an example, the physician may testify, as a part of the history, that the patient said he was bitten by an insect, or that he bruised the inflamed parts. The physician may testify as to his patient's complaints of pain resulting from an injury, but not as to its cause and manner of occurrence. In the case before us the physician found objective symptoms of the injury on the body of the deceased. By palpation of the area he was able to localize the injury by the expressions of pain by the deceased. The manner in which the trauma was sustained, and the person responsible for its application, was of no importance to the physician in diagnosing and treating the deceased. The evidence to which objection was made was nothing more than the recitation of a past event and inadmissible as hearsay. Field v. State, 57 Miss. 474, 34 Am. R 476; State v. Gruich, 96 N. J. L. 202, 114 A. 547; State v.

Barber, 13 Idaho 65, 88 P. 418. See, also, the cases collected in 67 A. L. R. 25.

The hearsay evidence was clearly prejudicial. With the pertinent evidence in direct conflict, the hearsay statement of Dr. Jones that the deceased said it resulted from a beating by two attendants could well have tipped the scales by which the jury was weighing the evidence in favor of the State. It was reversible error for the trial court to admit this evidence over proper objection. The State cites Roberts v. Kubik, 129 Neb. 795, 263 N. W. 143, in support of its contention that the hearsay statements of the physician were not prejudicial. The case is clearly distinguishable. In that case the physician was permitted to repeat the statements made to him by the plaintiff as to who inflicted the injuries, and the manner in which it was done. The opinion shows that every fact recited by the physician was testified to by plaintiff's witnesses and that the plaintiff also testified to every fact testified to by the physician. The error in admitting the evidence was held to be without prejudice. In the case before us the physician's informant was dead at the time of the trial. No evidence of the version of the deceased was in the record. It was new primary evidence of pertinent facts. It is not similar to the situation existing in Roberts v. Kubik, *supra.*

Since the case must be reversed for a new trial, we shall point out a plain error in the record which was not raised by proper objection, in order that its repetition may be avoided. See Hartman v. Hartmann, 150 Neb. 565, 35 N. W. 2d 482. The charge contained in the information is that the defendant unlawfully killed Charles Copperstone while defendant was engaged in an unlawful act. The unlawful act relied on was the alleged violation of section 83-356, R. R. S. 1943. We point out that this section contains no penalty for the criminal violation of its terms. Nor is a penalty fixed by any other applicable section of the statutes.

All crimes in this state are statutory. A penalty is

a necessary part of a statutory offense. One may not be convicted for a purported criminal offense where the statute provides no penalty for its violation. In State v. Fair Lawn Service Center, Inc., 20 N. J. 468, 120 A. 2d 233, the court said: "A law generally consists of three parts: (1) The scope and intent of the law; (2) the content of the law; (3) a sanction or penalty, and this is peculiarly true of a criminal or quasi-criminal statute. A criminal statute without a penalty clause is of no force and effect. The penalty is an essential to such a statute, and if none is specified a court has no warrant to supply the penalty if the Legislature has failed to clearly manifest such intention to impose one." In McNary v. State, 128 Ohio St. 497, 191 N. E. 733, the court said: "A statute cannot be classed as a criminal statute unless a penalty is provided for its violation. A criminal statute without a penalty is fundamentally nugatory."

We conclude that section 83-356, R. R. S. 1943, does not create a statutory offense. It is completely nugatory insofar as it purports to create a criminal offense. This being true, the statute cannot properly add to or detract from the elements of the crime of manslaughter charged in the information. It was prejudicial error, therefore, for the trial court to instruct with reference to section 83-356, R. R. S. 1943, and assume that a violation of such section was proof of an unlawful act required by section 28-403, R. R. S. 1943.

We do not intend to infer that an unlawful act under section 28-403, R. R. S. 1943, must necessarily arise out of the violation of a criminal statute. Such is not the fact. See Stehr v. State, 92 Neb. 755, 139 N. W. 676, 45 L. R. A. N. S. 559, Ann. Cas. 1914A 573; Annotations, 10 A. L. R. 1137, 1151. What we do say is that a criminal statute creating an offense, but containing no penalty, is nugatory in all respects, and proof of its violation is not of itself sufficient to prove an unlawful act in a prosecution for manslaughter.

The information charges the crime of manslaughter although it uses the word "feloniously" unnecessarily. It is mere surplusage under the previous holdings of this court. There is evidence in the record of an unlawful act, although disputed by the defendant. A jury question is therefore present. The defendant is entitled to have the case submitted on competent evidence and proper instructions. For the reasons given, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

YEAGER, J., participating on briefs.

EDWARD V. LUCAS ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

85 N. W. 2d 638

Filed October 25, 1957. No. 34242.

1. **Taxation.** The presumption is that, when an officer or assessing body values property for assessment purposes, he or it acts fairly and impartially.
2. ———. If the assessor does not make an inspection of the property but accepts the valuation thereof fixed by a professional appraiser, the presumption in favor of the assessment does not obtain but the burden in such a case remains upon the protesting party to prove the assessment is excessive.
3. ———. The burden imposed on the complaining taxpayer is not met merely by showing a difference of opinion between his witnesses and the county assessor or the county board of equalization with regard to values unless it is established by clear and convincing evidence that the valuation placed upon his property, when compared with valuations placed on other similar property, is grossly excessive, is the result of a systematic exercise of intentional will or failure of plain legal duty, and is not mere error of judgment.
4. ———. Generally, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by the officers were excessive or discriminatory

when compared with values placed thereon by such witnesses.

5. ———. The exemption from taxation provided by section 3 of the Act of Congress of August 12, 1935, Title 38, U. S. C. A., section 454a, in respect to payments of benefits to veterans by the government of the United States, does not extend to real estate purchased in part or wholly out of such payments.

6. **Constitutional Law: Appeal and Error.** This court will not, in an appeal, consider or determine the constitutionality of a statute unless it has been made an issue in the case in the trial court.

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

Fitzgerald, Ross & O'Connor, for appellants.

Eugene F. Fitzgerald, John C. Burke, and *Arthur D. O'Leary,* for appellee.

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

BOSLAUGH, J.

The controversy in this case relates to the valuation placed on real estate owned by Edward V. Lucas and his wife for taxation purposes and a claim of partial exemption of the property from liability to local taxation to the extent of $10,000 of the cost of the property which was paid with money received from the government of the United States by and for the use of Edward V. Lucas, a disabled veteran. Each of the claims was rejected by appellee and the district court. Appellants have continued the contest by this appeal.

Edward V. Lucas, referred to herein as appellant, a veteran of World War I, suffered a service-connected disability resulting in the amputation of his legs. He acquired and is the owner of Lot 4 in Tegtmeier's Second Addition in Douglas County. In 1954 he constructed a house thereon which was specially adapted for his use because of the nature of his disability. The house has ramps instead of stairs, wide hallways and doors to permit easy passage of a wheel chair, special

bathroom fixtures, and a double door in the bedroom of appellant to afford him direct and easy exit from the house in the event emergency withdrawal therefrom should be required. The house was constructed according to plans and drawings approved by and the regulations of the Veterans Administration. This agency furnished appellant $10,000 which was required to be and it was applied to the payment of that amount of the cost of the house constructed. The remittance of the grant of $10,000 made by the United States was payable to appellant and transmitted to and received by the Veterans Administration office in Omaha. Appellant endorsed the draft in blank in that office and the Veterans Administration applied the proceeds of it to the payment of that amount of the cost of the house.

The evidence offered by appellants as to the value of the property was as follows: Edward V. Lucas said the lot cost $3,750. The cost of constructing the house thereon was $21,000. The total cost of the whole property was $24,750. Repairs necessary because of faulty construction would, in his opinion, cost $2,000. His opinion was that the fair market value of the property was $20,000. He did not know the valuation for taxation of other residence properties in the neighborhood. There was no other evidence offered by appellants on this subject.

The county assessor of Douglas County testified that in his opinion the basic value of the lot was $2,080; that the basic value of the improvements thereon was $15,900; and that the basic value of the whole property was $17,980. The county assessor did not inspect the property but he had the report made by the tax appraisal board of the county. The county board of equalization sustained and adopted the basic value of the property as determined and fixed by the assessor and fixed the ratio of basic value to actual value at 70 percent.

The county assessor of Douglas County had held

that office since 1939. For the year 1956 he assessed the basic value of the lot of appellant at $2,080 and the basic value of the improvements on it at $15,900. The assessor did not inspect the property. He based his assessment upon his many years of experience in assessing property in that county and upon information gathered and reported to him by the tax appraisal board of the previous year. He testified that the valuation of the property of appellant compared favorably with valuations of comparable property in this area of the county. Appellants insist that the basic valuation of the property involved is excessive. They say that a basic valuation of $17,980, as fixed by the assessor, adopted by the board of equalization, and adjudicated by the district court, requires an actual value of the property of $25,685 because the basic value is 70 percent of the actual value. They also protest that there was no evidence produced by appellee to sustain an actual value in that amount. Appellants misconceive the party upon whom was cast the burden. They do not assert or attempt to establish that the assessed value of the property involved was not fairly and properly equalized when considered with the assessment of all other similar property. The only evidence offered by appellants was that of Edward V. Lucas and he stated that he had no information of the valuation placed on other comparable property in the neighborhood of his property. He testified only that his opinion of the fair market value of his property was $20,000.

The burden was on the property owner to establish the assessment was excessive. If the county assessor accepted the valuation of this property as determined and reported by the tax appraisal board, the presumption that he properly assessed the property would not exist but the burden would nevertheless be on the property owner to establish that the assessment was excessive. This court declared in Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489: "The presumption

is that, when an officer * * * values property for assessment purposes, he acts fairly and impartially in fixing such valuation. * * * Where the assessor does not make a personal inspection of the properties, either by himself or a deputy, but accepts the valuations thereof fixed by a professional appraiser the presumption in favor of the assessment does not obtain. However, the burden in such case is still upon the protesting party to prove the assessment is excessive."

The evidence on behalf of appellants is not sufficient to satisfy the burden cast upon them in this case. In LeDioyt v. County of Keith, 161 Neb. 615, 74 N. W. 2d 455, it is said: "The burden imposed on the complaining taxpayer is not met merely by showing a difference of opinion between his witnesses and the county assessor or county board of equalization with regard to value unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain legal duty, and not mere errors of judgment. * * * Generally, the valuation of property for tax purposes by the proper assessing officers should not be overthrown by the testimony of one or more interested witnesses that the values fixed by such officers were excessive or discriminatory when compared with values placed thereon by such witnesses. Otherwise, no assessment could ever be sustained." The contention of appellants in this respect is not sustained.

The immunity of the property involved to local taxation to the extent of a value of $10,000 is claimed by virtue of an Act of Congress. The Act of Congress of August 12, 1935, Title 38, U. S. C. A., section 454a, contains the following: "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from

taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments."

The payment of benefits in the sum of $10,000 above mentioned was made to appellant under a law of the United States relating to veterans within the terms of the Act of Congress described in the part thereof set out above. The proceeds of the grant were immediately upon receipt of them by appellant invested in the real estate owned by him and concerned herein. The exemption from taxation erected by the act applies only to "payments of benefits due or to become due." The real estate in which the benefits were invested by appellant does not qualify under the terms and limitations of the immunity granted by the act. Property in which benefits to veterans have been invested is excluded from this exemption.

Carrier v. Bryant, 306 U. S. 545, 59 S. Ct. 707, 83 L. Ed. 976, considered and interpreted the relevant Act of Congress. It is said therein: "The first sentence grants exemption from taxation, claims of creditors, attachment, levy or seizure under any legal process whatever. The things exempted are 'payments of benefits' due or to become due either before or after receipt by the beneficiary. * * * Investments purchased with money received in settlement of benefits are not such payments due or to become due. Accordingly, giving the words employed their ordinary meaning, the notes and bonds in question are not exempted by the first sentence in § 3. It left them, like other property, subject to taxation, claims of creditors, and legal process. * * * The second sentence of the section clearly recognizes the distinction between benefit payments and property pur-

chased with money therefrom. It declares the exemption provisions in the first sentence shall not attach to claims of the United States; also that exemption from taxation shall not extend to property purchased out of benefit payments. * * * We find nothing in the history or supposed purpose of the enactment adequate to support a construction not in accord with the ordinary import of the words employed."

Lawrence v. Shaw, 300 U. S. 245, 57 S. Ct. 443, 81 L. Ed. 623, 108 A. L. R. 1102, considered the relevant provisions of the Act of Congress of August 12, 1935, set out in part above, in respect to whether bank credits of a veteran which resulted from deposit of warrants received from the government in payment of benefits were exempt from local taxation when the deposits were made in the ordinary manner so that the proceeds thereof were subject to draft upon demand for the use of the veteran. The court therein said: "The provision of the Act of 1935 that the exemption should not apply to property purchased out of the moneys received from the Government shows the intent to deny exemption to investments, as was ruled in the Trotter case (290 U. S. 354). * * * We hold that the immunity from taxation does attach to bank credits of the veteran or his guardian which do not represent or flow from his investments but result from the deposit of the warrants or checks received from the Government when such deposits are made in the ordinary manner so that the proceeds of the collection are subject to draft upon demand for the veteran's use. In order to carry out the intent of the statute, the avails of the government warrants or checks must be deemed exempt until they are expended or invested."

Trotter v. Tennessee, 290 U. S. 354, 54 S. Ct. 138, 78 L. Ed. 358, contains this language: "The question is whether lands in Tennessee purchased by the guardian of a veteran with moneys received from the United States for the use of the disabled ward are subject to

taxation. * * * By the World War Veterans Act (Title 38 U. S. C. A., § 471 et seq.), 'The compensation, insurance and maintenance and support allowance * * * shall not be assignable; shall not be subject to the claims of creditors * * *; and shall be exempt from all taxation.' * * * Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. * * * On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian. * * * We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. * * * Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of 'compensation, insurance, and maintenance and support allowance payable' to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the state. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here." See, also, Raburn v. Board of County Commissioners of McIntosh County, 168 Okl. 4, 31 P. 2d 840; Ford v. Harrington, 189 Ark. 48, 70 S. W. 2d 49; City Council of Augusta v. Ransom, 179 Ga. 179, 175 S. E. 497; State v. Wright, 224 Ala. 357, 140 So. 584; Johnson v. Board of Commissioners of Yankton County, 61 S. D. 372, 249 N. W. 683; Annotation, 108 A. L. R. 1105.

The clear intent of the applicable Act of Congress is that payment of benefits due or to become due shall be exempt from taxation before or after receipt thereof by the veteran so long as they are not invested by him

but that the immunity from taxation does not extend to property purchased in whole or in part with the proceeds of the benefits granted him by the government. The exemption is limited to the one situation when payments of benefits are due or to become due. The payment of the grant made to appellant involved herein had departed from that situation and immunity from taxation of the proceeds of the grant was dissipated when investment of the proceeds was made by the beneficiary.

The Legislature of 1955 passed what is sometimes referred to as the basic value law. Laws 1955, c. 289, § 1, p. 918; § 77-112, R. S. Supp., 1955. Its invalidity is attempted to be established by appellants on constitutional grounds by a discussion in their brief. An issue of unconstitutionality of the act may not be made in this appeal because it was not made an issue before trial in the district court. The first mention of the subject in the record is an assertion in the motion for a new trial filed by appellants. The assignments of error made by them omit any reference to invalidity of the statute. The argument of appellants that the statute is invalid lacks foundation and must be disregarded in the consideration and decision of this appeal. Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737.

The judgment should be and it is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

CLAUDE EDEN, APPELLANT, V. RICHARD E. KLAAS, APPELLEE.
85 N. W. 2d 643

Filed October 25, 1957. No. 34259.

1. **Affidavits: Judgments.** An affidavit of a litigant consisting of denials, general allegations, conclusions, arguments, and statements that would not be admissible in evidence is of no avail in opposition to a motion for a summary judgment.

2. ———: ———. An affidavit opposing the rendition of a summary judgment to be effective must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein.
3. **Trial: Judgments.** In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law.
4. ———: ———. Summary judgment is effective and serves a separate useful purpose when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged.
5. **Negligence: Judgments.** If the undisputed facts conclusively establish in an action for negligence that plaintiff was guilty of contributory negligence more than slight when compared with the negligence of the defendant as a matter of law, a motion for summary judgment for the defendant may properly be sustained.
6. **Automobiles: Negligence.** The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence as a matter of law and defeats recovery.

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

Brogan & Brogan and *Wagner, Wagner & Conrad,* for appellant.

Frederick M. Deutsch and *Gordon L. Gay,* for appellee.

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

BOSLAUGH, J.

This is an action for personal injuries, property damage, medical services, and expenses sustained and incurred by appellant because of alleged negligence of appellee resulting in an automobile accident. A motion by appellee for a summary judgment was sustained by the trial court and a judgment of dismissal of the cause was

rendered. This appeal contests the correctness of the action of the trial court.

Appellant alleged in his amended petition that he was operating his automobile, towing a two-wheel trailer, east on a county road about 1 mile west and 2 miles south of Humphrey, traveling at a speed of approximately 40 miles per hour on the right or south part of the road in a careful manner about 4:30 on the afternoon of November 4, 1955; that appellee was driving his automobile north on a county graveled road in a reckless and careless manner and at an excessive speed; that the roads intersected at the place of the accident; that the intersection had no traffic controls; that as appellant approached the intersection he looked to his right and to his left, saw no traffic, and entered it in a lawful and prudent manner; and that when appellant was more than half the distance through the intersection the automobile of appellee traveling from the south, being operated recklessly and at an excessive speed, was out of control of the driver and it collided with the right center of the automobile of appellant, threw and forced it into the ditch north and east of the intersection, and caused the damages he seeks to recover in this action which were caused solely by the negligence of appellee.

Appellee made a motion for a summary judgment in his favor on the grounds stated therein that his automobile was to the right of appellant; that appellee had the right-of-way to cross the intersection which was not accorded to him by appellant; that the intersection was level and free from obstructions to vision for at least a block each way from it to travelers on the highways concerned but appellant operated his automobile into the intersection without looking and did not see appellee as he approached and entered it; and that appellant was guilty of more than slight negligence as a matter of law which directly and proximately caused the collision described in the amended petition of appellant.

The uncontradicted evidence in support of a motion

for summary judgment is as follows: The appellant in his deposition testified that his age was 42 years; that at the time of the accident he was in good health; that he lived 8 miles west and 6 miles south of Humphrey; that the place of the accident was 2 miles south and 1 mile west of that town; that he was traveling to Humphrey when the accident happened to do some trading, was following a route he had used several times, and was familiar with the road; that he was driving a 1947 two-door Chevrolet automobile towing a two-wheel trailer; that his car was in good working order and had good brakes; that the intersection, the site of the collision, was flat and level and vision was unobstructed for at least a quarter of a mile in all directions from it; that there was no interference with vision from a vehicle entering the intersection from any direction for a distance of at least 250 feet; that the roads which formed the intersection were flat and level on all sides of it; that appellant moved from the west toward and into the intersection on a road, the graveled surface of which was about 23 feet wide and there was only a slight ditch on either side of it; that the north-and-south intersecting road was of the same nature and condition; that there were no traffic signs at the intersection; that there were evergreen trees on the west side of the north-and-south road right-of-way commencing 250 feet south of the east-and-west center line of the intersection and they extended some distance to the south; that the speed of the car of appellant was around 40 miles per hour; that he continued that rate of speed into the collision without using the brakes of his automobile or attempting to change his course to avoid the accident; that he saw the automobile of appellee only a fraction of a second before the collision when it was about 10 or 15 feet away; that his attention was attracted thereto by appellee sounding the horn of his car; that appellant did not know the location in the intersection where the collision occurred or how far he had traveled into it; that appellant looked

to the right or south when he was 150 or 200 feet west of the intersection and that was the last and only time he looked to the south as he traveled toward the intersection; that there was no interference with his vision to the south from where he looked in that direction to and into the intersection except the evergreen trees 250 feet south of its center line; that appellant formed no judgment and had no opinion of the rate of speed of the automobile of the appellee and did not attempt to state the miles per hour he was traveling because appellant only had a momentary view of the car of appellee before the accident; that the accident happened so fast that it was probably only a split second; that appellant did say he thought appellee was coming fast and his only basis for that was the damage done by the collision; and that he, appellant, could not give any reason why he did not see the vehicle of appellee when he looked to the south. He said: "I can't figure it out."

The photographs of the intersection of the roads and the area surrounding it and the unsigned transcript of statements made by appellant a few days after the accident, which were placed in evidence, do not conflict in any material respect with the testimony of appellant contained in his deposition. Appellant complains that the transcript was improperly received in evidence over his objections. The validity of this assignment need not be decided in this case. If there was error it was without prejudice because in a cause tried to the court without a jury the improper admission of evidence is immaterial on appeal if the judgment rendered by the court is sustained by sufficient competent evidence. Peterson v. State, 157 Neb. 618, 61 N. W. 2d 263. The opposing affidavit of appellant is of no avail because it consists of conclusions as "that as he (appellant) approached said intersection, he did so in a reasonable and careful and prudent manner and at a lawful rate of speed"; general statements as "that he looked both to the south and to the north of said intersection and observed no traffic

approaching from either direction"; and matters which the record shows were not within the knowledge of appellant as "that defendant (appellee) failed to slow down as he approached said intersection at a speed of 70 miles per hour." There is no statement in the affidavit when or from what location appellant looked to the south. He testified that he had no knowledge of the rate of speed appellee was traveling.

It is provided in section 25-1334, R. R. S. 1943: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." In 3 Barron and Holtzoff, Federal Practice and Procedure, § 1237, p. 93, the author says: "Rule 56 (e) provides that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Under this provision, therefore, statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments, and of statements which would be inadmissible in evidence * * *." The court said in Engl v. Aetna Life Ins. Co., 139 F. 2d 469: "Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. * * * In the present case we have from the plaintiff not even a denial of the basic facts * * *." Likewise in this case there is no denial by appellant of the basic fact that he did not look for traffic during the time that he was traveling from 150 to 200 feet to the intersection and that there was no obstruction interfering with vision in any direction for that entire distance.

Appellant asserts that the summary judgment in this case deprives him of a jury trial and of his property

without due process of law contrary to the Constitution of the United States and the Constitution of Nebraska. A summary judgment is authorized by statute, the validity of which has been recognized. §§ 25-1330 to 25-1336, R. R. S. 1943; Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543; Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290; Hoke v. Welsh, 162 Neb. 831, 77 N. W. 2d 659; Kissinger v. School District No. 49, 163 Neb. 33, 77 N. W. 2d 767. In Miller v. Aitken, *supra,* the court said: "In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law. * * * Summary judgment is effective and serves a separate useful purpose only when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. * * * Where the undisputed facts conclusively establish in an action for negligence that plaintiff was guilty of contributory negligence more than slight when compared with the negligence of the defendant as a matter of law, a motion for summary judgment for the defendant may properly be sustained."

The evidence of appellant contained in his deposition is without dispute. If it establishes that he was guilty of contributory negligence more than slight as a matter of law, there is no genuine issue of fact in the case to be tried and it is immaterial in that event if appellee was or was not guilty of negligence at the time of the collision of the automobiles. There was a clear view for 250 feet west of the intersection to and through it and from 250 feet west of it there was a clear view of the north-and-south road for at least 250 feet south from the center line of the intersection. Appellant, while driving toward it, looked to the south or to his right once when he was 150 to 200 feet west of the intersection. He did not look again to the south until he was in the intersection and heard the horn on the

automobile of appellee sounded and the collision happened in a fraction of a second thereafter. It is conclusive that appellant, as he came toward the site of the accident, did not look to the south from which direction the automobile of appellee approached where by looking he could see and avoid the accident. He took dangerous chances in disregard of his safety which, as a matter of law, was more than slight negligence and fatal to any recovery by him in this case. It is said in Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491: "The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats recovery." See, also, Miller v. Aitken, *supra;* Wendel v. Carlson, 162 Neb. 742, 77 N. W. 2d 212; Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405.

The judgment should be and it is affirmed.

AFFIRMED.

IOTA BENEFIT ASSOCIATION, A CORPORATION, APPELLANT, V. COUNTY OF DOUGLAS, APPELLEE.
85 N. W. 2d 726

Filed November 1, 1957. No. 34182.

1. **Taxation.** A person who claims that his property is not subject to taxation must show affirmatively the facts rendering it exempt.
2. ———. The property which is claimed to be exempt must come clearly within the provisions granting such exemption.
3. ———. In determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control.
4. ———. A property that is being used by members of a university or college fraternity as a home while attending such university or college is not being used exclusively for charitable or educational purposes within the intent and meaning of

Article VIII, section 2, of the Constitution of Nebraska and section 77-202, R. R. S. 1943.

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

Young, Holm & Miller and *Edmund D. McEachen,* for appellant.

Eugene F. Fitzgerald, John C. Burke, and *August Ross,* for appellee.

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

WENKE, J.

This is an appeal from the district court for Douglas County. It involves the question of whether or not certain real property located at 4120 Dewey Avenue, Omaha, Douglas County, Nebraska, owned by the Iota Benefit Association, a Nebraska non-profit corporation, is exempt from taxation because it is owned and used exclusively for charitable and educational purposes within the intent and meaning of the Nebraska constitutional and statutory provisions relating thereto.

The property is legally described as: "Lots Twenty-five (25) and Twenty-six (26), Block Sixteen (16), Highland Place, an Addition to the City of Omaha, as surveyed, platted and recorded, Douglas County, Nebraska." Since February 26, 1952, it has been owned by the Iota Benefit Association and used by Iota Chapter of Phi Rho Sigma, a national fraternity the membership in which is limited to medical students, as a fraternity house. Prior to February 26, 1952, and since June 29, 1928, it was owned by Iota Investment Company, also a non-profit Nebraska corporation, and occupied by the same fraternity. Membership in both corporations was and is primarily limited to alumni of the fraternity.

In 1951, 1952, 1953, and 1954 this property was assessed and taxes levied thereon by the county of Douglas and the city of Omaha. On November 18, 1954, Iota

Benefit Association paid under protest the taxes levied on this property by the county for the years of 1951, 1952, and 1953 and by the city for the years of 1952, 1953, and 1954, basing its protest on the contention that the property was not subject to taxation for those years because it was owned and used during that time exclusively for charitable and educational purposes and not owned or used for financial gain or profit.

Within the time required by the statutes then in effect, Iota Benefit Association filed a claim with the county board of Douglas County asking that the taxes it had paid under protest be refunded. Its right to a refund thereof was made on the same basis as the protest. The county board disallowed the claim. An appeal was taken to the district court. That court sustained the action of the county board and dismissed the appeal. Its motion for new trial having been overruled, Iota Benefit Association perfected an appeal to this court.

Article VIII, section 2, Constitution of Nebraska, provides, insofar as here material, that: "The Legislature by general law may exempt * * * property owned and used exclusively for educational, * * * charitable * * * purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

In this respect the Legislature provided that: "The following property shall be exempt from taxes: * * * (3) Property owned and used exclusively for educational, * * * charitable * * * purposes, when such property is not owned or used for financial gain or profit to either the owner or user; * * *." § 77-202, R. R. S. 1943.

In Watson v. Cowles, 61 Neb. 216, 85 N. W. 35, we said: "A person who claims that his property is not subject to taxation must show affirmatively the facts rendering it exempt." And in Y.M.C.A. of Omaha v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123, we said: "* * * the property which is claimed to be exempt must come clearly within the provisions granting

such exemption." However, we said in Ancient and Accepted Scottish Rite v. Board of County Commissioners, 122 Neb. 586, 241 N. W. 93, 81 A. L. R. 1166, that: "* * * while it is a well-settled general rule that exemptions from taxation are to be strictly construed, and their operation is never to be extended by construction, the power and the right of the state to tax are always presumed, and the exemption must be clearly granted. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the legislature, but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption." Therein we stated that: "* * * we are committed to the doctrine that, in determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control."

The evidence establishes that the property was neither owned nor used for financial gain or profit by either the owners or users during the period in question. It can also be said there was not sufficient evidence adduced at the trial showing the property was owned and used for charitable purposes to make that an issue here. Consequently the only question remaining is, was it owned and used exclusively for educational purposes?

In Ancient and Accepted Scottish Rite v. Board of County Commissioners, *supra,* in discussing the question of what is meant by educational purposes, we said: "* * * lexicographers and the courts agree in defining 'educational' as pertaining to 'education.' The latter word taken in its full sense is a broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training—moral, intellectual, and physical."

Iota Investment Company, predecessor to appellant, acquired the property herein involved on June 29, 1928, and, since that time, it has been occupied by the members of Iota Chapter of Phi Rho Sigma as a fraternity house. It was being so occupied at the time of trial under a lease arrangement whereby the fraternity paid appellant $2,700 per annum for its use. Out of this fund appellant pays for the upkeep of the outside of the house and yard, the insurance on the building, taxes, and all other items relating thereto which may come up from time to time. It is not rented on a basis to yield a profit. In fact, part of appellant's income is from donations by its members. The upkeep of the inside of the house is the responsibility of the active chapter.

A careful study of the purposes for which appellant was incorporated, as set forth in Article III of its Articles of Incorporation, reveals objectives which, if they were the primary purpose for which the property was being used, would bring it within the exempt provisions of the statute as it relates to property owned and used exclusively for educational purposes. However, we think, as hereinafter more fully discussed, that the primary use to which the property is being put is covered by the following language contained therein: "* * * to support and maintain, on a cost sharing plan, a dormitory, to provide living quarters for undergraduate members of Iota Chapter of Phi Rho Sigma Fraternity * * *."

To carry out this purpose the foregoing article provides: "The corporation shall have the power to acquire, hold, improve, lease, mortgage and sell real estate and personal property necessary or suitable in the furtherance of its objects and purposes; and shall be vested with all the powers made available to it by the Statutes of Nebraska."

Iota Chapter of Phi Rho Sigma selects its membership exclusively from students attending the University of Nebraska College of Medicine. Its chapter house is located across the street from the campus of the medical

college. The fraternity house consists of three floors and a basement. On the first floor is a large living room, dining room, and kitchen. On the second and third floors are 19 rooms each of which is usually occupied by one or two men for living purposes, which includes study. There are also two bathrooms and a dormitory on the upper two floors. The basement also has two rooms in which members live. In addition thereto it contains a storeroom, recreation room, and bathroom.

At the time of trial the chapter had 115 members of whom 31 were living in the house. However, the number of the latter usually varies somewhere between 30 and 40. Meals are regularly served to those who live in the house and also to all other members, alumni, and guests who stop in at mealtime. Generally speaking the charge made for board and room to those living in the house, and for meals to members and alumni stopping in to eat, is less than it would be outside. All members of the active chapter pay dues which gives them the right to use the house and all its facilities. Although a housekeeper is employed to take care of the house generally, however, each member is responsible for the care of his room and of his bed in the dormitory. The fraternity seems to carry on a reasonably active social program and is a family unit for the members living there. In other words, it provides, in addition to a place to live and study, sufficient activities for relaxation and recreation to properly balance the life of these young men. It is their home while attending the medical college.

As stated in the annotation in 35 A. L. R. 1045: "The primary purpose of a college fraternity house is to furnish a private boarding place and dormitory for the use of the fraternity members; and with this fact in mind, the courts have generally held that college fraternity houses are not exempt from taxation." Some of the cases so holding are: Alpha Tau Omega Fraternity v.

Board of County Commissioners, 136 Kan. 675, 18 P. 2d 573; Phi Beta Epsilon Corp. v. City of Boston, 182 Mass. 457, 65 N. E. 824; Theta Xi Bldg. Assn. v. Board of Review, 217 Iowa 1181, 251 N. W. 76; Inhabitants of Orono v. Sigma Alpha Epsilon Society, 105 Maine 214, 74 A. 19; Kappa Gamma Rho v. Marion County, 130 Ore. 165, 279 P. 555; People ex rel. Carr v. Alpha Pi of Phi Kappa Sigma Educational Assn., 326 Ill. 573, 158 N. E. 213, 54 A. L. R. 1376. As held in Alpha Tau Omega Fraternity v. Board of County Commissioners, *supra:* "A house which is used by members of a college fraternity as a home while attending college is not used exclusively for literary, educational or scientific purposes * * *." And as stated in Phi Beta Epsilon Corp. v. City of Boston, *supra:* "But the housing or boarding of students is not of itself an educational process any more than is the housing or boarding of any other class of human beings. The nature of the process, so far as respects its educational features, is not determined solely by the character of those who partake of its benefits."

But appellant contends these cases are not controlling because the educational benefits received by the members of a social fraternity are not the same as in a professional fraternity where all the members of a class are, to a large extent, taking the same subjects and therefore attending the same classes. We think there is some merit to this contention. Certainly this fact tends to make group study and discussion much more effective than in situations where the members are in different colleges, take different courses, and consequently have different classes.

We have carefully examined all the evidence in regard to what is being done for the active members of Iota chapter in an educational way. While we think what is being done in this regard is above what is being done for the members of the average social fraternity, we are, however, still fully convinced that the primary

purpose to which the property is being put is to provide a fraternity home for the members living in it and a place for the other members to gather for fraternity activities and that the educational benefits the members reap therefrom are incident thereto. It would serve no useful purpose, in this respect, to set out in detail the evidence relating to formal lectures given from time to time at the house by the upperclassmen, graduate students, resident physicians, and faculty members on designated medical subjects; the tutoring of underclassmen by upperclassmen; the study sessions frequently held just before tests; and the benefits, including a better understanding of the ethics of the profession, obtained by active members while visiting with alumni, resident physicians, faculty members, and others stopping at the house to eat or visit. Suffice to say that no formal courses of study are being conducted and that what is being done is only incident to the primary purpose for which the fraternity house is being maintained, which we have already set forth. While it is probably of greater benefit to a member of a professional fraternity, we do not think it is the primary purpose for which the chapter here was established and exists. We think the property here involved is being used as a fraternity house in every way that those words are ordinarily and usually understood.

But appellant points to the case of City of Memphis v. Alpha Beta Welfare Assn., 174 Tenn. 440, 126 S. W. 2d 323, and says that holding should be here controlling. If we were inclined to adopt the reasoning of that court we could agree that it would be precedent for our so holding for generally speaking the factual situation therein is the same as here. But we do not agree with the reasoning of that court and the result therein reached. If appellant thinks it should be exempt from taxation it should apply to the Legislature for specific language so providing as we do not think this court, under the factual situation before us,

should extend the language of the present statute to so provide.

In view of the foregoing we affirm the judgment of the district court.

AFFIRMED.

LEONARD TURNER, APPELLANT AND CROSS-APPELLEE, V. BEATRICE FOODS COMPANY, APPELLEE AND CROSS-APPELLANT.
85 N. W. 2d 721

Filed November 1, 1957. No. 34239.

Workmen's Compensation. When an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor.

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

Norma VerMaas, for appellant.

Healey, Davies, Wilson & Barlow and *Kenneth Cobb*, for appellee.

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

SIMMONS, C. J.

This is a workmen's compensation case. The appeal here involves largely the question of whether or not the plaintiff suffered a permanent partial disability entitling him to compensation following a period of temporary total disability.

The matter was first heard before one judge of the compensation court and compensation was denied. On rehearing before the court en banc, compensation was awarded for temporary total disability for a period of

17 5/7 weeks, less credits for payments made; medical and hospital bills were allowed as a liability of the defendant; and a claim of compensation for permanent partial disability was denied.

Plaintiff took the matter on appeal to the district court claiming an award for permanent partial disability and one disallowed item for medical services.

The district court heard the matter under the provisions of section 48-184, R. S. Supp., 1955, dismissed the appeal, and affirmed the award of the compensation court.

We review the cause here de novo on the record. See Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315. We affirm in part and reverse in part, and render judgment allowing compensation for permanent partial disability.

The record is somewhat voluminous and consists largely of the testimony of physicians as to their findings at different times and their conclusions thereon. We recite only those matters deemed necessary to determine this appeal.

Plaintiff was a young man about 30 years of age. He was able to perform physical labor. In August 1952 he was employed by defendant as a wholesale route man making deliveries of heavy cans of milk and other commodities. He suffered an injury in May 1953 with resulting pains localized in the lower back. He was hospitalized, was put in traction, and a myelogram was performed. It was then discovered that he had a congenital sixth vertebrae. The cause of the disability was not definitely diagnosed. He was released to return to work, and did so in July 1953.

His physician, however, required that he wear a low back brace. Plaintiff did so from that time forward during all of his employment by the defendant.

Plaintiff worked for the defendant thereafter without interruption until October 7, 1955, when he suffered a compensable injury.

Plaintiff testified that defendant was notified of the accident on October 8, 1955. Without question defendant was notified on October 11, 1955. Plaintiff was hospitalized October 12, 1955. After a series of diagnostic tests a laminectomy was performed on October 27, 1955, and a herniated disc removed. The operation appears to have been successful and a normal recovery was had.

Plaintiff was ready and able to return to work in February 1956. The doctors did not approve wearing the back brace after the operation and plaintiff was told to discontinue its use, which he did sometime in March 1956. Light work was approved. The defendant failed or refused to re-employ plaintiff. He went to work on February 13, 1956, as a wholesale bread salesman. This employment did not require heavy lifting. He has since been gainfully employed in that work.

The controversy here arises because of different estimates given at different times by different physicians as to the extent and permanence of plaintiff's disability. One physician estimated a disability as of December 14, 1953, of 25 percent, which he stated was, in his opinion, not a permanent condition. One physician estimated that in May 1955 plaintiff had a permanent partial disability of 35 to 40 percent. The evidence is that the back condition for which he was then wearing the brace was improving thereafter. One physician estimated that on October 7, 1955, based on a hypothetical question, plaintiff had a disability of 5 percent or less. One physician estimated that as of January 1956 plaintiff had a temporary partial disability of 25 to 30 percent. One physician estimated that as of September 25, 1956, plaintiff had a permanent partial disability of 20 percent. One physician estimated that as of December 11, 1956, plaintiff had a permanent partial disability of the back, based on the work he was then doing, of 15 percent.

Based on these percentages of disability, defendant argues that plaintiff in December 1956 had a lesser

degree of disability than he had before October 7, 1955; that his disability, therefore, was not aggravated by the accident of October 1955; and that he consequently is not entitled to an award of permanent partial disability.

The error of defendant's reasoning is demonstrable. Prior to October 7, 1955, plaintiff without question had a physical impairment of the lower back. He was able to and did compensate for that by the wearing of the back brace. He had no industrial disability in the work which he was performing. After October 7, 1955, he had a physical impairment of the lower back. It was caused by the effects of the operation removing the herniated disc which was required by the condition caused by the accident. He was not able to wear a brace to compensate for the impairment. He had an industrial disability in the work which he was performing.

We have held that when an employee meets with an accident which accelerates or aggravates an existing impairment to a state of disability, such disability not being the result of a natural progression of the impairment, there may be an award of compensation therefor. McCoy v. Gooch Milling & Elevator Co., 156 Neb. 95, 54 N. W. 2d 373.

Accordingly we hold that plaintiff is entitled to compensation for permanent partial disability.

It is noted that the doctors' estimates of the permanent partial disability varied from 15 to 20 percent.

The statute provides in part: "For disability partial in character, * * * the compensation shall be sixty-six and two-thirds per cent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than thirty dollars per week. This compensation shall be paid during the period of such partial disability, but not beyond three hundred weeks after the date of the accident causing disability.

Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability." § 48-121, R. S. Supp., 1955.

The evidence is without dispute that plaintiff's wages for the period before the accident of October 7, 1955, averaged $100 per week. He received in addition $6 a week expense money which was tax exempt. We hold that the "wages received" were $100 per week.

What was plaintiff's "earning power" thereafter? We defined that term in Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51. Here the earning power is testified to in the form of wages earned after plaintiff returned to work. He testified that his average earnings were $85 to $90 a week. There is no other evidence as to that question. This must be accepted as evidence of an earning power of $90 a week, that being the figure less favorable to the plaintiff who offered the alternative evidence. See Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293.

Plaintiff's wage at the time of the injury was $100 a week. His earning power thereafter was $90 a week. The difference is $10. Plaintiff's compensation is fixed at 66 2/3 percent of $10, or $6.67 per week. The compensation court found that plaintiff had a temporary total disability from October 12, 1955, to February 12, 1956, or 17 5/7 weeks. The finding and award of the compensation court is as to that affirmed.

Accordingly plaintiff is entitled to be paid compensation for permanent partial disability for 282 2/7 weeks at the rate of $6.67 per week, beginning February 13, 1956.

Defendant is entitled to credit for payments made of compensation for temporary total disability of $30 per week paid for 16 weeks as found by the compensation court.

The compensation court decreed that the defendant

should pay for and on behalf of the plaintiff the sum of $287 to Dr. Frank Stone, $480.40 to the Lincoln General Hospital, and $30 to Dr. Frank Cole. Plaintiff challenges the payment as to amount to Dr. Stone, contending that it is $18 less than the amount claimed. Dr. Stone's bill was for $305. It was stipulated to be a reasonable charge for the services rendered to the plaintiff. The compensation court disallowed a charge on September 25, 1956, for office call and X-ray in the sum of $18. The facts do not appear clearly in the evidence about this charge. It was for services rendered 2 days before the hearing before the one judge of the compensation court where Dr. Stone was a witness. We find no showing that the $18 item was legally chargeable to the defendant. The finding of the compensation court in that regard is affirmed.

Defendant by cross-appeal here presents the contentions that the findings of fact are not supported by the evidence and do not support the award; that the finding that a pre-existing condition was aggravated by the "incident" of October 7, 1955, is erroneous; that the court erred in finding that the "accident" of October 7, 1955, caused the herniated disc; that the award for temporary total disability "as a result of the accident on October 7th, 1955," was erroneous; and that the court erred in ordering "the plaintiff" to pay the doctor and hospital bills. These contentions are based on the same propositions of law and argument advanced in resistance to the appeal. Ultimately they rest on the contention that plaintiff's "pre-existing condition was not aggravated." Without rediscussing the matters, we deny the cross-appeal.

As above pointed out, the trial court dismissed plaintiff's appeal and affirmed the order of the compensation court.

On trial de novo we affirm the order of the trial court affirming the award of the compensation court, decreeing that the plaintiff have and recover compensation for

temporary total disability at the rate of $30 per week for the period of 17 5/7 weeks from October 12, 1955, to and including February 12, 1956, less credit for 16 weeks compensation for temporary total disability which has been paid in the sum of $30 per week; and decreeing that defendant pay on behalf of the plaintiff the sum of $287 to Dr. Frank Stone, $480.40 to Lincoln General Hospital, and $30 to Dr. Frank Cole.

We reverse the judgment of the trial court and the compensation court denying payments for permanent partial disability and decree that defendant shall pay the plaintiff compensation for permanent partial disability for 282 2/7 weeks beginning February 13, 1956, at the rate of $6.67 per week.

AFFIRMED IN PART, AND IN PART REVERSED.

LEE M. MILLER, APPELLEE, V. ROSS A. PETERSON, DOING BUSINESS AS ROSS FLORISTS, APPELLANT.
85 N. W. 2d 700

Filed November 1, 1957. No. 34244.

1. **Workmen's Compensation: Appeal and Error.** Jurisdiction of an appeal in a workmen's compensation case is obtained by this court by the filing of a notice of appeal in the office of the clerk of the district court and depositing therein the docket fee required by law within the time prescribed.
2. **Officers: Appeal and Error.** Where a duty is placed upon a public officer to perform acts necessary to perfect an appeal, his failure to perform cannot be charged to the litigant nor operate to defeat the appeal.
3. **Workmen's Compensation.** An employee who is unable to perform or to obtain any substantial amount of work, solely because of the accident and resulting injury, either in his particular line of work or in any other for which he is fitted, is totally disabled within the meaning of the workmen's compensation law.
4. ———. Disability under section 48-121, R. S. Supp., 1953, subdivisions (1) and (2), is defined by our statute in terms of

employability and earning capacity rather than in terms of loss of bodily function.

5. ———. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.

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

Cassem, Tierney, Adams, Kennedy & Henatsch, for appellant.

Hammes & Hammes, for appellee.

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

CARTER, J.

This is a workmen's compensation case. The trial court awarded the plaintiff the sum of $28 per week for 238 weeks commencing on June 30, 1955, and $22 per week thereafter for the remainder of the life of the plaintiff for total and permanent disability. The defendant was ordered to pay a doctor bill in the amount of $893.69 and a hospital bill in the amount of $1,065.80. The defendant has appealed from the decree thus entered.

The appellee has filed a motion to dismiss the appeal for the reason that a transcript was not filed in this court within 30 days from the entry of the judgment in the district court. In support of this proposition the case of Dobesh v. Associated Asphalt Contractors, 137 Neb. 1, 288 N. W. 32, is cited. We point out that at the time that case was decided the filing of a transcript within 30 days was a jurisdictional act under the general law regulating appeals to this court. Since the adoption of Laws 1941, chapter 32, sections 1 and 2, pages 141 and 142, now sections 25-1912 and 25-1914, R. R. S. 1943, jurisdiction of an appeal is obtained by this court by the filing of a notice of appeal in the office of the clerk of the district court and depositing therein

the docket fee required by law. No other acts are required to lodge jurisdiction of an appeal in this court. Fick v. Herman, 161 Neb. 110, 72 N. W. 2d 598. Under section 25-1912, R. R. S. 1943, as amended by Laws 1947, chapter 87, and section 48-185, R. S. Supp., 1953, the filing of a transcript within 30 days became an official duty of the clerk of the district court. When the filing of the transcript is the duty of a public officer, a dereliction of duty by such officer will not prejudice the rights of a party to the litigation. In re Estate of Tagart, 119 Neb. 647, 230 N. W. 492; In re Estate of House, 144 Neb. 870, 15 N. W. 2d 56. The motion of appellee to dismiss the appeal is therefore without merit.

The appellant contends that an appeal to the district court after a rehearing before the compensation court en banc is in the nature of an error proceeding, and the district court is without authority in such a case to disturb questions of fact supported by evidence. The previous holdings of this court support this contention. Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212, and cases therein cited. Even though the district court is so limited, an appeal therefrom to this court is considered de novo upon the record. Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315. Under such circumstances the manner in which the district court considered the case is of little concern. Whether or not the trial court properly considered the controlling issues, the case is here de novo for all practical purposes. While the situation is an anomalous one, it has long been the rule. Since the case is reviewed here de novo, the appellant has not been prejudiced by any misconception on the part of the trial court as to its duty with respect thereto in disposing of the case in that court. The contention of the appellant indicates no prejudice as to him and for that reason his assignment of error with respect thereto is not well taken.

The appellee, plaintiff below, was employed by the defendant as a carpenter. He was 60 years of age and in good health, except as hereinafter noted. On April 22, 1954, he suffered an injury arising out of and in the course of his employment. The only question presented by this appeal is the amount of compensation to which he is entitled.

At the time of the accident he was engaged in the construction of an additional room at the rear of defendant's place of business. While so engaged he leaned against a stair railing which gave way. Plaintiff fell approximately 16 feet to the ground. He sustained a double fracture of the sternum and a tearing of the brachial plexus in the region of the left armpit. It is asserted, also, that he sustained compression fractures of the third and fourth thoracic vertebrae which increased a preexisting kyphosis (rounded or hunched back) and added to his disability. The evidence shows an increased lipping of the vertebrae, particularly in the lumbar area, indicating arthritis of the spine alleged to have been increased by the trauma. The evidence shows that the brachial plexus resulted in an injury to the ulnar nerve and a consequent atrophy of certain muscles of the forearm and hand. There is evidence of continued numbness of the left hand, particularly of the two little fingers. There is evidence of inability to close the left fist and a three-fourths weakness of the left hand as a whole. Plaintiff's physician testified that there was injury to the soft parts of the cervical region which has resulted in a permanent limitation of about 25 percent of the lateral movement of his neck and almost a complete fixation in the forward and backward movements of the neck. There is evidence that the compression fractures of the spine have limited the movement of the spine in turning and twisting, and that this condition will become more pronounced with the lapse of time. There is evidence of adhesions of the shoulder joint, resulting in an immobilization of the

left arm at the scapula. The left arm can be raised to a 45 degree angle as compared with the normal 180 degrees. The abduction and circumduction of the arm is seriously restricted.

There is evidence that while taking physical therapy treatments in the hospital, plaintiff suffered what is referred to as a cardiac episode. It was believed that he had suffered a coronary heart attack. A physician specializing in internal medicine was called into the case. No evidence of a coronary heart attack was found. Electrocardiograms failed to disclose an existing coronary heart condition, or evidence that one had occurred. The physician testified that periarthritis of the shoulder and ulnar nerve damage are frequently mistaken for a cardiac condition. We think the evidence sustains a finding that the alleged cardiac episode was not a coronary heart attack, and was in fact a result of the injuries resulting from the accident.

The plaintiff stated that he had a moderate kyphosis before the accident. He stated that he was always able to work, up until that time, but has never been able to work since. There is evidence by an employer of carpenters that plaintiff could not work as a carpenter because of this physical condition, that insurance carriers would frown upon it, and that contractors would not hire him, although carpenters were in demand.

The evidence shows that a carpenter is required to work with both hands. He must be able to stoop, and work on his stomach and on his back. He must be able to work with both hands above his head, move his neck, and twist his body in numerous positions. Much of the work is heavy, requiring a strong back and body. Plaintiff has only an eighth grade education and had worked as a carpenter for 36 years preceding the accident. He has had no other training.

The physicians who testified in the case appear to agree there is nothing more that can be done to better plaintiff's condition. Dr. Murray, plaintiff's attending

physician, said that plaintiff is totally and permanently disabled. Dr. Hamsa, a recognized orthopedist physician, gave the plaintiff a permanent partial disability rating of 25 percent as a working man and declined to rate his disability as a carpenter. Dr. Browne, a neurosurgeon, estimated that plaintiff had a 25 percent permanent partial disability without relating it to any particular type of work. The plaintiff testified that the kyphosis did not interfere with his work prior to the accident and that he did not know that any arthritic condition existed prior to that time.

The facts do not bring the case within subdivision (3) of section 48-121, R. S. Supp., 1953. Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152. The primary question is whether the disability is total or partial. This court has consistently held that a workman who is unable to perform or to obtain any substantial amount of labor, solely because of the accident and resulting injury, either in his particular line of work or in any other for which he is fitted, is totally disabled within the meaning of the workmen's compensation law. Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262; Haler v. Gering Bean Co., *supra.*

We conclude from the evidence herein set forth that the plaintiff is totally disabled within the meaning of the workmen's compensation law. He has suffered an injury to his left arm which has most seriously limited its movement and reduced its strength. He has a periarthritis of the left shoulder which not only immobilizes the arm at the shoulder joint but subjects the plaintiff to pain when he attempts to use it. He has a limitation of the lateral movement of the neck and a fixation which prevents the forward and backward movements of the neck. Due to the compression fractures of the spine, he has a very limited movement in twisting and turning.

There is no evidence in the record that plaintiff can perform any of the major duties required of a carpenter,

or one engaged in similar work. Plaintiff said he is unable to work. He has not worked from April 22, 1954, to the date of the trial in the compensation court on June 21, 1956. No one testified that he was able to work during this period, and no contention that plaintiff was a malingerer is advanced. There is some evidence that plaintiff was not cooperative with the physicians on the case, but there is medical testimony to the effect that he developed an apprehensiveness following the cardiac episode that could have been the cause. There is no evidence in this record by any physician that plaintiff could perform the work of a carpenter, or similar work, at the time of the trial or at any foreseeable time in the future. There is undisputed evidence in this record that, although carpenter work is in demand, it is not available to the plaintiff because of his condition. That plaintiff's injuries are permanent is not questioned. The record shows that plaintiff is unable to obtain or perform the work of a carpenter, or similar work for which he is fitted. He is therefore totally and permanently disabled.

The defendant argues that this court should give consideration to the fact that the compensation court saw the witnesses and heard them testify. He contends also that Drs. Hamsa and Browne are recognized experts in their respective fields and that this court should hesitate before refusing to accept their findings.

There seems to be an assumption that the ratio of functional loss, or loss from the medical viewpoint, is the same as loss of earning capacity or wage loss. If this were so it would be quite immaterial in what occupation an injured workman was engaged and to what extent he was unable to perform it or similar work because of his injury. Disability under subdivisions (1) and (2) of section 48-121, R. S. Supp., 1953, refers to loss of earning capacity and not to functional or medical loss alone. Castle v. City of Stillwater, 235 Minn. 502, 51 N. W. 2d 370, is a case very similar both as to

facts and principle to the one before us. In that case two physicians fixed the functional disability of the employee as 25 percent and 30 percent. A third physician stated that the employee was totally and permanently disabled from earning a living. A finding of permanent total disability was sustained, the court saying: "Thus, in defining total disability, losses in bodily function are not important in themselves, but are only important insofar as they relate to ability to earn an income."

The record shows that Drs. Hamsa and Browne did not relate the functional disability of the employee to the work of a carpenter or other similar work which he could have done except for the injury. The basis for a finding of partial disability in earning capacity as contemplated by the workmen's compensation law was not laid and the testimony of these two physicians does not go to the primary issue in the case. The compensation court apparently accepted the evidence of Drs. Hamsa and Browne as evidence of the disability contemplated by subdivisions (1) and (2) of section 48-121, R. S. Supp., 1953, when it does not in fact directly relate to that question. Under such a situation it is not necessary for us in a trial de novo to question the competency or reliability of these two physicians in determining that the plaintiff was totally and permanently disabled.

The defendant urges that he is under no obligation to pay certain medical and hospital bills which were incurred because of the cardiac episode incident. Since it is established that the employee did not sustain a coronary heart attack and that the episode resulted from the injury sustained in the accident, such expenses are properly chargeable to the defendant.

The decree of the trial court awarded compensation for total and permanent disability. It conforms to our findings on a de novo hearing. We therefore affirm the judgment of the trial court. An attorney's fee of $500

is awarded the appellee for services of legal counsel rendered in this court.

AFFIRMED.

YEAGER, J., participating on briefs.

JOSE CARRANZA, APPELLEE, V. PAYNE-LARSON FURNITURE COMPANY, A COPARTNERSHIP, ET AL., APPELLANTS.
85 N. W. 2d 694

Filed November 1, 1957. No. 34248.

Workmen's Compensation: Trial. The rules of law which are applicable and controlling in this case appear in Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891, Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379, and Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and dismissed.*

Blackledge & Sidner, for appellants.

Dryden & Jensen, for appellee.

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

CHAPPELL, J.

This is a workmen's compensation case. Plaintiff, Jose Carranza, in his petition filed in the Nebraska Workmen's Compensation Court, alleged that defendant, Payne-Larson Furniture Company, hereinafter called defendant, was a partnership composed of Alvie Payne and James Larson, with its principal place of business in Kearney, and that defendant Glens Falls Insurance Company was its compensation insurer. Plaintiff also alleged therein that on a specified date, "while engaged in the course of his employment and in the warehouse of the defendant * * * while attempting to lift a Certa (Serta) bed, he injured his back, causing a rupture of

the intervetetral (intervertebral) disc in said back," which caused him to be totally disabled for a stated period of time and thereafter suffered a 10 percent permanent partial disability. He also alleged "that as a direct and proximate result of the injury sustained by him as a result of attempting to lift said Certa (Serta) Bed as aforesaid, he incurred" certain medical, surgical, and hospital bills.

After a hearing before one judge of the workmen's compensation court, judgment was rendered on January 18, 1956. Thereafter, on January 20, 1956, plaintiff filed in the workmen's compensation court a waiver of rehearing and a notice of intention to appeal directly to the district court for Buffalo County, all of which is shown by a certificate of the workmen's compensation court filed in the district court on January 23, 1956. Also on that date, plaintiff filed his petition for trial de novo in the district court, reciting that he had waived rehearing before the workmen's compensation court and elected to appeal directly to the district court. Therein he alleged that he was employed by defendant as a common laborer and: "That on about the 18th day of August, 1955, while engaged in the course of his employment and in the warehouse of the defendant * * * while attempting to lift a Certa (Serta) bed, being approximately 250 pounds, the same wobbled as he was lifting his end of the same, causing a rupture of the intervertebral disc in his back" which resulted in total disability for a stated period of time, and thereafter a 10 percent permanent partial disability. He also alleged: "* * * that as a direct and proximate result of the injuries sustained by him in attempting to lift said Certa (Serta) bed as aforesaid," he incurred certain medical, surgical, and hospital bills.

So far as important here, the answer of defendants was a general denial and a specific denial that plaintiff sustained any injury from an accident arising out of and in the course of his employment by defendant, and a

specific denial that either of the defendants was under any obligation to pay for any claim made by plaintiff.

After a trial on the merits in the district court, a decree was rendered, finding that: "* * * plaintiff sustained an accidental injury on or about the 18th day of August, 1955, while in the course of his employment for the defendant * * *. That said injury was sustained, while he was lifting a certa (Serta) bed weighing approximately 250 pounds. That as said bed was lifted, it wobbled and plaintiff slipped and the bed fell partially out of his hand and while attempting to grab it, he sustained an extruded intervertebral disk (disc) in his back. The court further finds that the aforesaid plaintiff was temporarily totally disabled from the 22nd day of August, 1955 up to and including the 20th day of February 1956. That thereafter he was 10% permanently partially disabled." At this point, it should be said that there was no competent evidence whatever which could sustain a finding that "plaintiff slipped."

Judgment was rendered in accord with the aforesaid findings, and defendants' motion for new trial was overruled. Therefrom they appealed to this court, assigning error as follows: (1) That plaintiff in his appeal to the district court failed to make a record sufficient to support a judgment because he failed to plead or prove any previous judgment of the workmen's compensation court; and (2) that the evidence was not sufficient to support a finding that plaintiff's alleged injuries and disability were caused by an accident arising out of and in the course of his employment. We conclude that assignment (1) has no merit, but that assignment (2) should be sustained.

We turn first to assignment (1). In that connection, section 48-181, R. R. S. 1943, provides in part: "In any such case, any party thereto may serve notice upon and waive rehearing before the Nebraska Workmen's Compensation Court. In such case any appeal shall be directly to the district court of the county in which the

accident occurred; * * *. Such appeal to the district court shall be taken and perfected in the same manner as provided for appeals *to the compensation court.* In such cases the trial in the district court shall be *a trial de novo.*" (Italics supplied.) With relation to that section, we said in Sporcic v. Swift & Co., 149 Neb. 246, 30 N. W. 2d 891: "The defendant argues that plaintiff's petition in the instant case failed to have attached to it the pleadings and orders of the Workmen's Compensation Court as required by law, citing Hansen v. Paxton & Vierling Iron Works, 135 Neb. 867, 284 N. W. 352, to the effect that the petition on appeal in the cited case, from the compensation court, included a copy of the pleadings before the Workmen's Compensation Court, setting forth the issues, and also the order of dismissal of the Workmen's Compensation Court. * * *

"In the cited case, followed by Bell v. Denton, 136 Neb. 23, 284 N. W. 751, there was no specific requirement that the pleadings, orders and findings of the Workmen's Compensation Court be attached to the petition on appeal. Section 48-181, R. S. Supp., 1945, which provides for direct appeal when rehearing is waived before the Nebraska Workmen's Compensation Court to the district court, makes no such requirement that such pleadings, orders or findings be attached to the petition on appeal to perfect such appeal where the petition sets out the errors of the compensation court and alleges that rehearing was waived and notice of appeal given in due time." That statement is controlling here and disposes of defendants' first contention.

In dealing with assignment (2), we turn to Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379, wherein we held: "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record.

"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 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.

"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." See, also, Haufe v. American Smelting & Refining Co., 163 Neb. 329, 79 N. W. 2d 570; Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394.

Such rules are controlling here on the merits, and we summarize the material and relevant evidence in the light thereof. Also, in doing so, we are not unmindful that Jones v. Yankee Hill Brick Manuf. Co., *supra*, was decided by this court on December 9, 1955, and that in the district court, after filing his petition in the compensation court and testifying therein, plaintiff materially changed his theory of recovery, as shown by his petition on appeal, and his testimony with regard thereto in the compensation court and the district court, in order to meet the exigencies of the pending action.

That conduct makes applicable Gohlinghorst v. Ruess, 146 Neb. 470, 20 N. W. 2d 381, wherein we held: "Where a plaintiff, without reasonable explanation, testifies to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change clearly being made to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded.

"A trial court is not required to helplessly sit by and permit a litigant to toy with the processes of the court by insisting under oath at different times on the truth of each of two contradictory stories according to the exigencies of the particular occasion presenting itself." Subsequently, we have distinguished that case, but, where controlling, we have never departed from the foregoing rules promulgated therein.

Further, we also discover upon examining this record that plaintiff's testimony on appeal was so uncertain, inconsistent, contradictory, and speculative in material respects that it is unworthy of belief.

Plaintiff was a high school graduate. At time of trial he was 26 years of age, married, and had 3 children. He resided near Kearney, farmed some 40 acres or more of irrigated land, and was employed at odd jobs in and about Kearney in his spare time. On August 15, 1955, he returned from 15 days of service with the National Guard, where he had been a track vehicle mechanic and attended its military maneuvers in Minnesota. On the afternoon of August 17, 1955, defendant employed plaintiff at 90 cents an hour to temporarily assist it in unloading a boxcar of furniture and move some of it to defendant's store and some of it to defendant's warehouse. Two other employees of defendant, one Jim Campbell, hereinafter called Jim, and John Payne, hereinafter called John, who was a 15-year-old son of one of the partners, worked with plaintiff, who had done some comparable odd-job work for defendant during the previous year.

Plaintiff did such work the rest of August 17, 1955, and continued to do so on the 18th and 19th, and again on Monday, August 21, 1955, when he returned to work. However, on that date he went with Jim in defendant's truck to assist in the delivery of some furniture in Kansas, which completed his work with defendant. In that connection, plaintiff testified that while riding in the truck that day his back felt stiff and upon their return he told Jim that his back felt a little stiff and that maybe he had hurt it real bad.

He testified that on August 17, 1955, they started to take some chests out of the boxcar to defendant's store, and the next day they took some furniture down to defendant's warehouse where they had to move some of it in order to make room for that which yet remained in the boxcar. In doing so, they lifted and moved a Serta bed weighing about 275 to 300 pounds, at which time plaintiff claimed to have been injured. Jim had hold of one end of the bed and plaintiff the other. Plaintiff testified that: "It didn't look too heavy. I just bent over like I usually do and picked it up. * * * I bent over and I had the Serta sleeper about half ways up and it wobbled and I lost my balance on my feet and it slipped out, and instead of letting it fall and put it clear down I tried to keep it from falling on the cement; and when I did that I felt a snap in my back, a sharp pain; and I tried to lift it up again; and I told Jim: 'I think I hurt my back;' * * * 'I can't lift it up.' * * * 'You better get John Payne to help me lift it up.'" Then Jim took hold of one end while John took hold of one corner and plaintiff took hold of the other. Thus they lifted it up and moved it over to another part of the warehouse.

Plaintiff continued to work the rest of that day. The next morning he felt stiff, but thought it was caused by the unusual kind of work he was doing, so he worked that day and again on Monday. Thereafter, he was stiff and had a little pain in his lower pelvic

region, and a few days later one leg seemed shorter than the other, so on August 30, 1955, he went to see a chiropractor who treated him for a lumbosacral strain on that date and three times thereafter. Plaintiff gave that doctor no history of being injured while moving some furniture for defendant, but said he had the difficulty with his back for about one week. Later he told that doctor he hurt his back when he lifted a sleeper for defendant, and they might have insurance on it.

In the meantime, plaintiff told one of the partners "that he believed that he had injured his back in some way * * * while he was working for" defendant. On September 1 that partner and plaintiff went to see counsel for defendant insurer. There plaintiff voluntarily made, corrected, and signed a written question and answer statement duly certified by an official court reporter.

In that statement, he said among other things: "I don't know what really happened, but when we unloaded that car the first day I worked for them why I felt stiff, you know, tired, and — oh, I probably reached for those chests and they were pretty heavy, but I didn't think nothing about it. I didn't think I had hurt my back or nothing, knocked a bone out of place or nothing. * * * I wasn't feeling good all last week, you know, after I got done working for them. But I didn't even think about it being my back, or nothing, and I told my wife, I says: 'This will probably get over in two or three days. I'm tired from lifting all that furniture.' So I just thought that was what it was." When asked to fix the date when his back started hurting, plaintiff answered: "Well, I don't know. I think it happened when we were unloading them boxcars, because we had to reach high and we had to slide those chests down." He admitted that it was nothing sudden, saying: "Well, I'll tell you what happened. I was unloading a chest and when I lifted it up — we lifted up a sleeper, one of those big sleepers, and I

told him: 'I can't lift that up by myself. My back hurts.'" Plaintiff said nothing in his statement about the bed wobbling or slipping, or losing his balance and grabbing for it.

About September 15, 1955, plaintiff went to see Doctor Royal Jester, Jr., and Doctor Harold V. Smith, who were associated together in the practice of medicine. In that connection, Doctor Smith, as a witness for plaintiff, testified: "He gave a history of hurting and pain while he was working for Payne Larson, on the date of approximately August 23rd, from the record that we have here; that he was carrying furniture at the time he suffered the occurrence of the pain in his back. * * * I understood that he had been working for Payne Larson and that he thought he had hurt his back while lifting furniture at that time. * * * We felt that his injury was a disk (disc) injury; and with the history of pain, the onset of the pain while he was lifting furniture, we assumed that it occurred at that time."

They then referred plaintiff to Doctor Robert M. House, an orthopedic surgeon in Grand Island, who examined plaintiff on October 3, 1955. He then gave a history of injuries incurred while at work unloading furniture, "stated that he hurt his back while lifting this furniture." On October 12, 1955, that surgeon operated upon plaintiff for an extruded intervertebral disc at the fifth left lumbar level, and in giving his conclusion with regard to what caused or aggravated plaintiff's disability, the surgeon relied upon his initial examination and that history given him by plaintiff.

The next statement made by plantiff was in his petition filed in the compensation court. Therein he said that: "* * * while attempting to left a Certa (Serta) Bed, he injured his back, * * *." In his testimony in the compensation court, he said nothing about the bed wobbling or falling down, or losing his balance and grabbing to catch it, and in the district court blandly so admitted, giving as an excuse that nobody had

asked him about it. He claims that he did testify in the compensation court about "attempting to lift the bed and it slipping." He says in this record that the bed wobbled and slipped, and in attempting to grab it he felt a pain in his back. There is no competent evidence that in doing so plaintiff himself slipped or fell or twisted his back.

Also, in his petition filed in the district court, defendant simply said: "* * * while attempting to lift a Certa (Serta) bed, being approximately 250 pounds, the same wobbled as he was lifting his end of the same, causing a rupture of the intervertebral disc in his back." The only other testimony regarding the alleged incident was given by plaintiff's fellow employees, Jim and John, who were called as witnesses for plaintiff. Their evidence gave plaintiff no support. Jim, a deliveryman for defendant, was plaintiff's superior. In describing what happened with relation to the Serta bed, he said: "Well, Jose and I was to bring this hide-a-bed to the store. And I lifted up my end, and I asked Jose to help me and he picked it up and immediately dropped it or set it down, I forget which, and said his back was hurting. * * * He just said his back was sore." Jim then asked John to help and the three of them lifted and moved the bed. Thereafter plaintiff continued to work without complaint and never claimed he had hurt his back in any manner until he was in the store 3 or 4 days or maybe a week later. He then said "that he had hurt his back" without calling attention to any incident when he had hurt it. Jim had so moved furniture quite often, nearly every day, and testified that two men usually handled a Serta bed. John testified that he had lifted one end of such beds before, and he remembered that he helped plaintiff lift the bed involved when he was called to help do it, but he remembered nothing further about the incident.

Alvie Payne, a defendant partner, who was called as a witness by plaintiff, testified that plaintiff was em-

ployed to do odd jobs when needed; that his wages were 90 cents an hour; that a Serta bed weighed from 275 to 300 pounds, and was quite a lift; and that he was out of town on August 17, 1955, the day that plaintiff was employed, and never thereafter learned about plaintiff's claimed back injury until a week or so later when plaintiff came to him and said "that he believed that he had injured his back in some way" while he was working for defendant in its warehouse. Thereafter, the witness took plaintiff to see counsel for defendant insurer, where he made the written statement aforesaid.

We are convinced that mere exertion in lifting the Serta bed, which exertion was no greater than that ordinarily incident to plaintiff's employment, combined with preexisting disease, produced plaintiff's disability, rather than an accident arising out of and in the course of his employment. To hold otherwise would erroneously permit plaintiff to recover an award based upon possibilities, probabilities, or speculative evidence. Further, this record is not convincing that the Serta bed wobbled or slipped, or that plaintiff was injured thereby. His testimony in that regard was clearly changed to meet the exigencies of his appeal and thus, being discredited as a matter of law, should be and is disregarded. To hold otherwise would permit plaintiff to toy with the processes of courts, which this court will not tolerate.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed and the cause is dismissed. All costs are taxed to plaintiff.

REVERSED AND DISMISSED.

YEAGER, J., participating on briefs.

LOUIS R. BOETTCHER, APPELLANT, V. ROBERT L. GOETHE, APPELLEE, REVIVED IN THE NAMES OF IDA U. GOETHE AND THE OMAHA NATIONAL BANK, EXECUTORS OF THE ESTATE OF ROBERT L. GOETHE, DECEASED, APPELLEES.

85 N. W. 2d 884

Filed November 8, 1957. No. 34179.

1. **Agency.** An undisclosed principal is bound by a simple contract made by an agent if it is within the scope of his authority and in the course of his employment.
2. **Estoppel.** If a person gives a reason for his conduct and decision in reference to a matter involved in a controversy, he cannot, after litigation is begun, change his reason and put his conduct on another and different consideration.
3. **Fraud.** A confidential relation exists between two persons if one has gained the confidence of the other and purports to act or advise with the interest of the other in mind.
4. ———. The asking of a certain price for an item of property is not a representation of its value.
5. ———. A representation to be fraudulent must be made either with knowledge of its falsity or without such knowledge as a positive statement of a known fact.
6. ———. The rule is that fraud must relate to a present or preexisting fact and may not be generally predicated on a representation concerning an event in the future or acts to be done in the future.
7. **Contracts: Evidence.** Oral negotiations between the parties preceding the execution of a written instrument are regarded as merged in it and the instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it.

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

Shrout & Brown and *McCulloch, Leigh & Koukol,* for appellant.

Fitzgerald, Hamer, Brown & Leahy, for appellees.

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

BOSLAUGH, J.

The recovery of damages because of alleged fraudu-

lent representations made by Robert L. Goethe to appellant to induce him and which did induce him to enter into a contract with Robert L. Goethe for the purchase by appellant of the stock of Charles E. Walters Company, a corporation authorized to do business in the State of Nebraska, is the relief sought in this litigation. At the conclusion of the evidence offered by appellant in his case-in-chief Robert L. Goethe moved the court to dismiss the case because of insufficiency of the evidence to sustain a verdict for the appellant. The motion was sustained and a judgment of dismissal of the cause was rendered. The motion of appellant for a new trial was denied and he prosecutes this appeal.

Charles E. Walters Company, an Iowa corporation doing business in Nebraska with its principal place of business in Omaha, was a defendant. Its general demurrer to the amended petition of appellant was sustained and the case as to it was abandoned. Robert L. Goethe died after the appeal was docketed and by stipulation of the interested parties it was revived in the names of Ida U. Goethe and the Omaha National Bank as the executors of the estate of Robert L. Goethe, deceased. The designation of appellee as used herein refers to Robert L. Goethe who was a party to the negotiations and contract had and made with appellant which are important to this case.

The appeal presents an issue as to the sufficiency of the evidence to sustain a verdict for appellant. If it does, the cause should not have been dismissed by the trial court and the judgment rendered must be reversed. If it does not, the judgment is correct and should be approved. The proof from which this must be concluded is without conflict. It was produced by appellant and he is entitled to have it and any reasonable inferences deducible therefrom considered most favorably to him. Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593. It is in this manner that the record is examined and the issue resolved.

The record contains proof of the following:

Appellant was a graduate of high school at 16 years of age and was on the honor roll of the school on two occasions. His attendance at the University of Omaha was interrupted by military service in the last World War. He was released from that engagement in September 1945 and returned to the University of Omaha to complete the requirements and obtain a degree in business administration. His study and instruction largely concerned economics, investments, and accounting. His experience in the university continued for 13 or 14 semesters and he accumulated more than sufficient credits to entitle him to a degree in business administration. He testified at the trial that he was deprived of a degree because he failed in the math course at one time but he said at an earlier time when his deposition was taken that he did not get a degree because of an oversight in taking one of the required courses and not because he failed to pass in any course. He attended the university after his engagement in military service one year, one summer school session, and two additional semesters.

He was employed after he concluded his university attendance by Central Republic Company of Omaha which was operating an investment business dealing in and selling stocks, bonds, and securities. His duties were largely clerical including writing up the Dow-Jones averages and he remained with that company 6 or 8 months. He later was employed from October 1947 to April 1948 by Fitzgerald & Company in South Omaha. He promoted their insurance business. Appellant was a stockholder, cashier, and director of Nodaway Valley National Bank of Villisca, Iowa, during the period from April 1, 1948, to August 17, 1951. He owned one-half of 51 percent of the stock of the bank and Walter Hyink owned the other half of the 51 percent of the stock. Charles E. Walters Company as a broker acting by appellee, manager of the company, assisted

the appellant and Walter Hyink, hereafter referred to as Hyink, in finding and buying the bank stock in March or April of 1948. During the time from April 1, 1948, to August 17, 1951, a period of more than 3 years, appellant saw appellee on three occasions, twice when he stopped at the bank to say "hello" and once when appellant visited with appellee at the bankers convention in Des Moines.

There was a controversy between appellant and Hyink in October of 1950, the nature and reason of which does not appear in the record because appellant could not remember the cause or subject matter of it. He conferred and corresponded with appellee concerning the sale of his stock in the bank. The disagreement was of a character that appellant entertained the idea of disposing of his stock in the bank and this was his reason for communicating with appellee during October of 1950. Appellee counseled appellant not to dispose of his stock but to otherwise resolve his disagreement with Hyink. He accepted and followed this suggestion. However, there was an additional disagreement of appellant and Hyink in December of 1950 concerning policy of the bank. It related to bonuses to officers and specifically to appellant. He was not satisfied with a salary increase because it could not be made to apply to the preceding year. This lack of harmony continued until Hyink and appellant contemplated an arrangement whereby one of them would buy the stock of the other. Hyink, disregarding the agreement that both of them would confer with appellee at the same time, solicited appellee for assistance in reference to the problem. Appellee advised appellant at once that he had been approached by Hyink. Appellant testified on the trial of this case that he had not determined to end his relationship with Hyink before he conferred with appellee on July 27 or August 2 or that he was serious about leaving Villisca at that time. He admitted that he had testified at an earlier time in a deposition that when

appellee really realized that he was serious in wanting to get out (of the bank and the town of Villisca), "* * * we (appellant and appellee) started discussing the possibility of my (appellant) joining the Charles E. Walters Company." He further testified in the deposition: "Question: Now, was this before you had concluded definitely to sell your interest (in the bank), or was it as you said a minute ago, after he (appellee) learned that you were serious about getting out of the bank at Villisca? Answer: I think that's the proper way to state it; we entered into negotiations, or discussed it more seriously after Mr. Goethe knew that I wasn't going to stay in the bank at Villisca. Question: It came about then really more in the way of your future as to what you would do as distinguished from your decision to make the sale, is that true? Answer: Well, you are making kind of a fine point there, but I would agree on that, yes."

It was testified by appellant at the trial that he talked with appellee concerning the investment of the funds that appellant would receive because of the sale of his bank stock to Hyink and admitted that appellee made an effort to have appellant purchase other bank stock but appellant evinced no interest in doing so. He was shown and had opportunity to examine the prospectuses of several banks which appellee was offering for sale including a bank in Aurora, Nebraska. This preceded any inquiry by appellee as to whether appellant could be interested in joining the Charles E. Walters Company or purchasing stock of that company.

It was agreed by appellant and appellee at the commencement of their conversations concerning the Charles E. Walters Company and the possible purchase by appellant of the stock of the company owned by appellee and his family that before any specific or binding obligation would arise their agreement would be put in writing and executed by them.

A complete and comprehensive written contract was

prepared by or at the instance of appellee in which he, acting for himself and as agent of all other stockholders of the Charles E. Walters Company, was designated as seller and appellant as buyer. It provided that appellee would sell the entire capital stock of the company, consisting of 500 shares, to appellant who would purchase it for $100,000 and pay to the seller one-fourth thereof at the time of the execution of the contract, payment of which was acknowledged by recitation in the contract. The balance of $75,000 was to be paid from the income of appellant consisting of salary, percentage of his production, interest on his investment, and participation in gross income of the company as specified and limited in the contract. Appellant was not to have the stock, any voting rights, or dividends thereon until the full purchase price was paid except as otherwise provided in the contract but in lieu of dividends he was to be paid by the seller 5 percent annual interest, payable semiannually, on his investment from year to year until the purchase price was fully satisfied at which time the stock and full control and operation of the company would be surrendered to and vested in appellant. The buyer was to devote his time and efforts to the conduct of the business of the company and was to be paid, until the purchase price was satisfied, $5,000 the first year, $6,000 each year thereafter, a percent of the amount of his production or contribution to the total income of the company, and a percent of the gross commissions and fees collected by the company as provided in the contract. He was also to be paid his traveling expenses including 6½ cents per mile for the use of his automobile. The company was obligated to pay for 3 years the premiums on $25,000 of life insurance on the life of the buyer to be represented by a policy of the 5-year convertible plan with the wife of appellant as beneficiary. It was provided that if the seller died before August 15, 1952, the purchase price was reduced to the amount the buyer had paid the seller at the time of his death;

if he died after that date and before August 15, 1953, it was reduced one-half or to $50,000; if the seller died after August 15, 1953, and before August 15, 1954, the purchase price was to be $75,000; and if he died after August 15, 1954, it was the full $100,000. The seller had the option to waive further payments by the buyer and assign and deliver the stock and control of the company to him in which event the contract should be completely performed. Likewise the seller had an option at any time within 3 years from the date of the contract, if he decided the buyer was not adapted to the duties and responsibilities assumed by him and did not give promise of qualifying to insure the mutual benefits contemplated, to refund to the buyer the amount of the purchase price he had paid to the time of the election to exercise the option less the amount of interest and participating benefits received by the buyer, to terminate the contract, and to end all rights and obligations by virtue of it. The draft of the contract was presented to and it was examined by appellant. On August 24, 1951, it was executed by the parties thereto and delivered in the sense and with the intention that it was and should be an effective, binding contract.

In the negotiatons appellee was asked by appellant the price of the stock and appellee answered $100,000. That is all that was said on that subject. It was discussed that a cash initial payment of $25,000 of the purchase price would be expected and the payment of that amount was made by appellant the day the contract was executed and delivered. The contract provided and appellant intended to satisfy the unpaid part of the purchase price by the application thereto of his future earnings, commissions, and interest income. He so testified and this is confirmed by the accounting statements of the company prepared to evidence the earnings and commissions. These were made and exhibited to appellant. Each is signed by him without any showing of objection or protest. He made and accepted settlement on the

basis of the statements and he has retained what was due him according to them.

The contract was acted upon from the time it was made until October 3, 1953, without change or modification except a verbal understanding that the amount equal to the federal income tax on the interest paid and the commissions earned by appellant would not be applied to complete payment for the stock purchased but could be used by him to discharge his income tax liability. The contract prepared and submitted to appellant for examination had a blank space to insert in it the rate of interest to be paid by the company to appellant upon the investments made by him including the initial payment of $25,000 and a blank space to insert therein the mileage to be paid appellant for the use of his automobile while he was traveling on the business of the company. These were filled in by appellee in the presence and with the knowledge and acquiescence of appellant immediately before the contract was executed and delivered. In the space for the rate of interest "5" was inserted and in the space for the mileage allowance "6½" was inserted. Appellant testified that his father told him the evening of the day the written contract was made that appellant had made a bad bargain and that he, his father, would never have entered into such a contract. Appellant made no effort to prevent payment of his check of $25,000 given to appellee that day which was not paid by the bank for 4 days thereafter or on August 28, 1951.

Appellant read the contract, knew its contents, and knew that it expressly contained each and all of the provisions he attempts now to assail as different than his understanding of statements made in conversations and negotiations preceding the making and delivery of the contract. He took a copy of the contract with him the day it was executed. The seller performed the contract to the time when appellant abandoned it and attempted to rescind it.

There was no personal production by appellant for the 6-month period preceding February 15, 1953. This means that he did not sell any bank stock or arrange any sales as a broker upon which he earned commission for that period. He had by his efforts during the preceding 6-month period been responsible for the company earning an amount in excess of $17,000. In the third 6-month period he was with the company his efforts produced commissions of $2,450. From August 15, 1953, to October 3, 1953, he made sales and earned on account thereof for the company approximately $20,000 and was the recipient of his share thereof according to the contract.

Appellant testified he concluded he made a bad bargain and since that time he had been trying various ways and means to avoid his contract. He consulted and employed attorneys in the summer of 1953, and requested appellee to talk with one of them about August 15, 1953, after a settlement of commissions was made. The attorneys at the direction of appellant wrote a letter on October 2, 1953, and sent it to appellee by registered mail to the office of the Charles E. Walters Company. Appellant was in the office October 3, 1953, when the letter was delivered. He saw it and told the secretary of appellee to deliver it unopened to appellee. Appellant knew generally what was in the letter. He had mentioned his intention of withdrawing from his connection with the company but had indicated no time or date. On October 3, 1953, he was a party to plans for him and his wife to attend a bankers convention in Des Moines, Iowa, with appellee shortly thereafter. Appellant left the office of the company the day the letter of the attorneys was delivered. He did not see or talk with appellee. He did not return to the office. He called appellee by telephone a few days thereafter and told him that appellant was sorry he did not have an opportunity to discuss the matter with appellee. Appellant testified that he at no time had any bitterness or anger toward appellee. It appears in the testimony of ap-

pellant in one of the depositions he gave that he was certain that appellee never lied to appellant in any way or ever misrepresented any facts to him.

Appellee disclosed to appellant during the negotiations that he owned only a part of the stock of the company, that his daughters owned the balance thereof, and that appellee had a power of attorney to represent and act for them. Appellant said that he knew who the stockholders were before the contract was prepared and entered into. A recitation of the contract is that the capital stock of the company was 500 shares of the par value of $50 per share, that appellee owned 150 shares, and that he was authorized to act for the other stockholders. The books and records of the company, including copies of its income tax returns for a period of 2 or 3 years, were on August 2, 1951, made available to appellant and he made such examination of them as he desired. He testified that they were genuine, proper, and accurate and that he was not presented any fictitious figures, books, or records. It was admitted by appellant that after he left the company he told Harry E. Ross, president of the City National Bank of Shenandoah, Iowa, that the reason he withdrew from the company was because his wife objected to his traveling so much which his work for the Charles E. Walters Company required.

The letter of October 2, 1953, written on behalf of appellant to appellee says that appellant had elected to rescind the contract on the ground and for the reason that under it appellee failed, neglected, and refused to give appellant the training and education necessary to permit him to pay out the contract. Appellant thereafter instituted an action against appellee for the rescission of the contract. Subsequently that action was dismissed by appellant. Eventually this action was commenced for damages because of the claim of fraudulent misrepresentation.

Appellant now asserts that he was forced to sign the

contract dated August 24, 1951, although, as he says, its terms were read and understood by him and they were different than the statements made during the negotiations preliminary to the written contract, because of commitments he made after the sale of his bank stock on August 17, 1951. He admits that he previously testified that he had determined to leave Villisca, Iowa, sometime in July 1951.

It is argued by appellant that the contract because of which this litigation resulted is intrinsically fraudulent. He says appellee could not have performed by delivering all of the shares of the stock of the company and appellant could not have enforced the contract in the event of the death of appellee because he owned only 150 of the 500 shares of the stock of the company and the other stockholders were not named in and did not sign the contract. The contract recites that appellee, referred to as seller, was acting for himself and as agent for all other stockholders of the Charles E. Walters Company. Another part of the contract says that the capital stock of the company is 500 shares, that the seller is the owner of 150 shares, and that he is authorized to act for the other stockholders who own the balance of 350 shares. The identity of all the stockholders was made known to appellant during the negotiations preliminary to the making of the contract and any stock transfer subsequently was disclosed to appellant. Appellee advised appellant that he was authorized to sell all the stock and that his authority was evidenced by power of attorney. The power of appellee to bind the stockholders was expressly given and the act of appellee in making the contract was later ratified by them because of what was subsequently done in which they acquiesced and participated. Appellant seems to have a unique theory that the stockholders, other than appellee, would be obligated if their names appeared in the contract or as signatories over the name of appellee but would not be obligated otherwise notwithstanding their obvious

intention to be bound. The law in this jurisdiction, and quite generally, is that a disclosed or undisclosed principal is obligated by an authorized simple contract made only in the name of the agent if it was the manifest intention of the agent and the third party to obligate the principal as well as the agent. This court said in Lincoln Joint Stock Land Bank v. Bexten, 125 Neb. 310, 250 N. W. 84: "Except as to the execution of negotiable instruments and obligations under seal, an undisclosed principal is bound by simple contracts made by the agent, when the acts done by the agent are within the scope of his authority and in the course of his employment." See, also, Bankers Surety Co. v. Willow Springs Beverage Co., 104 Neb. 173, 176 N. W. 82; Lincoln Joint Stock Land Bank v. Bexten, 129 Neb. 422, 261 N. W. 845; Restatement, Agency, § 149, p. 379; 2 Am. Jur., Agency, § 394, p. 308; 3 C. J. S., Agency, § 241, p. 162. The argument of appellant in this respect cannot be sustained.

The substance of the recitations of the contract in part is: (1) That the person whose name the company bears organized the business of selling banks without publicity, that the company is a pioneer in the business and has served bankers for more than 46 years, that it enjoys an enviable reputation where known, and that its stock has a substantial good-will value; and (2) that the nature of the business requires special training to qualify an individual to operate successfully and profitably, that the greater the experience of an officer or employee, the more valuable his services are to the company and the more valuable to such officer or employee is the ownership of the stock of the company, and that the purchase price of the stock is not based upon tangible values but upon earning capacity of the company and the benefits to be enjoyed by the owner and operator of it. Appellant characterizes these as false solely because of the amount of his earnings during the rather brief time he was connected with the com-

pany. This is not a convincing deduction. The pleading of appellant does not charge that these were false or misleading and no attempt was made during the trial to establish that they were false. The truth of them finds some support in the proof submitted by appellant. It shows that during the year 1952 the income of the company was in excess of $67,000 even though appellant did not produce a single cent of that income during the last half of the year. The mere characterization of these recitations as false does not condemn them or assist appellant. There are similar comments and conclusions by appellant concerning other portions of the contract. The weakness of them is that in each instance there is a lack of evidential integrity. It is appropriate to observe in this connection that appellant, with the assistance of counsel and extended opportunity for an appraisal of the entire situation, did not consider that the contract was faulty or that it contained a means of escape from its obligations because of any of the reasons for which it is now assailed by the arguments made in the respects referred to in the foregoing. If any of these had been considered as important factors, they or some of them would naturally have been included in the letter prepared and transmitted by counsel for appellant as reasons for the rescission of the contract. The appellant at that time, by his sworn admissions, was motivated by a desire and determination to discern some way or means to avoid his contract obligations. These matters now emphasize why any of them were not assigned for the conclusion and action of appellant. It is significant that fraud, misrepresentation, concealment, or deception are not mentioned in the letter of October 2, 1953, as a reason or ground for rescission or for any purpose. If appellant had been deceived or defrauded, he knew it then and it is unbelievable that he would not have proclaimed it as a basis of terminating the effectiveness and burdens of the contract. The letter was written more than 2 years after the contract was

made. Appellant had concluded he had made a bad bargain and he was seeking ways and means to avoid any obligation because of the contract. He then knew all the facts. He employed and consulted counsel in the summer of 1953. By the letter he gave notice that he had rescinded the contract and freed himself from its very considerable burdens for a single reason: "* * * on the ground and for the reason that under this contract you (appellee) have failed, neglected and refused to give him (appellant) the training and education necessary to permit him to pay out said contract in accordance with the provisions set forth in the contract to his damage." Appellant then knew that he had a valid contract and he sought to rescind it because there had been a material breach in the performance of a condition subsequent by appellee. The first action instituted by appellant recognized that it was a valid contract. It sought to have a court of equity rescind it for breach of condition subsequent. It was consistent with the reason assigned for the attempted rescission in the letter written to appellee. This is convincing that what appellant did was deliberately and knowingly done. There was a deposition of appellant taken in that case in which he testified that appellee never misrepresented any facts to him or lied to him in any way. Appellant has never attempted to testify that he learned any additional or new fact after October 2, 1953, of importance in this respect. He, under these circumstances which are established by uncontroverted evidence, is estopped to assert fraud as a basis of relief. The rule is venerable in this jurisdiction that a litigant is not permitted to take inconsistent positions and pursue them to the detriment of his adversary. The latest expression of this doctrine by this court is in O'Neil v. Union Nat. Life Ins. Co., 162 Neb. 284, 75 N. W. 2d 739: "It is a well-settled rule in this jurisdiction that where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after liti-

gation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."

It is asserted by appellant that a confidential relationship existed between the parties at the time the contract of August 24, 1951, was made. The prior relationship between the parties was a single instance when appellee, representing the Charles E. Walters Company, acted as a broker shortly before April 1, 1948, in the sale of bank stock to appellant and Hyink. There was no other business matter in which the parties to the contract were interested until the services of appellee were solicited in the sale of the bank stock of appellant to Hyink. In this matter appellee was first contacted by Hyink. About 3½ years elapsed between these transactions and during that time appellant saw appellee briefly three times in the most incidental manner and the evidence fails to show that any subject was discussed or considered. There is absence of proof of reason or opportunity for appellant to have developed trust and confidence in appellee or for him to conclude that such a relationship existed at the time the negotiations for the sale of the stock of the Walters Company were initiated. The facts disprove justification of such conclusions. Appellant had several meetings with appellee, took time for deliberation of the proposal, and had opportunity for disinterested consultation before he decided to buy the stock. He and appellee agreed at the threshhold of the conversations that the terms of purchase discussed by them should not be final or binding until a written contract was prepared and executed by both parties. This kind of procedure and precaution is foreign and abhorrent to a relationship of confidence and trust. Appellee did not purport or attempt to act concerning the sale of the stock of the company in the interest of appellant. He was claiming to act and did act as owner in his interest and in the interest of the other stockholders of the company who were properly and

definitely concerned to secure as large a price as was fairly possible for the stock. It was not established in this case that a confidential relationship existed between the parties at any time. Generally, it may be said that such a relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind. Restatement, Restitution, § 166, Comment d, p. 676; Popejoy v. Eastburn, 241 Iowa 747, 41 N. W. 2d 764; Thorne v. Reiser, 245 Iowa 123, 60 N. W. 2d 784; In re McDonnell's Estate, 65 Ariz. 248, 179 P. 2d 238; Harrison v. Welsh, 295 Pa. 501, 145 A. 507. The term confidential relation has a comprehensive meaning and it may vary in reference to particular relationships involved, but it has not been construed to include the relationship of vendor and vendee merely because the parties had known each other for a limited time and both parties were favorably impressed with the other.

Appellant claims that appellee falsely represented the value of the Charles E. Walters Company, the method of paying the purchase price of the stock sold to him, the mileage allowance for the use of his automobile in the business of the company, the rate of interest to be paid appellant on the amount he invested, the expected income to be realized by him, and the insurance program for him.

There was no representation as to the value of the company or its stock. The record is that appellant asked appellee at the beginning of their negotiations the price of the stock and he said it was $100,000. There was nothing further said about it. Appellant knew from the beginning the price was that amount and he could not have been deceived concerning it. The statement of appellee as to the price of the stock was the amount asked for an item of property which he and his family owned and were offering for sale. It did not amount to a representation as to value. In Hooning v. Henry, 106 Or. 605, 213 P. 139, the court said: "We find no

case in which the mere asking of a price for an article is construed as a representation as to its value. Every man has the right to ask any price he sees fit for the wares he has to sell and the matter of fixing the price may be predicated upon the supposed usefulness of the article or some sentimental value that the party may place upon it, or what he thinks he can get for it from a prospective purchaser." See, also, 37 C. J. S., Fraud, § 57c, p. 343.

The contention concerning the method of payment of the balance of the purchase price is equally untenable. The contract contains provisions which conform precisely to the testimony of appellant as to the manner of paying the purchase price after the cash installment of $25,000 was paid. The contract does not require payment of the balance within any period or by payment of certain amounts at specified times. Payments to be made are on the basis of the earnings of appellant in excess of his base salary as determined in part by his production of commissions and a percentage of the total income of the company in excess of a stated amount. Appellant knew this when he executed the contract and he testified that he always expected to pay the $100,000 for the stock as the contract provides unless the price was reduced by the terms thereof in the event of the death of appellee.

Appellant claims he was defrauded because he says appellee told him that he would be making an income of $20,000 per year at the end of 3 years. This statement was obviously and inherently a prediction. It just had to be understood by appellant to be that. He did not continue with the company for the 3 years referred to and he did not apply himself efficiently to its interests at all times while he was employed. There is no proof of bad faith on the part of appellee in this regard and the most that he could be blamed for was that he overestimated the ability of appellant to earn an income of that amount. It was not a false representation. In

Cook Livestock Co., Inc. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370, this court referred to the elements of fraud including the one that a representation to be fraudulent must be made either with knowledge of falsity or without such knowledge as a positive statement of known fact and continued: "In addition to the above, the general rule * * * is that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. * * * It is a general rule that fraud must relate to a present or preexisting fact, and cannot be ordinarily predicated on unfulfilled promises or statements as to future events. * * * False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts."

The remaining representations said by appellant to be fraudulent concern the mileage allowance for the use of his automobile, the number of years the premium on the insurance policy on his life should be paid by the company, and the rate of interest to be paid on his investment. These were not representations but they, according to appellant, were verbal agreements talked of during the negotiations preliminary to and before the contract was prepared and executed. The testimony could not in the situation of this case make an issue of fact or support a verdict for him because of these matters if a verdict had been obtained. Any conversation about these matters was merged in and foreclosed by the written contract and parol evidence concerning them was incompetent. The provisions of the written contract include all of the matters complained of by appellant to which reference has been made above except the single statement that he would have an income

of $20,000 in 3 years. Appellant examined, read, and understood the contract. He afterwards executed it. It was delivered, became effective, and the parties operated under and had the benefit of it for more than 2 years. Their rights and obligations were fixed by and must be determined according to their written contract. Bitler v. Terri Lee, Inc., 163 Neb. 833, 81 N. W. 2d 318; Hafeman v. Gem Oil Co., 163 Neb. 438, 80 N. W. 2d 139; Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N. W. 2d 458.

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

AFFIRMED.

YEAGER, J., participating on briefs.

PAUL R. SMALL, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
85 N. W. 2d 712

Filed November 8, 1957. No. 34180.

1. **Evidence.** The general rule is that a person of ordinary intelligence who first qualifies himself to speak upon the subject by showing that he has had opportunity for personal observation may give opinion testimony as to a person's identity from any fact that leads him to believe that he knows the identity of the person in question.
2. ———. Such person may base his conclusion upon the form, size, manner, walk, tone of voice, or any mark or peculiarity of the person, rather than upon a view of his features.
3. **Criminal Law: Evidence.** Where an accused is identified by a witness who has had a reasonable opportunity to observe him such evidence is admissible and the probative value of such evidence is a question for the jury.
4. **Robbery: Evidence.** The positive testimony of one credible witness, identifying the defendant as the perpetrator of the crime of robbery, may be sufficient to support a conviction.
5. **Criminal Law: Evidence.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the

accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt.

6. **Criminal Law: Trial.** It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.
7. ———: ———. The unsupported testimony of the accused in a criminal case, which the jury does not believe, cannot be said to furnish a hypothesis consistent with the innocence of the accused.
8. **Criminal Law: Evidence.** In a criminal prosecution any testimony otherwise competent which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony, and it is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting.
9. **Criminal Law: Appeal and Error.** This court in a criminal action will not interfere with the verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.
10. ———: ———. The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury may not be disturbed by this court unless it is clearly wrong.

ERROR to the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Schrempp & Lathrop, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

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

MESSMORE, J.

The information in this case against the plaintiff in error Paul R. Small, hereinafter referred to as the defendant, charges him with robbery under section 28-

414, R. R. S. 1943. On this charge a trial to a jury was had resulting in a verdict of guilty. Thereafter the defendant's motion for a new trial was overruled and a sentence of confinement in the State Penitentiary for a period of 15 years was imposed. The defendant prosecutes error to this court.

Two grounds for reversal are presented: (1) The trial court erred in failing to sustain the defendant's motion to direct a verdict of acquittal or in the alternative to dismiss the information; and (2) the trial court erred in admitting rebuttal testimony which had no reasonable relationship to the defense. We consider the assigned errors in the order above enumerated.

The first assignment of error has to do with the sufficiency of the evidence to take the case to the jury.

There is no doubt in this case that Margaret W. Kellogg was the victim of an armed robbery at approximately 8 p.m., on October 18, 1955. The residence here involved was owned by Margaret W. Kellogg. It is located at 5601 Farnam Street in Omaha, and faces the east. There is a front door on the east and an entrance consisting of french doors on the north into a solarium from which entrance may be had to a living room and to a staircase leading to the upper floor. On the upper floor to the north is a bedroom occupied by Mae Hamernick who was a nurse companion of Mrs. Kellogg. There is also a hall, an upstairs living room, and a bedroom occupied by Mrs. Kellogg in the south part of the second floor. In the latter room was a safe in which she kept some money and other valuables. In the house on the night of the robbery were Mrs. Kellogg, Mrs. Hamernick, Mrs. Arthur a friend who at times visited Mrs. Kellogg, and also a friend Miss Gladys Rohrs who arrived at the Kellogg residence about 10 a.m., on the day of the robbery. She stayed there most of the day and was there for dinner about 6 p.m. After finishing dinner, about 6:30 p.m., Mrs. Kellogg and Miss Rohrs went upstairs. There was a television set

in Mrs. Kellogg's bedroom and they decided to watch a television program that came on at 8 o'clock. Miss Rohrs sat in a chair by the bed and Mrs. Kellogg lay down on the bed to watch the program. Just previous to this time Mrs. Hamernick and Mrs. Arthur, who had remained downstairs to tidy up the kitchen, came upstairs and went into Mrs. Hamernick's bedroom at the north end of the second floor. To get to Mrs. Kellogg's bedroom it was necessary to go through a sitting room. There was a wood panel door which blocked the entrance to the sitting room and a gate to confine some small dogs owned by Mrs. Kellogg. The main door was open and the gate across the door was in place.

Miss Rohrs testified that they heard a crash of glass. She got up to see what happened. She had slipped off her shoes. She picked them up and started through the living room to go into the hall. As she came through the hall door, a masked man grabbed her left arm and endeavored to pull her out into the hall. She told him to let go, that she had to open the little gate to get into the hall, which she did. This man had a silk stocking covering his face. He held a gun which he pointed at her and, in an excited tone of voice, told her to come out in the hall. They had an argument about her putting on her shoes, which she eventually did. After she got into the hall, this man told her to stand to one side. There was a light in the living room, but no light in the hall. About that time Mrs. Kellogg came to the door to see what the noise was about. The masked man saw her and yelled: "This is the one we want." Mrs. Kellogg slammed the sitting room door. Miss Rohrs further testified that there were two masked men in the house. The other one was in the room where Mrs. Hamernick and Mrs. Arthur were. He came running down the hall. After Mrs. Kellogg slammed the door, the masked man who held the gun on Miss Rohrs turned the lights on and off in the hall. The two masked men proceeded to break down the door to gain entrance to

Mrs. Kellogg's bedroom. At that time Miss Rohrs ran down the back stairs and gained entrance to the Roncka home which is just south of the Kellogg residence. From the front porch of the Roncka home she could see one of the masked men and Mrs. Kellogg at the safe. The masked man was standing over Mrs. Kellogg. She later saw the same men running east across the street. She further testified that the man who pointed the gun at her kept changing the gun from one hand to the other as he was talking to her in the hall; and that he was slight of build, had on a light beige sport jacket and, she supposed, gabardine trousers. He also had on a hat. She heard his voice in a conversation lasting a minute or two. She could not observe his features through the silk stocking mask because it came below his chin, to about the middle of his neck. He was nervous and in a crouching position at times. Both of the masked men were about the same build, except the man who came down the hall might have been a little heavier. This man had no conversation with her.

Mrs. Mae Hamernick testified that she lived with Mrs. Kellogg as a nurse companion, and was at the residence the night of the robbery. She and Mrs. Arthur were in her bedroom looking at television when they heard a "rumbling" noise which was almost below her window. They got up to investigate, and at that time a man came running down the hall. He had a gun and said it was a hold up, and "I mean it." He came into her room. He was going to lock them in the bathroom, but there was a lock on each side and he decided that would not do. He looked around, and directed Mrs. Hamernick to sit at the head of the bed, which she did. This man then went down the hall toward Mrs. Kellogg's room. She further testified that the man she saw was not big. He had on a light sport coat with black blotches in it and heavily padded shoulders. He was wearing a hat. She could give no description of the other man. The man she saw had a stocking over his face.

Proper foundation was laid for the introduction of Mrs. Kellogg's evidence taken at the preliminary hearing, as she was too ill to testify at the trial. Her evidence was read to the jury. She testified that about 8 p.m., on October 18, 1955, she was held up by two robbers who each had a gun. She and Gladys Rohrs were in her bedroom watching television. Mrs. Hamernick and Mrs. Arthur were in Mrs. Hamernick's bedroom also watching television. Mrs. Kellogg was lying on the bed watching the program and Miss Rohrs was sitting in a chair. They heard a noise and jumped up. By the time they got from the bedroom to the sitting room door the robbers were at the door. One of them went into Mrs. Hamernick's room to take care of her and Mrs. Arthur, and said he was going to kill them. The other robber had a gun pointed at her and Miss Rohrs. They wanted her to open the safe. She had just been in the safe and it was closed but not locked. The robbers took a bedspread off the bed and dumped her papers, money, and jewelry on the bedspread. There was about $4,500 in money in the safe. They tied the bedspread, and one of them threw it over his shoulder and they hurried out of the house. During the process of the robbery she put her hand on one of the robber's hands and said: "Let's sit down and talk this over"; and he said "Take your hand off of me or I'll kill you." She let him take the money and personal property then.

On cross-examination she testified that when she heard the noise she and Miss Rohrs were together and went to investigate. When she got to the sitting room door she could see into the hall and see these masked men. Miss Rohrs was pulled into the hall by one of the men. At that time Mrs. Kellogg slammed the door and locked it. They broke down the door to gain entrance, and one of the robbers covered her with a gun and went through the safe. She further testified on cross-examination that the man who came through the door had a stocking over his head and had on a felt

hat. The hand that held the gun was a light, thin hand. She did not remember the first conversation with the man who entered her room, but she knew he said, "This is the one we want" meaning her, and told her to take him to the safe and open it. She further testified that it was rather hard to tell the denominations of the money in the safe, it could have been in one hundred dollar bills, fifty dollar bills, and some twenty dollar bills. With reference to five hundred dollar bills, she indicated that there could have been some in the safe.

A detective of the police department was summoned to the Kellogg home, arriving there almost immediately after the robbery. He found the frame of the doors in the north entrance broken. He went into Mrs. Kellogg's bedroom and observed the safe. It was open, and some of the small compartments had been removed. He talked to the ladies in the house, made some notes of the conversation, and prepared a report. He learned from the ladies that two masked men had robbed the house. He took two hats that were left behind by the robbers.

A lieutenant of police assigned to burglary and robbery investigation went to the Kellogg home the night of the robbery. He took Mrs. Kellogg and Miss Rohrs to the second floor of the police station where the identification bureau is located. This was at approximately 10 or 10:30 p.m. They were shown several hundred regular standard police pictures commonly referred to as "mug shots" which, for the most part, were mounted on hinges in metal trays. They looked at the pictures until 11 p.m.

Miss Rohrs testified that on the night of the robbery she went to the police station about 9:30 p.m. They took her into a large room and brought out a number of pictures, some of which were loose, some in drawers, and some in trays. She and Mrs. Kellogg looked through a number of the trays and, from looking at the pictures, she selected three as resembling one of the men involved in the robbery. The officer then

brought out full length pictures of the three she had selected. She looked over these pictures carefully and pointed out the man she thought was one of the robbers. After leaving the police station she went back to the Kellogg home. The next morning she returned to the police station with Mrs. Kellogg and Mrs. Hamernick. They went into a small closet located in the inspector's office where they could look through a window and see people, but the people could not see them. The defendant was brought in. She viewed him and at that time identified him as one of the robbers. On the same day, or another day, she was unable to remember which, the three ladies were taken to another floor of the police station where they stood in a sort of a hall near a barred door. They could see the room. Prisoners were marched before them. They observed four or five men for a minute or two. In this line-up was the defendant. He said something, and she believed his voice to be the voice of the man she met in the hall at the Kellogg residence the night of the robbery. She also observed the left hand of this man and described it as a light colored, slender hand. To her mind, she made a positive identification of the defendant. To do this, she considered the build of the man, his voice, and his hands. She further testified that the build of the man she saw at the police station was the same as that of the man she saw in the hall at the Kellogg home the night of the robbery, the voice was the same, and the hand resembled the hand that held the gun. In addition, she pointed the defendant out in the courtroom.

Mrs. Kellogg testified that in the line-up at the police station she thought she saw one of the men who took part in the robbery. She testified that she made an identification, as far as one could be made. At the line-up the defendant was asked to put out his hands. Mrs. Kellogg testified that she thought she identified him at that time and that the basis of her identification was mostly his posture and his hands.

A lieutenant of police testified that he talked to Mrs. Kellogg and Miss Rohrs at the police station on October 19, 1955. He was assigned to take them to the jail on the fourth floor to conduct a show-up of a prisoner in custody. He further testified that the witnesses were left in the jail lobby. The suspect and other prisoners were lined up inside the doorway in the jail office. There were four men in this particular line-up, the defendant and three others. He had them step forward one at a time and stand in front of the doorway, at which time he asked each one his name, age, address, occupation, and what he was in jail for. He had them each speak and hold out their hands for examination, and then requested them to step back. Each man then made a quarter turn to the right and a half turn to the left for a profile examination. He asked Mrs. Kellogg, Miss Rohrs, and Mrs. Hamernick if they could identify any of the men.

A captain of police, whose duty covered investigations, testified that he had occasion on October 19, 1955, to go to Meek's Garage at Sixteenth and Leavenworth Streets. He and his partner arrived there at approximately 2 p.m. They checked the garage and found a 1952 Cadillac car belonging to the defendant. Shortly thereafter the defendant entered the garage and was placed under arrest. He was searched and cash taken from his person in the amount of $354.05, mostly in ten and twenty dollar bills. The defendant was taken to the office of inspector Brown at the police station, arriving there at 2:15 or 2:20 p.m. He was interrogated and asked to remove his clothing. In taking off his shorts, a quantity of money fell from where he had secreted it. This money consisted of two five hundred dollar bills and five one hundred dollar bills. After further investigation, the defendant was booked.

A title clerk in the office of the county clerk testified to a certificate of title issued October 18, 1955, in the name of the defendant on a 1950 Pontiac which was

acquired on October 17, 1955, from Wolfson Used Cars.

Inspector Brown of the police department testified that he reported for work at 6:30 a.m., on October 19, 1955, and the defendant was then in custody. The defendant had been booked that morning at 1:15 a.m., and released about 8:30 a.m. He further testified that he had occasion to investigate the Kellogg robbery, and in connection with this matter he and another officer went to the Wolfson Auto Sales lot at Twenty-fourth and Ames Streets, arriving there at approximately 10:30 a.m. After arriving at the Wolfson lot, a 1950 Pontiac bearing a Nebraska license and dealer plates was searched resulting in a silk stocking being found in the car. After the second arrest, as previously mentioned, the defendant was again in the inspector's office. He testified to the defendant removing his clothing and the finding of a quantity of money which the defendant had secreted. Mrs. Kellogg, Miss Rohrs, and Mrs. Hamernick came to the office and were put into the special place where they could use the facilities as a matter of identification of the defendant. The inspector further testified that he drove the 1950 Pontiac from the Wolfson lot to the police station and had difficulty with the transmission. He questioned the defendant about the car and the defendant told him that he returned the car due to the fact that he had some motor trouble; that there was some defect in it; and that he drove it to Wolfson's sales lot the evening of October 18, 1955.

The defense was an alibi. An employee of the police department testified that the defendant was booked at 1 a.m., October 19, 1955, on a charge of vagrancy and at that time he had $52.20 on his person; and that his case was dismissed October 22, 1955.

A waitress at the Reno Bar testified that she knew the defendant as one of the customers of the bar; that on October 18, 1955, the defendant came into the bar about 7:30 p.m.; that there was a three-piece orchestra which started playing in the bar at 8:45 p.m., and played

until nearly closing time; that she observed the defendant visiting with people at the bar; that he talked to her and she danced with him a couple of times; that the defendant left about 10 p.m., and returned about half an hour later; and that the defendant was arrested in the bar about midnight.

The leader of the orchestra that played in the Reno Bar testified that he arrived at the Reno Bar between 20 minutes after 8 and 20 minutes to 9 p.m. When he arrived on October 18, 1955, the defendant was there and talked to him. The defendant left a little before 10 p.m., came back, and was arrested in the bar.

One of the musicians also testified to seeing the defendant in the bar that night. He knew the defendant by sight, and saw him leaning over the bar talking to someone about 9 p.m.

In considering the defendant's first assignment of error wherein the defendant contends that there was no possible means of identifying the defendant as one of the robbers of the Kellogg home and that the evidence in this respect was wholly insufficient to take the case to the jury, we believe the following to be applicable.

In 20 Am. Jur., Evidence, § 880, p. 740, it is said: "The general rule is that a person of ordinary intelligence who first qualifies himself to speak upon the subject by showing that he has had opportunity for personal observation may give opinion testimony as to a person's identity from any fact that leads him to believe that he knows the identity of the person in question. Such person may base his conclusion upon the form, size, manner, walk, tone of voice, or any mark or peculiarity of the person, rather than upon a view of his features. * * * Another recognized method of proving identity is the testimony of a witness to his recognition of a person's voice; such proof is not regarded as a matter of opinion, but the statement of a conclusion directly and primarily operating from the sense of hearing—in other words, direct and positive proof."

In Wilshusen v. State, 149 Neb. 594, 31 N. W. 2d 544, this court said: "Where an accused is identified by a witness who has had a reasonable opportunity to observe him such evidence is admissible and the probative value of such evidence is a question for the jury."

In Froding v. State, 125 Neb. 322, 250 N. W. 91, it is held: "Where an accused is identified by a witness solely from having heard his voice, the probative value of such evidence is a question for the jury.

"The positive testimony of one credible witness, identifying the defendants as perpetrators of the crime of robbery from the person, may be sufficient to support a conviction."

The court went on to say: " 'That one may be identified by his voice is now generally held by the authorities. * * * Accordingly it has been held to be competent evidence to support a conviction, where a prosecuting witness identified the defendant solely by his voice, and where the witness had never heard the defendant's voice but once before the commission of the crime, and that on the same day that the crime was committed, and then heard him speak only a few words.' 8 R. C. L. 184, sec. 176. See Mack v. State, 54 Fla. 55, 13 L. R. A. n. s. 373, and note.

"We have held that the positive testimony of one credible witness identifying the defendant as perpetrator of the crime is sufficient to support a conviction. Lee v. State, 124 Neb. 165, and cases cited in the opinion." See, also, 20 Am. Jur., Evidence, § 351, p. 326; Commonwealth v. Hayes, 138 Mass. 185; Ogden v. People, 134 Ill. 599, 25 N. E. 755; State v. Herbert, 63 Kan. 516, 66 P. 235.

In Opanowich v. Commonwealth, 196 Va. 342, 83 S. E. 2d 432, it is said: "In an annotation to the case of Mack v. State, 54 Fla. 55, 44 So. 706, in 13 L. R. A. (N. S.) at page 373, it is said: 'The cases with great unanimity sustain the ruling in Mack v. State, that a witness may be permitted to identify a person solely

from having heard his voice, and such testimony will be admissible and legitimate to establish identity.'"

We conclude that on this phase of the case the evidence was sufficient to take the case to the jury.

The defendant's first assignment of error is also predicated on the claim that the circumstantial evidence introduced does not implicate the defendant in the robbery.

This court in Morgan v. State, 51 Neb. 672, 71 N. W. 788, held: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt.

"It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. (Casey v. State, 20 Neb., 138.)" See, also, Kitts v. State, 153 Neb. 784, 46 N. W. 2d 158; Maher v. State, 144 Neb. 463, 13 N. W. 2d 641.

It should be borne in mind, however, that the unsupported testimony of the accused in a criminal case, which the jury does not believe, cannot be said to furnish a hypothesis consistent with the innocence of the accused.

The ultimately applicable rule in the case at bar is that: "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Williams v. State, 115 Neb. 277, 212 N. W. 606. See, also, Kitts v. State, *supra*.

With the foregoing authorities in mind, we proceed

to the rebuttal evidence offered by the State which constitutes the basis of the defendant's second assignment of error.

Harry Wolfson testified that he was a used car dealer and transacted business with the defendant by selling him a 1950 Pontiac automobile in October 1955. As shown by an exhibit, the date of the sale is indicated as October 14, 1955. He saw the Pontiac car again sitting in his used car lot on October 19, 1955. He further testified that he worked from 10 a.m. to 8:30 p.m., on October 18, 1955. This Pontiac car was not in his used car lot at that time. On redirect examination he testified that a complaint was lodged with his company on October 19, 1955, relative to some mechanical difficulty with the car.

The treasurer and manager of a finance company testified that about 12 o'clock, noon, October 19, 1955, the defendant came into the finance office and paid $1,550, using three five hundred dollar bills, two twenty dollar bills, and one ten dollar bill, to pay off the loan against a car which had been repossessed by the company for security reasons.

An officer assigned to the detective bureau and also to the Kellogg case testified that he had occasion to make an arrest, and arrested the defendant at the Reno Bar at 12:30 a.m., October 19, 1955. At that time he had a conversation with the defendant. Other officers were present. This conversation took place in the detective bureau at 12:45 a.m., the same day. The defendant said he left his apartment about 7:30 p.m., went to the Reno Bar and stayed there until 8:30 p.m., when he went to the 1512 Club at 1512 Harney Street, a block and a half distant from the Reno Bar; that he walked to the 1512 Club; and that he had one drink there and returned to the Reno Bar.

A witness who was attending a barber school and who also drove a yellow cab in the evenings testified that he commenced driving on October 18, 1955, at 5:30

p.m. He tried to finish his work at 10 p.m. He was called to the Wolfson auto lot at Twenty-fourth and Ames Streets and arrived there about 20 minutes to 10 p.m., to pick up a fare. His fare was the defendant. He took him to the Reno Bar, arriving there about 10 minutes to 10 p.m., and the defendant asked him to wait. The defendant got out of the cab and went into the bar. The cab driver could observe him as he walked to the bar and away from there and around the room talking to different people. The defendant stayed in the bar about 5 minutes and returned to the cab and was taken to the 1512 Club, and that was the end of the fare. The trip slip, an exhibit in evidence, discloses the foregoing facts.

Section 29-2016, R. R. S. 1943, provides in part: "After the jury has been impaneled and sworn, the trial shall proceed in the following order: * * * (4) the state will then be confined to rebutting evidence, unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief; * * *."

In Hampton v. State, 148 Neb. 574, 28 N. W. 2d 322, this court said: "It is within the sound discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting."

The order in which a party shall introduce his proof is to a great extent discretionary with the trial court, and the court's action will not be reversed unless an abuse of discretion is shown. See, Joyce v. State, 88 Neb. 599, 130 N. W. 291; Baer v. State, 59 Neb. 655, 81 N. W. 856.

As said in Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672: "In a criminal prosecution any testimony otherwise competent which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony, and it is within the discretion of the court to permit in rebuttal the introduction of evidence not strictly rebutting." See, also,

Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113; Argabright v. State, 56 Neb. 363, 76 N. W. 876.

The testimony offered by the State in rebuttal is in a true sense rebutting testimony, rebutting the alibi of the defendant and in addition rebutting the fact that the defendant had little money when in fact upon his second arrest it developed that he had over $3,000. We find no prejudicial error in the admission of this evidence.

The evidence shows that there was a positive identification of the defendant. A silk stocking was found in the back seat of the car owned by the defendant the day after the robbery. Both men who committed the robbery had silk stockings over their faces. The defendant's Pontiac car was found in a used car lot. He took a yellow cab from this lot 1 hour and 40 minutes after the robbery. He paid off an obligation on his Cadillac car the day after the robbery was committed, in the amount of $1,550, and when apprehended the second time he had $1,500 secreted on his person and over $300 in his billfold. The loss Mrs. Kellogg suffered in money was $4,500. The denominations of the bills found on the defendant's person and used to pay the mortgage on the Cadillac car correspond somewhat closely to the bills taken from Mrs. Kellogg's safe.

Referring to the authorities on circumstantial evidence heretofore set forth, we conclude that the circumstances, coupled with the identification of the defendant, were sufficient to take the case to the jury.

The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case and the verdict of the jury will not be disturbed by this court unless it is clearly wrong. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701; Franz v. State, 156 Neb. 587, 57 N. W. 2d 139; Fisher v. State, 154 Neb. 166, 47 N. W. 2d 349. The evidence in the instant case does not permit a conclusion that the verdict of the jury is without proof to sustain it.

Finding no error in the record prejudicial to the defendant, we conclude that the judgment of the trial court should be, and hereby is, affirmed.

AFFIRMED.

S. A. SORENSEN CONSTRUCTION CO., APPELLEE AND CROSS-APPELLANT, V. ROY F. BROYHILL ET AL., APPELLANTS AND CROSS-APPELLEES.
85 N. W. 2d 898

Filed November 8, 1957. No. 34187.

1. **Mechanics' Liens.** An action for foreclosure of a mechanic's lien must be commenced within 2 years after filing the lien.
2. **Work and Labor: Pleading.** An action on quantum meruit is properly pleaded when the petition alleges a right of recovery for the reasonable value of labor and materials for which there is an express or implied agreement to pay.
3. **Appeal and Error.** Where the evidence on material questions of fact in an equitable case triable de novo is in irreconcilable conflict, this court will, in determining the weight of evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the other.
4. **Work and Labor: Evidence.** There being no specific standard by which reasonable value of labor and materials furnished shall be proved, prima facie proof thereof is made where a reasonable inference of such value flows from the evidence adduced.
5. **Evidence.** A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it is made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.
6. **Work and Labor: Evidence.** In an action on quantum meruit for services rendered, evidence of stated rates is competent evidence tending to show value.

APPEAL from the district court for Dakota County: ALFRED D. RAUN, JUDGE. *Affirmed as modified.*

Sherman W. McKinley, Jr., for appellants.

Edward L. Moran and *Mark J. Ryan,* for appellee.

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

YEAGER, J.

This is an action to foreclose a mechanic's lien instituted by S. A. Sorensen Construction Co., a copartnership, plaintiff, and appellee and cross-appellant, against Roy F. Broyhill and Arline Broyhill, defendants, and appellants and cross-appellees. By cross-petition filed in the action the defendant Roy F. Broyhill sought to recover a money judgment against the plaintiff. The case was tried to the court at the conclusion of which the court found that the lien was valid and that there was an indebtedness of defendants to plaintiff in the amount of $3,862.01, and decree of foreclosure was rendered accordingly. The cross-petition of defendant Roy F. Broyhill was dismissed. Thereafter there were proceedings whereby the decree was vacated and later reentered. These proceedings however have no controlling significance on this appeal except that there is no motion for new trial made by the defendants here for consideration. A motion for new trial was filed by them after the original rendition of the decree but it was withdrawn.

From the decree as re-entered the defendants have appealed. The plaintiff has cross-appealed.

The basis of the action as declared by the petition is that in the summer of 1952 the plaintiff and the defendant Roy F. Broyhill entered into an oral agreement for the repair of a house on real estate which was owned by the defendant Roy F. Broyhill, by the terms of which the plaintiff was to furnish the material, work and labor, and supervision to make the repairs; that the plaintiff in performance under the agreement furnished work and labor, supervision, and material of the reasonable value of $20,578.34; and that the defendants were entitled to credit upon this amount of $11,013.82,

which left due and owing from the defendants $9,564.52. The prayer was for the recovery of this amount.

The defendants by answer in substance asserted the existence of an oral agreement for the repair of the house but declared that the plaintiff agreed to make the repairs and furnish the material therefor for a firm or fixed price of $10,000, except that in the event of changes from the orginal plans the plaintiff was to be paid additionally therefor; and that there were changes which would have increased their obligation by $1,400 if there had been full performance.

By cross-petition the defendant Roy F. Broyhill asserted that the plaintiff received in payment directly and indirectly $12,719.83 which was $1,319.83 in excess of the agreed price; that the repair of the house was not completed by plaintiff; that the cost of completion of the repair was $3,960; and that the total of the excess payment and the added cost of completion was $5,279.83. For this amount the defendant Roy F. Broyhill prayed judgment.

There were other pleadings whereby there was a joinder of the issues presented by the petition and cross-petition. They do not require review here except to say that the plaintiff denied that an agreement for a firm or fixed cost of repair was ever entered into, and to say that in amendment to the petition made after the trial the plaintiff prayed in the alternative for recovery on an oral cost-plus agreement or quantum meruit.

As grounds for reversal the brief of defendants contains six assignments of error. The fourth requires first consideration. The court decreed a recovery in favor of the plaintiff on the theory that the contract between the parties entitled the plaintiff to recover upon quantum meruit for the work and labor performed and the materials which were supplied. By the fourth assignment of error it is contended that any action upon quantum meruit was barred by the statute of limitations. It is urged that the cause of action as originally pleaded

was for recovery under a cost-plus agreement, and not in any sense on quantum meruit; that the cause of action on quantum meruit was not pleaded until the amendment of the petition after trial was made; and that this amendment amounted to the statement of a new cause of action which new cause of action was barred by the statute of limitations since it was pleaded more than 2 years after the filing of the lien. Section 52-103, R. S. Supp., 1955, limits the time for commencement of action after filing lien to 2 years.

The assignment is without merit. No new cause of action was pleaded by the amendment to the petition. The action pleaded in the original petition was on quantum meruit. This becomes readily apparent on examination. An action on quantum meruit is properly pleaded when the petition alleges a right of recovery for the reasonable value of labor and materials for which there was an express or implied agreement to pay. See Umberger v. Sankey, 154 Neb. 881, 50 N. W. 2d 346. The original petition in the case conforms to this requirement. The pertinent language contained therein is the following:

"That sometime in the summer of 1952, the plaintiff and defendant entered into an oral contract for the alteration, remodeling and improvement of the dwelling house situated on the above described real estate; that thereafter on or about September 5, 1952, the plaintiff furnished certain lumber and building materials * * * and furnished certain labor and supervision for the alteration, remodeling and improvement of said dwelling house; * * *.

"That the said Roy F. Broyhill promised and agreed by verbal contract to pay the plaintiff for the lumber and materials so furnished by the plaintiff and for the work and labor and supervision furnished * * * the fair and reasonable value of which was the sum of $20,578.34; * * *."

The prayer was for an accounting of the amount due

together with the other relief which is ordinarily incident to a decree of foreclosure of a mechanic's lien.

It is a fact that on the trial the plaintiff attempted to sustain a right of recovery under an oral agreement for compensation on what is commonly called a cost-plus agreement but it may not well be said that any benefit flowed from that to the defendants under the fourth assignment of error.

The remaining assignments of error, except the sixth, have reference to the question of whether or not on the evidence and applicable principles of law the plaintiff sustained a right of recovery. Separate and specific reference to them is not required.

The parties agree that the contract was verbal. They likewise are in accord as to the purpose to be accomplished by the contract. They are not in accord as to its character. As pointed out the plaintiff declared upon a contract based upon quantum meruit. It attempted on the trial to prove a cost-plus agreement. In this it wholly failed.

The evidence of the plaintiff unequivocally disclosed that there was no such agreement. The evidence of the plaintiff disclosed that it assumed that it was to be paid for the material and labor on a cost-plus basis. The assumption was based solely and alone on the fact that it was paid on two other contracts on a cost-plus basis. There was no evidence of any agreement that the basis for payment on the agreement under consideration here was to be the same as that of the other two agreements.

The defendants contended that the agreement was that the plaintiff was to perform the agreement and therefor receive in payment $10,000 and additionally for such changes as were made at the request of the defendants.

The work contemplated by the agreement was not completed by the plaintiff. This fact however is not relied upon by the defendants in their briefs as a de-

fense against a right of recovery in the action, hence the reasons therefor will not be discussed herein.

As pointed out there was a failure of proof by plaintiff of a cost-plus agreement. By the decree the plaintiff was allowed to recover on quantum meruit. This was proper if it sufficiently pleaded and proved a right of recovery on that theory. It has already been pointed out that it did sufficiently so plead.

It becomes necessary now to examine the facts and from this examination to determine whether the agreement was one requiring payment on a quantum meruit basis or on the basis of an agreed price, and if on a quantum meruit basis the amount of the obligation of the defendants. It is pointed out here that the record discloses without question that if the agreement was entered into on the basis contended for by the defendants the plaintiff has already received payment and credit in excess of that to which it was entitled.

The evidence on these questions is in irreconcilable conflict, hence this court has resort to the following rule: "Where the evidence on material questions of fact in an equitable case triable de novo 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 accepted one version of the facts rather than the other." Timmons v. Nelsen, 159 Neb. 193, 66 N. W. 2d 406.

The evidence of the parties to the action as to the character of the contract is in direct opposition. Stanley R. Sorensen, a member of the partnership, in clear effect testified that the plaintiff agreed to perform the work and furnish the necessary material but that there was no agreement as to the pay that was to be received therefor. He further testified in effect that he assumed that the payment was to be on a cost-plus basis since that was the basis for payment on two other contracts one of which had not been completed at the time this agreement was made.

The defendants on the other hand testified in substance that the plaintiff, through Stanley R. Sorensen, agreed to perform the agreement for $10,000 plus the cost of extra work and material made necessary by additions and changes not contemplated by the agreement.

It becomes apparent that a search must be made beyond the direct testimony of the parties to ascertain the character of the agreement and the rights and liabilities under it. Looking elsewhere the record discloses that the plaintiff offered evidence which was received without objection that the cost of the material which was used was $8,318.62. It offered evidence in the form of statements prepared and itemized from its office record that the cost of labor was $8,795.67. This evidence as to cost of labor was objected to and the objection was sustained. Later the office record itself was offered and received in evidence.

Statements for material and labor were presented to the defendants. As to material they contained the cost of material to which a charge in the amount of 10 percent for supervision was added. Also included in the total charge for material was a discount received by the plaintiff from the material supplier in the amount of $626.55. On the labor they contained charges for the labor furnished to which was added a charge of 11 percent for insurance and social security. Up to the time that the dispute arose as to the character of the agreement the defendants made payments in conformity with the amounts appearing upon the current statements.

The work and material to be furnished was for the repair of an old structure. In the very nature of things, without getting behind the existing surfaces, the amount of material and labor required for performance could not be known.

There were no written specifications prepared or submitted for the work to be performed. The defendants testified that there were verbal specifications. Evidence

of verbal specifications except as to certain finished and completed aspects does not appear.

Taking into consideration these particular aspects of the evidence, the testimony of the parties, and the fact that the trial court accepted the version of the plaintiff rather than that of the defendants the conclusion reached is that the agreement was not for a fixed price.

It becomes necessary therefore to find what, if anything, under the evidence adduced the plaintiff is entitled to recover quantum meruit from the defendants. The question of material and proof of its reasonable value will be considered first.

The question of the quantity of material which was purchased by the plaintiff for use and used is not seriously in dispute. The plaintiff's evidence discloses that it was so purchased and used. The only substantial contention of the defendants with regard to it was that some of it was removed and not used. There is no evidence as to description or quantity removed. There is only a bare general contention that some was removed. This was not sufficient to overcome the evidence of furnishing and use. It is held therefore that the evidence of plaintiff sufficiently establishes the amount of material furnished.

As to the value there is no testimony stating directly and specifically that the amounts set opposite the items listed were the reasonable value thereof. The testimony showed that this was the cost. However there is evidence from which a reasonable inference flows that this was the reasonable value. We think however the evidence as to cost and a lack of any effort on the part of the defendants to show that this was not the reasonable value was sufficient as prima facie proof of reasonable value. In Umberger v. Sankey, *supra,* it was said with regard to proof of reasonable value of labor and materials furnished: "There is no specific standard by which such reasonable value is to be determined."

It is concluded that this observation is applicable in the present instance.

As to the amount of labor furnished the conclusion reached is that the evidence of plaintiff is sufficient to sustain its cause of action. There was no evidence of probative value to the contrary.

As pointed out the plaintiff offered in evidence its permanent records as to the amount of work performed under the agreement in question and the charges made therefor. These records were properly identified, the mode of preparation was described, and a qualified witness testified that they were made in the regular course of business near the time that the work was performed. These records were admissible for the purposes declared in section 25-12,109, R. R. S. 1943, as follows: "A record of an act, condition, or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission."

Whether or not the statement of charges made in these records taken alone may be regarded as proof of their reasonableness does not require decision herein. There was evidence that these charges were the going standard union rate of pay for the classes to which the employees respectively belonged, except as to one employee who was paid 10 cents an hour in excess because he was a superior workman. In Hibbard v. Wilson, 51 Neb. 436, 71 N. W. 65, it was pointed out that in an action on quantum meruit for services rendered evidence of stated rates is competent evidence tending to show the value. That is the situation here, and there is no evidence to the contrary, in consequence of which it must be said that the reasonable value of the work and labor performed was sufficiently proved.

In the light of these observations and the analysis which has been made of the record it has been concluded that the plaintiff has sustained a right of recovery quantum meruit for work and labor and material furnished in the total amount of $17,114.29. In the total amount claimed by it is a profit on material, a charge for insurance and social security, and a charge for work and supervision by one of the partners. The evidence does not sustain a right of recovery therefor.

As to supervision there is no evidence as to the amount required or reasonable value. The record fairly shows that for the most part the supervision was by a regular foreman or superintendent for whose service a regular charge was made against the defendants. There is an absence of evidence of any amount paid for insurance and social security. Attention has not been called to any rule that would allow a recovery of profit in a case such as the one presented by this record. This is not to say that profit may not be an element of recovery in an action based upon a cost-plus agreement.

It therefore appears that the plaintiff was entitled to receive for its labor and materials $17,114.29; that it received in payment and by credit $11,013.82, leaving due and owing a balance of $6,100.47; and that by the decree it was awarded $3,862.01 which was $2,238.46 less than the amount to which it was entitled.

By the sixth assignment of error the defendants urge that the court erred in dismissing their cross-petition. The cross-petition was predicated upon a right of recovery for overpayment on the agreement. In view of the finding that there was no overpayment the assignment requires no consideration.

The pertinent question presented by the cross-appeal was that of whether or not the amount decreed to be due from the defendants to the plaintiff was sufficient. This question has been decided favorably to the plaintiff, though not to the extent insisted upon, therefore the cross-appeal requires no further consideration.

On a consideration of the record de novo, it is found that the plaintiff is entitled to recover $6,100.47, instead of $3,862.01, with interest at 6 percent per annum from the date of the decree. The decree as modified is affirmed.

AFFIRMED AS MODIFIED.

SOUTHWESTERN TRUCK SALES AND RENTAL COMPANY, A CORPORATION, APPELLANT, V. H. L. JOHNSON, APPELLEE.
85 N. W. 2d 705

Filed November 8, 1957. No. 34207.

1. **Contracts.** Contracts must receive a reasonable construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed.
2. ———. When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law.
3. **Sales.** Under a conditional sales contract each party has certain property interests in the goods less than complete and absolute ownership. The right of the seller to collect the price is the principal thing; the reservation of title, the secondary thing. The reservation of title is not absolute but for the limited purpose of collecting the price.
4. ———. The vendor under a conditional sales contract retains title solely for security; other attributes of ownership as possession, use, control, or right thereto under such a contract belong to the vendee.
5. **Witnesses: Evidence.** A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case.
6. **Evidence.** Where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where the party so testifying made no effort to retract, qualify, or otherwise explain the positive force of his own evidence.

7. Sales. In the absence of statute or of some provision in the contract to the contrary, a conditional seller of goods who repossesses the property sold may not thereafter recover the unpaid purchase money. The operation of the rule is not affected by the fact that the retaking of the property was after suit had been commenced to enforce the payment of the purchase price.

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

Torgeson, Halcomb & O'Brien and *John D. Knapp*, for appellant.

Martin, Davis & Mattoon and *Gerald E. Matzke*, for appellee.

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

SIMMONS, C. J.

Plaintiff brought suit on a contract allegedly dated April 14, 1954, alleging that there was due and owing to it from the defendant the sum of $14,683.84 after allowance of $4,768.40 which it alleged had been paid. Defendant's answer, subject to admissions, was a general denial.

Defendant further alleged that he had entered into a contract with the plaintiff; pleaded fraud and misrepresentation and that the contract did not represent the intent of the parties; and alleged that a parol contract of purchase was entered into in April and May of 1954, that there were misrepresentation and damages, that there was a subsequent modification of the parol contract, and that on or about November 1, 1955, plaintiff repossessed the property which was the subject of the parol contract and prevented performance by the defendant. Defendant sought recovery on a counterclaim which is not involved in this appeal. The reply was, in effect, a general denial except as to admissions consistent with the allegations of the petition.

Trial was had on the issues. At the close of the

plaintiff's case-in-chief, the defendant moved for dismissal or a directed verdict based on some 12 different reasons.

The trial court sustained the motion. In its journal it made a finding that the contract offered in evidence was a conditional sales contract and not a lease; that the plaintiff had repossessed the equipment covered by the contract; and that the plaintiff had waived its right to recover past due or future accruing payments. The court further found that the motion of defendant should be sustained and dismissed the petition with costs taxed to the plaintiff.

Plaintiff appeals. We affirm the judgment of the trial court.

Plaintiff is an Arizona corporation. It alleged a contract with "H. L. Johnson." It attached to the petition and made a part thereof a contract bearing the title "Truck and Accessory Lease" entered into with "H. L. Johnson, a corporation, Lessee." The contract offered in evidence shows that "H. L. Johnson" was typed into a mimeographed form. The contract thereafter refers to the lessee. It is signed by "H. L. Johnson" over the mimeograph title "President." Below the signatures of the parties is a "Guarantor Statement" signed by "H. L. Johnson, Owner."

The motion above referred to presented the question that H. L. Johnson individually was not a proper party defendant and not individually liable. It is not argued here. Both parties assume that Johnson is a proper party defendant. Without deciding that question we proceed, on that assumption of the parties, to the other issues presented.

Plaintiff alleged a contract dated April 14, 1954. The copy attached and made a part of the petition bears the date of June 21, 1954. The contract offered in evidence bears the date of April 14, 1954. It was "acknowledged" by the plaintiff's officers on June 14, 1954, and by "H. L. Johnson" on May 20, 1954. The contract pleaded

provided for a "lease * * * period of 2 years from the date hereof." The contract offered in evidence provided for a "lease * * * period of three years from the date hereof."

Prior to the trial plaintiff was required by court order to furnish the defendant a copy of the "conditional sales" contract. Defendant, on cross-examination of a plaintiff witness, introduced a copy of the contract for "purposes of comparison" only. On this copy the date "14" is lined through in pencil and "21" written above. Above "April" is written "June" in lead pencil. Above "three" is written "2". Plaintiff's witness testified that these changes were made on an office copy by an employee for the purpose of knowing when to start and when to stop sending bills.

It appears then that the contract copy attached to the petition, both as to date and one material term, was not the contract signed by the parties.

One further preliminary fact requires statement. It appears from the evidence that a Mr. Bogard owned and controlled two corporations — "Bogard GMC" and the plaintiff corporation. Bogard GMC was an "owning" corporation and plaintiff was a "leasing" corporation.

Chronologically the evidence shows the development of this controversy. Sometime in April of 1954 defendant desired to purchase some oil field equipment and discussed his needs with one Goffinett, an employee of the Ferguson Trucking Company of Fort Morgan, Colorado. Ferguson desired to sell three pieces of motor-driven equipment. Goffinett advised defendant of that fact and sent one Turner, an employee of plaintiff, to the defendant. Turner and defendant discussed the leasing of the Ferguson equipment and two "floats" which were then in New Mexico. Apparently Bogard GMC was to buy the equipment from Ferguson and plaintiff was to "lease" it to defendant. There is no showing as to how or from whom the other two pieces were to be acquired.

Turner started with the calculation that the five pieces of equipment had a valuation of $19,000. To determine the "rental price" he started with that value and calculated handling charges, interest, and carrying charges.

Mr. Bogard said that the rental basis was the fee "of which we have to pay— * * * plus a reasonable mark up of profit," and interest rates on money, and that those things determined the cost of the lease. Mr. Bogard further testified that at the end of a 2-year period this sort of equipment was usually "used up pretty muchly" so as to have no particular value.

Turner testified that in the April negotiations he told defendant that at the end of the 24-month period he had the option to purchase the equipment for 5 percent of the original selling price. Such a provision was not in the contract and is negatived by a general provision in the pleaded contract.

In April 1954, Turner calculated the "rental" charges for a 2-year period at $1,062.40 per month. Defendant at that time gave Turner a postdated check for $1,062.40 marked "Rent on Truck." That check was not paid when presented.

Turner then went to the plaintiff's home office at Tuscon, Arizona, and prepared the contract, in multiple number on mimeographed forms, which was admitted in evidence. This contract called for the payment of $25,936.40 payable $1,080.68 in cash and the balance payable $1,080.68 monthly commencing on the same day of the month "until the total sum hereunder is paid in full." Turner explained that the "$20.00" difference in payments was due to his failure to include a "rent tax" in his calculations.

This contract and copies were sent to Goffinett who took them to the defendant and secured his signature in May 1954. They were then sent to the plaintiff in Arizona where ultimately they were approved and executed by plaintiff's officers on June 14, 1954.

In June 1954 defendant paid the plaintiff, in cash and by check, $1,080.68, the original check not having been paid. Plaintiff gave defendant credit for this payment on June 19, 1954. Just when this equipment was delivered to the defendant does not appear. Neither does it appear as to whether plaintiff retained title or transferred title to defendant. It does appear that in May 1954 defendant was having trouble with the serviceability of one of the trucks. Plaintiff authorized its repair and on June 22, 1954, plaintiff gave defendant credit for $800 on the repair bill. Defendant paid $1,080 in October 1954 and again the same amount in November 1954. Defendant paid $500 in August 1955, and in September 1955, $227.04 was paid to plaintiff by a Fort Morgan bank. The facts of this payment do not appear in the record.

This brings us to the plaintiff's first assignment of error and that is that the trial court erred in holding that the contract proven was a conditional sales contract.

Plaintiff points to 11 alleged provisions of the contract: 1. The title as a "Truck and Accessory Lease." 2. The denomination of the parties as "lessor" and "lessee." 3. The provision that in consideration of the payment of $25,936.40 the "lessor does hereby *lease* unto the lessee." 4. The nonexistent provision of the lease (as pointed out earlier) "for the period of 2 years from the date hereof." 5. The lessee may add accessories and remove them before returning them to the lessor. 6. The lessee agreeing to maintain the vehicles. 7. The lessor has the right of inspection at all reasonable times. This provision is followed by this: "* * * lessor will provide free inspection to the lessee upon the latter's request at reasonable times." 8. A provision that the lessee will not sell or attempt to sell, mortgage, or otherwise dispose of the vehicles. 9. A provision that the lessee may release subject to conditions imposed. 10. A provision that lessee will not remove the vehicles from the state "without the

written consent of the lessor * * *." 11. A provision that the lessee will surrender the vehicles to the lessor "at the end of this lease." As above pointed out, the contract provides no terminal date.

Defendant points to those alleged provisions in the contract contending that it contains no provision allowing defendant to return the vehicles before the full amount of $25,936.40 has been paid and that it requires the payments until the total sum has been paid "in full"; that it requires the lessee to keep the property insured covering lessor's and lessee's interests; that in the case of total loss lessee agrees to pay the unpaid balance not covered by insurance and, if the insurance exceeds the balance due on the contract, the excess is to "enure" to the lessee; and that in the event of default of the lessee the vehicles may be retaken "or the full amount hereunder becomes due and payable at the option of the lessor * * *."

Plaintiff argues that it is entitled to every reasonable inference that can be drawn from this record. Plaintiff further argues that the practical construction of the contract by the parties controls and points out that defendant wrote "Rent on Truck" on the postdated check given in April 1954. The evidence is that at that time the parties were discussing a "lease." However, the contract here involved was not prepared nor executed at that time. Plaintiff points to the testimony of Turner that he had forms of the contract with him and showed them to defendant at the April meeting. Accepting that as true, defendant was shown a contract that had a lease provision "for the period of three years" in the mimeographed form. As pointed out, that provision and the amount of the stipulated monthly payments (and of necessity the total payment), were changed when the contract was prepared by plaintiff and executed by the parties. Defendant contends that the contract is to be construed most strongly against the party that drafted it.

Threaded through plaintiff's argument is the premise that this contract was a lease for a 2-year period and that the defendant agreed to surrender the vehicles to the plaintiff at the end of the 2-year period. As pointed out, the contract provides no terminal date for the lease. It does, however, provide a fixed period during which payments are to be made and when they are to terminate.

We start with two basic rules:

Contracts must receive a reasonable construction, so as to give effect to the intention of the parties thereto and carry out, rather than defeat, the purpose for which they were executed. Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245.

When the provisions of a contract together with the facts and circumstances that aid in ascertaining the intent of the parties thereto are not in dispute, the proper construction of such contract is a question of law. Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299.

In Landis Machine Co. v. Omaha Merchants Transfer Co., on rehearing, 142 Neb. 397, 9 N. W. 2d 198, we held:

"Under a conditional sales contract each party has certain property interests in the goods less than complete and absolute ownership. The right of the seller to collect the price is the principal thing; the reservation of title, the secondary thing. The reservation of title is not absolute but for the limited purpose of collecting the price. * * * The vendor under a conditional sales contract retains title solely for security; other attributes of ownership as possession, use, control, or right thereto under such a contract belong to the vendee."

What, then, is this contract in substance? We start with the fact that the vehicles involved had a value of $19,000. Plaintiff added thereto the various items enumerated above and came up with the total amount that was to be paid to it at the rate of $1,080.68 "until the total sum hereunder is paid in full."

Plaintiff cites our holding in Baker v. Priebe, 59 Neb. 597, 81 N. W. 609, that: "If a person secures a profitable

bargain in the hiring of personal property, no different application of legal principles is to be made on that account." Prior to that we said: "It is urged that the rental for the property is so great as to indicate a conditional sale. We do not so regard it. This might be true, if, with other facts or circumstances, a sale could be inferred; but, standing alone, the fact possesses no value for that purpose."

What are the other facts and circumstances? Plaintiff struck out of the contract the provision fixing a period for the termination of the lease. Its concern was the getting of the fixed and stipulated payments. It required the defendant to insure the property for the benefit of the plaintiff and defendant "as their interest may appear." Defendant agreed to pay to the plaintiff any loss or damage not covered by insurance. In the event of total loss the defendant guaranteed the payment of "the unpaid balance." If the insurance exceeded that "unpaid balance" the excess was to "enure" to the defendant. In the event of a default by the defendant, plaintiff had the right to retake the vehicles "or the full amount hereunder becomes due and payable at the option of the lessor."

Clearly the right of the plaintiff to collect the price was the "principal thing" provided in this contract. In this connection see Motor Power Equipment Co. v. Park Transfer Co., 188 Minn. 370, 247 N. W. 244.

The plaintiff further agreed to provide the defendant "with all necessary instruments for the procurement of licenses, operational permits, etc., incidental to the operation of said vehicles * * * at the expense of" the defendant. Clearly the plaintiff agreed to provide the defendant with those indicia of ownership which would enable him to procure licenses, operating permits, etc. At best it was a conditional reservation of title. The right to possession, use, control, and instruments of title for the purpose above recited were by the contract vested in the defendant.

The trial court did not err in holding this to be a conditional sales contract.

This brings us to the contention that the trial court erred in holding that the plaintiff by retaking possession of the property had waived its right to recover payments.

It is urged that such is an affirmative defense, and must be pleaded. Defendant alleged that on or about the first day of November 1955, plaintiff "did * * * repossess and take possession of all of the vehicles and equipment * * *." The sufficiency of the allegation was not challenged in the trial court. We see no merit in the contention.

We have pointed out that under the terms of the contract in the event of default of payment, the plaintiff had the right to retake the property "or" the full amount became due and payable at plaintiff's option. The remedy of the plaintiff was fixed by the contract.

Plaintiff filed its petition on November 30, 1955, in which it sought to recover the balance then due on the contracted payments, beginning with June 1954, the date of the execution of the contract by the plaintiff.

Plaintiff repossessed the vehicles. Goffinett testified that: "It was in November" 1955. Mr. Bogard testified that the vehicles were repossessed on his order: "I have in mind around the first part of November" 1955.

Plaintiff rested. The motion to dismiss was made asserting, as one ground, that plaintiff had repossessed the vehicles. Plaintiff then withdrew its rest and offered a witness who testified that on December 2, 1955, representing the plaintiff, he went to Fort Morgan, conferred with defendant and "suggested" that he turn the vehicles back in order to halt the accrual of monthly payments and that all of the vehicles were at that time in defendant's yard.

Plaintiff contends that, if this is a conditional sales contract, and having brought suit for accrued rentals,

it thereby made a binding election to look to the contract and vested title in the defendant and, title having vested in the defendant, it cannot be divested by a later change of possession to the plaintiff.

Plaintiff claims, then, the right to recover three-fourths of the stipulated payments under the contract and then repossess all of the property involved. Plaintiff seeks to exercise in part both remedies.

It will be noted that Goffinett and Bogard were testifying as to facts which they knew, i.e., the date of repossession and in accord with the allegations of the defendant's answer. The witness was testifying to the facts that he knew which, however, were only a foundation for a conclusion contrary to that of the Goffinett and Bogard direct evidence.

We have held that: "A party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstances of his case." Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236.

Was the testimony of Goffinett, and particularly Bogard, in the nature of a judicial admission?

That question has been answered in Tennes v. Tennes, 320 Ill. App. 19, 50 N. E. 2d 132, to the effect that where a party testifies clearly and unequivocally to a fact which is within his own knowledge, such testimony may be considered as a judicial admission. That rule has particular application where, as here, the parties so testifying made no effort to retract, qualify, or otherwise explain the positive force of their own evidence. See 31 C. J. S., Evidence, § 381, p. 1173. See, also, 32 C. J. S., Evidence, § 1040, p. 1110; 20 Am. Jur., Evidence, § 1181, p. 1032.

We conclude that the evidence of the witness is ineffective to overcome the testimony of Goffinett and Bogard.

We reach the same conclusion even on the premise

advanced by the plaintiff. In Star Drilling Machine Co. v. Richards, 272 Pa. 383, 116 A. 309, 23 A. L. R. 1460, there was a conditional sale of machinery for which payments were to be made in part by installments with a right of repossession in case of default. Default in a payment was made. Suit was brought to recover on a note given for one of the payments. Thereafter plaintiff repossessed the property. The court held: "The only question we need consider is whether or not the retaking of the machinery operated to relieve defendant from liability on his endorsement. The court below held this would have been the effect if it had been taken by plaintiffs before suit was brought, but, since the fact was otherwise, a different result obtained. We know of no principle or authority which sustains this supposed distinction. It would be a sad reflection on any system of jurisprudence, if it permitted a litigant, who was entitled to either one of two inconsistent recoveries, but not to both, to ultimately obtain both, merely by his order of procedure in relation to the matter. 'Equity, which is part of the common law of Pennsylvania, never would permit liability to depend upon the option of one party to a controversy, instead of upon legal principles applicable to all concerned' * * *."

The holding is stated in 78 C. J. S., Sales, § 600, p. 352, that: "In the absence of statute or of some provision in the contract to the contrary, a conditional seller of goods who repossesses the property sold may not thereafter recover the unpaid purchase money. * * * The operation of the rule is not affected by the fact that the retaking of the property was * * * after suit had been commenced to enforce the payment of the purchase price, * * *." See, also, Fredrickson v. Schmittroth, on rehearing, 77 Neb. 724, 112 N. W. 564, where a like result was affirmed.

The judgment of the trial court is affirmed.

AFFIRMED.

LOUIS ZIEMBA, APPELLEE, V. LEONA T. ZELLER ET AL., APPELLANTS.

86 N. W. 2d 190

Filed November 15, 1957. No. 34202.

1. **Trial.** It is for the jury to determine controverted issues of fact in a law action if the evidence is in dispute.
2. ———. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom.
3. **Waters.** Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
4. ———. Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.
5. ———. The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.
6. **Boundaries: Waters.** Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel.
7. ———: ———. Where a stream which is a boundary from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary, and the boundary remains as it was in the center of the old channel, although no water may be flowing therein.
8. ———: ———. If the change in the stream is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel has been formed, the original thread of the stream continues to mark the limits of the two estates.
9. **Adverse Possession.** The title to land becomes complete in the occupant by adverse possession when he and his grantors have maintained an actual, exclusive, open, and continuous possession thereof, claiming title to the same against all persons, for the statutory period of 10 years.
10. ———. The payment of taxes is an element and circumstance which may be considered together with all of the other circum-

stances of the case with respect to the subject of adverse possession.

11. **Trial.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

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

Brower & Brower and *John F. McCarthy,* for appellants.

Raecke & Phares and *Boyle & Hetzner,* for appellee.

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

CHAPPELL, J.

Plaintiff, Louis Ziemba, brought this action in ejectment, claiming to be the owner and entitled to possession of a portion of the northeast quarter of Section 1, Township 16 North, Range 5 West of the 6th P. M., and part of the southeast quarter of Section 36, Township 17 North, Range 5 West of the 6th P. M., in Nance County. All of such land was originally on the south side of the Loup River but now is on the north side thereof. Defendants Leona T. Zeller and Robert C. Purvis, owners of land adjacent thereto, and defendant Mike Prososki, who was their tenant, admitted that they were in possession of plaintiff's lands aforesaid, but claimed ownership and right to possession thereof by accretion and adverse possession.

Upon trial of the issues to a jury, it returned a verdict for plaintiff, finding that he was the owner and entitled to possession of the property as claimed by him. Judgment was accordingly rendered thereon, and defendants' motion for new trial was overruled. Therefrom defendants appealed, assigning error as follows: (1) The admission of exhibit No. 12 over objection of defendants; (2) the verdict was not sustained by the

evidence but was contrary to law; and (3) the giving of and refusing to give certain instructions. We conclude that the assignments should not be sustained.

The first assignment has no merit. Exhibit No. 12 was a photostatic copy of a map or plat of the lands involved, which was prepared in 1937 by a county surveyor from a survey just previously made by him. Such plat was duly recorded in Nance County on April 8, 1937. Without citing any authority, defendants argued that: "There is a great deal that is unsatisfactory in the foundation to Exhibit 12 * * *." An examination of the record discloses that ample foundation was laid for its admission. Also, as a matter fact, defendants argued in their own brief that the exhibit was beneficial to them in certain respects upon the issues of accretion and avulsion.

We reaffirmed in Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, that: "It is for the jury to determine controverted issues of fact in a law action if the evidence is in dispute."

In that connection, in Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127, we reaffirmed that: "In testing the sufficiency of the evidence to support a verdict it must be considered in the light most favorable to the successful party, that is, every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be deduced therefrom."

In Reams v. Sinclair, 97 Neb. 542, 150 N. W. 826, this court held that: "In an action of ejectment, the plaintiff must allege and prove a legal title and right of possession."

In Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458, this court held: "Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the

lowering of its surface level from any cause.

"Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.

"The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.

"Where the thread of the main channel of a river is the boundary line between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel. Commissioners v. United States, 270 Fed. 110." See, also, State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782.

In Bouvier v. Stricklett, 40 Neb. 792, 59 N. W. 550, this court held: "Where a stream of water is the boundary line of a tract of land, and it suddenly abandons its channel, and makes for itself a new course or bed, by cutting across a neck or bend, as it did in the case at bar, the middle of the old channel or bed of the stream still constitutes the boundary line of the tract of land, though it may be dry, or no water flowing therein."

In Iowa Railroad Land Co. v. Coulthard, 96 Neb. 607, 148 N. W. 328, it was held: "Where a stream which is a boundary from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; the boundary remains as it was in the center of the old channel, although no water may be flowing therein. State of Nebraska v. State of Iowa, 143 U. S. 359.

"If the change in the stream is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel has formed, the original thread of the stream continues to mark the limits of the two estates. Gould, Waters (3d ed.) sec. 159."

This court recently reaffirmed that: "The title to

land becomes complete in the occupant by adverse possession when he and his grantors have maintained an actual, exclusive, open, and continuous possession thereof, claiming title to the same against all persons, for 10 years." James v. McNair, 164 Neb. 1, 81 N. W. 2d 813. See, also, Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331, wherein we held: "The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years."

Also, as stated in Wells v. Tietge, 143 Neb. 230, 9 N. W. 2d 180: "The payment of taxes is an element and circumstance which may be considered together with all of the other circumstances of the case with respect to the subject of adverse possession."

In the light of the foregoing rules, we have examined the record. It discloses that at the time of the government survey in 1876, all of the land involved was on the south side of the Loup River but now is all on the north side thereof. Plaintiff obtained the legal title to Lots 1 and 2 and the south half of the northeast quarter of Section 1 by warranty deed from Peter Uzendoski and Kate Uzendoski on April 24, 1933. About 45.81 acres of such land still remain south of the Loup River, but about 40.74 acres thereof are now north thereof. Plaintiff obtained title to a 16.18-acre adjacent tract in Lot 1 in the southeast quarter of Section 36 by warranty deed from Earl D. Willard et al., on May 28, 1954, all of which is now north of the Loup River. Those lands now north of the river are involved here. The record titles aforesaid were traced by the abstracts from the United States to plaintiff. Originally, the only land on the north side of the river in the adjacent southeast quarter of Section 36 was Lots 2 and 3. The record title thereto was traced by the abstracts from the United States to defendants Leona T. Zeller and Robert C. Purvis, except a small portion not here involved, which

had been deeded to the Loup River Public Power District.

In that situation, plaintiff claimed to be the owner and entitled to possession of the lands deeded to him as aforesaid, which are now on the north side of the river, and defendants admitted that they are in possession thereof, but claimed to be the owners with a right to possession thereof by accretion and adverse possession.

We turn first to the issue of accretion. In that connection, plaintiff contended that the location of such lands was changed from the south to the north side of the river by avulsion and not by accretion as claimed by defendants. The jury so found, and we conclude that although in dispute, as admitted by defendants in their brief, the evidence amply supported that conclusion. There is competent evidence as shown by the survey and plat or map made in 1937, aerial photographs taken on July 22, 1938, and again on October 9, 1950, and the testimony of eyewitnesses, that the river prior to 1936 flowed in its channel north, thence east to the west end of Section 1, thence northeast across plaintiff's land, thence east and directly south for some distance, thereby forming a loop. In 1936, just east of that point, the Loup River Public Power District constructed a diversion dam and a riprapped dike some 700 to 800 feet long, which ran from the headgate northwest to the river loop, thence west across it, which shut off the main channel. Then, in order to divert the flow to the headgate, pilings were driven along the dike and a new channel was cut through with a bulldozer. At that time, the channel of the river was abruptly changed and it came from the west almost straight through toward the east to the dam, thence south, and cut off plaintiff's land here involved, leaving it on the north side of the river channel. Thereafter the old channel gradually filled up with debris, brush, and sizeable trees, generally like the land adjacent thereto.

Also, the tax records from 1930 to 1956 relate them-

selves to both adverse possession and avulsion. In 1930 that record shows 150 acres in the northeast quarter of Section 1 assessed to and taxes paid by plaintiff's predecessors in title. In 1931 and 1932, the same land was so assessed with taxes paid by plaintiff. From 1933 to 1937, inclusive, the same land was assessed in plaintiff's name, and the taxes were paid by him. In 1938, the first year after the survey heretofore noted was made and the plat was filed of record, and the second year after the dam and dike were completed, there was a change in plaintiff's assessment which resulted in his assessment upon only 86.55 acres, consisting of two tracts in the northeast quarter of Section 1. One such assessment was upon 40.74 acres and the other was upon 45.81 acres. The same acreage was also assessed in each year from 1939 to 1956, all of which taxes plaintiff has paid except for 1956. In that connection, the 1937 survey and plat show plaintiff's acreage in the northeast quarter to be 45.82 acres south of the river and 40.74 acres north of the river. The tax record also shows that after plaintiff obtained his warranty deed to the 16.18 acres in Lot 1 of Section 36, he paid the taxes thereon in 1955. Such record corroborates the testimony of plaintiff and other witnesses, one of whom was called by defendants, that an avulsion had taken place about the time the Loup River Public Power District constructed its diversion dam and dike. Also, the payment of taxes by plaintiff on 40.74 acres north of the river from 1938 to 1956 supports plaintiff's contention that there had been an avulsion and he still owned that land. This is particularly true since there is no evidence that defendants ever paid any taxes on any of said lands here involved or placed anything of record indicating claim of ownership thereof.

With regard to the 16.18 acres in Lot 1 of the southeast quarter of Section 36, for which plaintiff received a warranty deed on May 28, 1954, the tax records show the following: It was listed as 16.16 acres in the river

for 1930 to 1937 inclusive. In 1938 and 1939 it was valued at $560, with tax sales against it which were subsequently cancelled. In 1940, 1941, and 1953, it was given no valuation. In 1942 to 1952, inclusive, and again in 1954, it was listed as in the river. In 1955 no valuation thereof was listed, but the consolidated state and county tax was $12.44, which plaintiff paid on April 3, 1956. In 1956 the valuation was shown as $90, with a tax of $1.65, which was unpaid at time of trial. It was certainly reasonable for the jury to conclude from the foregoing evidence that defendants could not have obtained ownership of such land either by accretion or adverse possession while it was in the river.

Nevertheless, the evidence upon the issue of adverse possession was conflicting in material respects and a question for the jury. In that connection, contrary to their claim of ownership by accretion, defendants adduced evidence that the channel of the river had never changed in any material respect and that they and their predecessors had used all of the land involved south of the dike to the river for pasturage of their cattle prior to and since 1936. However, we find no direct evidence that they did so claiming to own the land adversely to the owners thereof. In that connection, it is significant that while defendants claimed to have so pastured their cattle, there is no evidence whatever that they ever at any time constructed any fences on or around any portion of the land in question until 1955, shortly before plaintiff filed his petition.

On the other hand, plaintiff adduced evidence that he rented the land in Section 1 before 1933; that he lived south of the river, almost straight south of the west line in the northeast quarter of Section 1; and that he obtained the legal title thereto in 1933 and had been in possession thereof since that time. In that connection, there is evidence that he had cattle on the land in question before and after the river changed; that he had chopped wood for fuel and posts there every second

year, and every year when he was strong enough to do so, and gave permission for others to do so; that he went upon the land several times every summer and winter for such purposes and other reasons, as did his two sons at different times; that he gave the Loup River Public Power District permission to cut wood thereon for riprapping and repairing its dike every year since its construction until about 4 years ago; and that he fenced the land on the north side of the river twice. He fenced it first in 1937 along the north line of Section 1, thence southwest along the line with circles on it referring to the surveyor's plat, and fenced it again in 1954, thereby enclosing the adjacent fraction in Section 36 for which he had received a warranty deed. Thereafter, he again put his cattle on all that land, but defendants tore out the fence and removed his cattle.

There is evidence that it was difficult to put in a fence because six men had to chop their way through the timber and brush, and it took 3 or 4 days to do so. There is evidence that once before 1954, that is in 1951 or 1952, plaintiff saw a few, 5 or 10 cattle on the land, and asked defendant Prososki whose they were, but defendant Prososki replied that he didn't know, maybe the neighbors; that plaintiff then told defendant Prososki he would put up or repair a fence which was down on the west, and rent the land to him for pasturage, but defendant Prososki said he didn't want it, they had plenty of pasture; and that although plaintiff had been on the land several times each year, as had his sons at different times, they never saw or found any footprints or manure or evidence that defendants' cattle had been grazing on the land involved.

The material and relevant evidence aforesaid was corroborated in material respects by employees of the Loup River Public Power District and plaintiff's two sons. We conclude that the issue of adverse possession was a question for the jury.

Defendants complained that the trial court erred in

giving instructions Nos. 4 and 8, and in refusing to give their tendered instructions Nos. 2, 5, 6, 7, 10, 11, 15, and 16. In that connection, we have held that: "Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

"Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.

"Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism." Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170.

In Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423, we held: "The refusal to give a requested instruction is not error if the subject thereof is substantially and correctly included in the charge of the court to the jury.

"The meaning of an instruction, not the phraseology, is the important consideration, and a claim of prejudice will not be sustained when the meaning of the instruction is reasonably clear.

"When different instructions are given on the same subject, they should be considered together, and if they fairly submit the case, it will not be reversed for indefiniteness or ambiguity in one of the instructions.

"In determining whether or not there was error in a sentence or clause of an instruction, it will be considered with the instruction of which it is a part and the other instructions, and the true meaning thereof will be determined not from the sentence or phrase alone but by a consideration of all that is said on the subject." See, also, Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680.

In the light of such rules, we have examined all of the instructions given by the trial court and those tendered by defendants. In doing so, we find that the trial court fully and fairly submitted every material issue to the jury in a manner which could not have been prejudicial to defendants. To discuss defendants' contention further with regard thereto would unduly prolong this opinion and serve no useful purpose.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

WILLIAM J. MCDERMOTT, APPELLEE, V. DAN J. BOMAN ET AL., APELLANTS.
86 N. W. 2d 62

Filed November 15, 1957. No. 34224.

1. **Adverse Possession.** Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party.
2. **Boundaries: Adverse Possession.** The rule of recognition and acquiescence may be the means of determining the corner or boundary, but it is separate and distinct from establishment by adverse possession.
3. ———: ———. Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of 10 consecutive years.
4. **Adverse Possession.** The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years.
5. ———. The claim of adverse possession is founded upon the intent with which the occupant has held possession, and this intent is ordinarily determined by what he has done in respect thereto.

APPEAL from the district court for Morrill County: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Paul Rhodes and *Heaton & Heaton,* for appellants.

Robert J. Bulger, for appellee.

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

WENKE, J.

This is an appeal from the district court for Morrill County. It involves an action brought by William J. McDermott against Dan J. Boman, Loren H. Boman, and B. A. Williams, II, for the purpose of quieting and confirming in the plaintiff his title in and to all the real estate lying north and east of a fence between the northeast quarter and the east half of the northwest quarter of Section 6, Township 19 North, Range 47 West of the 6th P.M., in Morrill County, Nebraska, as against the claims of the defendants, and each of them, and to permanently enjoin the defendants, and each of them, from moving, or causing to be moved, that fence. The basis for the relief asked is: "That during the year 1934 plaintiff's immediate predecessor in title built a division fence along the south and west lines of the real estate owned by the plaintiff; that at all times since said fence was constructed the same has been used as the boundary between the above described land of the plaintiff and the above described lands of the defendants; that at all time since said fence was constructed the plaintiff and his grantor have had and maintained the continuous, exclusive, actual, open, hostile and adverse possession of all of the real estate lying east and north of the said fence for a term of more than twenty-two years."

Prior to trial the action was dismissed as to the defendant B. A. Williams, II. The trial court granted plaintiff the relief he prayed for as to "All that portion of the East Half of the Northwest Quarter (E½NW¼)

of Section Six (6), Township Nineteen (19) North, Range Forty-seven (47), lying East of the fence built and maintained by the plaintiff near the East line of said tract, all in Morrill County, Nebraska." The Bomans filed a motion for new trial and have appealed from the overruling thereof.

This is an action in equity and triable here de novo. However, "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." Johnson v. Erickson, 110 Neb. 511, 194 N. W. 670. The latter has particular application here with reference to the evidence as it relates to when the fence was built and whether or not it was maintained at all times from 1934 to July 24, 1956, when appellants started to remove it and change its location until restrained from doing so by an order of the district court.

The evidence discloses that in 1934 Corry W. Mount, also referred to in the evidence as C. W. Mount, owned Lots 1 and 2 and the south half of the northeast quarter of Section 6, being the northeast quarter of that section. At that time Harry Heath owned Lot 3 and the southeast quarter of the northwest quarter of Section 6, being the east half of the northwest quarter of that section. Heath also owned other lands in Section 6.

In that year (1934) Mount had the county surveyor establish the division line between the northeast quarter and the northwest quarter of Section 6. The division line established by the survey was not the same as the division line that was then being recognized by the parties on the basis of their farming operations. Some 2 or 3 weeks after the survey Mount was proceeding to have his sons, Dan and Woodrow, put in a division

fence on the line that had been established by the survey when Heath came out to where they were working. Heath and Mount then agreed, for various good and sufficient reasons, that the fence should be built on the division line that had been recognized, prior to the survey, by their farming operations and not on the division line that the surveyor had established. That was done. This resulted in the north end of the fence that was built being constructed considerably to the west of the north end of the surveyed division line whereas the south end of the fence was considerably to the east of the south end thereof. The fence was constructed in a straight line and crossed the surveyed division line some 55 to 60 rods north of the south end thereof, thus the fence that was built and the division line that was surveyed formed an X. The fence that was then built has been maintained and kept on that location ever since without being disturbed until July 24, 1956, when appellants began to remove it and place it on a division line that had been established by a survey made by the county surveyor on July 21, 1956. This action immediately followed, having been commenced on July 25, 1956.

Corry W. Mount was in possession of, claimed to own, and openly farmed the land east of this fence at all times after the fence was put in until he sold it to appellee on August 23, 1948. Thereafter appellee went into possession thereof, claimed to own, and openly farmed it. He was the record title owner thereof when he commenced this action. Health continued to farm the land to the west of the fence. Heath died in 1954. His widow, Nora Heath, sold the east half of the northwest quarter of Section 6 to appellants in August 1954. They went into possession thereof in September 1954.

"One claiming ownership of real estate by adverse possession must recover upon the strength of his title and not because of a possible weakness in the title of

his adversary." Hehnke v. Starr, 158 Neb. 575, 64 N. W. 2d 68.

Appellants contend that the possession of appellee, and his predecessor in title Mount, of that part of the east half of the northwest quarter of Section 6 east of the fence built in 1934 was permissive and therefore the following principle applies in this case: "Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party." Weisel v. Hobbs, 138 Neb. 656, 294 N. W. 448. See, also, Mader v. Mettenbrink, 159 Neb. 118, 65 N. W. 2d 334; Chase v. Lavelle, 105 Neb. 796, 181 N. W. 936; Thuresson v. Seifert, 94 Neb. 823, 144 N. W. 777; Smith v. Hitchcock, 38 Neb. 104, 56 N. W. 791. If the evidence adduced sustained appellants' contention that the possession was permissive this principle would be controlling but we do not find that to be the situation.

Appellee seeks to invoke the doctrine of recognition and acquiescence as being here applicable to the factual situation as established by the evidence. But appellee did not plead that as a basis for his claim to the relief prayed for. In Hakanson v. Manders, 158 Neb. 392, 63 N. W. 2d 436, we said: "The rule of recognition and acquiescence may be the means of determining the corner or boundary, but it is separate and distinct from establishment by adverse possession." The court therein quoted that part of section 34-301, R. R. S. 1943, which provides that: "Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, * * *." See, also, Hehnke v. Starr, *supra*. As stated in Hehnke v. Starr, *supra*: "* * * plaintiffs did not by 'proper plea' put in issue that the alleged boundary line claimed by them had 'been recognized and acquiesced in by the parties or their grantors for a period

of ten consecutive years' as required by section 34-301, R. R. S. 1943, * * *." We do not think the issue of recognition and acquiescence was properly raised in the district court and consequently is not here for our consideration in determining the merits of the case. Neither is appellee's contention that the right claimed was established by agreement properly here, for that was not the basis of appellee's claim in the district court, although, in a case where it is properly pleaded and then proved, that may be the basis for establishing a disputed boundary line. See Hakanson v. Manders, *supra.*

In the recent case of Purdum v. Sherman, 163 Neb. 889, 81 N. W. 2d 331, we said: "The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years." Therein we went on to hold: "The claim of adverse possession is founded upon the intent with which the occupant had held possession, and this intent is ordinarily determined by what he has done in respect thereto. '* * * it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor.' " See, also, Hallowell v. Borchers, 150 Neb. 322, 34 N. W. 2d 404.

We think the evidence adduced entitles appellee to the relief granted him by the trial court under the principles applicable where a claim is made to the ownership of land by adverse possession. The judgment of the district court is therefore affirmed.

AFFIRMED.

SARAH G. NORTON, APPELLANT, V. HOWARD V. KANOUFF ET AL., APPELLEES.
86 N. W. 2d 72

Filed November 15, 1957. No. 34231.

1. **Libel and Slander.** Slander of title is the false and malicious, oral or written, statement disparaging a person's title to real or personal property or some right of his causing him special damage.
2. **Libel and Slander: Limitations of Actions.** An action for damages caused by defendant's alleged wrongful, intentional, and malicious disparagement of the plaintiff's title to real estate is an action for slander of title, and hence governed by the 1-year statute of limitations applicable to libel and slander, and not by the 4-year statute respecting an action for trespass upon real estate or an action for the injury to the rights of plaintiff, not arising on contract, and not enumerated.
3. ———: ———. The 1-year statute of limitations applicable to actions for libel and slander is equally applicable to actions for slander of title.

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

Edward J. Robins, for appellant.

George O. Kanuoff, John O. Brown, and *Howard V. Kanouff,* for appellees.

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

MESSMORE, J.

This is an action brought in the district court for Saunders County by Sarah G. Norton, plaintiff, against Howard V. Kanouff and Raymond W. Moody, defendants, for damages due to the loss of sale of land owned by the plaintiff in Holt County, Nebraska. In this action the defendants are charged with making wrongful statements and publications, and doing other wrongful acts in disparagement of plaintiff's title to said land by reason of which the plaintiff claims special damages.

The defendants demurred to the amended petition

filed by the plaintiff on three grounds, one of which was argued, namely, ground No. 3, as follows: All acts of defendants are alleged to have occurred more than 1 year prior to the filing of said petition and are barred by the statute of limitations. The trial court sustained the demurrer. The plaintiff elected to stand on her petition and not plead further. As a result, the trial court dismissed the plaintiff's action. From the order dismissing the plaintiff's action, the plaintiff appeals.

The plaintiff's petition and amended petition are long and involved. We summarize them so that the nature of the action may be discerned.

The plaintiff alleged that on January 27, 1950, she became the owner of the principal interest in and the right of possession of a 2,770-acre tract of land described in the petition, and owned such land for many years prior and up to November 23, 1953; and that prior to November 23, 1953, the plaintiff owed the amount of $28,603 on the ranch and proceeded to borrow money from the defendants. To negotiate this deal, the defendants required and demanded a deed, rather than a mortgage, and agreed that in the event the plaintiff paid the defendants $20,000 with interest from November 11, 1952, the defendants would then deed the property back to the plaintiff. The plaintiff furthur alleged that the defendants immediately began to block sale or loan to pay them off by claiming that they were the absolute owners of the land. A suit was started in the district court for Holt County, Nebraska, to have the deed to the defendants by the plaintiff declared a mortgage. On November 23, 1953, a consent decree was entered in that action by which the plaintiff was to have until April 1, 1954, to sell or obtain a loan to pay the indebtedness due the defendants.

The plaintiff further alleged that she obtained purchasers, setting forth the names in the petitions, ready, willing, and able to purchase the land involved at a price equal to $71,650 above all encumbrances including

the amount owing to the defendants prior to April 1, 1954. Plaintiff alleged that she also obtained an offer of a loan in an amount sufficient to pay the indebtedness due the defendants prior to April 1, 1954; that the defendants continuously, from 1952 to April 1, 1954, by their actions blocked every sale or loan that could be obtained by the plaintiff by locking the gates to the land, posting notices on the land claiming to be the owners thereof, by advertising, in letters and telephone calls, and stating to prospective purchasers and lenders that the plaintiff did not own the land and had no right to sell or mortgage the same; and that all of these acts of the defendants caused the plaintiff to lose sales of the land and loans thereon to her damage in the amount she could have sold the land for above the liens, including that of the defendants, in the amount of $71,650.

We more specifically set forth the language of the amended petition referring to the action of the defendants as follows: Repeatedly and during all of said times defendants and each of them told generally to all the neighbors of the ranch that they were the absolute owners and plaintiff had no right to sell or obtain a loan on said land. Defendants told the public in bank, in restaurant, at oil stations, in real estate offices, and by advertisement in the World Herald of Omaha, by posting notices on the fences, by locking the gates, by letter to Ed Hall of Dallas, South Dakota, by telephone call to Ross & McIllnay, Central City, Nebraska, to real estate agents at Burwell and Loup City, Nebraska, and many others that plaintiff had no interest whatever in the land involved herein and had no right to sell or obtain loans on said land. All of the above was conveyed to prospective purchasers by persons who came to knowledge of the same from the defendants.

It appears from what is set out above in the summary of the plaintiff's amended petition that the plaintiff claims the actions of the defendants were derogatory to her title to the real estate in question. This being true,

the action is one that is referred to in law as an action for "slander of title." The question here presented is, is the action barred by section 25-208, R. R. S. 1943, which provides in part as follows: "The following actions can only be brought within the periods herein stated: Within one year, an action for libel, slander, * * *."

The plaintiff contends that the above-cited section of the statutes is not applicable, that the action is properly one that is included in section 25-207, R. R. S. 1943, which provides in part: "The following actions can only be brought within four years: (1) An action for trespass upon real property; * * * (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; * * *."

The plaintiff's action was filed on December 19, 1955, approximately 1 year and 8 months after April 1, 1954, the latter date being the last date that the plaintiff had any interest in the land in question.

We might say at this point that in the case of Kanouff v. Norton, 160 Neb. 593, 71 N. W. 2d 89, the defendants in this case brought an action against the plaintiff here, unnamed heirs, devisees, legatees, personal representatives, and all others having or claiming an interest in the estate of Della Bixler, deceased, to quiet title to certain land in Holt County, Nebraska, namely the land here involved. The plaintiff was the only defendant who appeared at any stage of the proceedings in that action. The court, speaking of a consent decree which has hereinbefore been referred to, said: "A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties."

The question here presented has not been before this court previously, however it has been before courts of other jurisdictions in this country as will hereinafter be pointed out.

The type of action here involved is generally denomi-

nated, although some text writers say improperly, as an action for slander of title. An action for slander of title is based upon the false and malicious statement, oral or written, made in disparagement of a persons's title to real or personal property, resulting in special damage. See Cawrse v. Signal Oil Co., 164 Or. 666, 103 P. 2d 729, 129 A. L. R. 174.

The action is not one for defamation of character and is, therefore, distinguishable from ordinary slander and libel. As said in Burkett v. Griffith, 90 Cal. 532, 27 P. 527, 13 L. R. A. 707, 25 Am. S. R. 151: "Although the term 'slander' is more appropriate to the defamation of the character of an individual, yet the term 'slander of title' has by use become a recognized phrase of the law, and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage."

The view adopted in a majority of the several American jurisdictions where the question has arisen is that in the absence of a statute expressly referring to actions for slander of title, a statute of limitations relative to actions for libel and slander is equally applicable. Thus, the time within which an action for slander of title must be instituted has been held to be governed by statutory provision relative to actions for slander (or for libel and slander), rather than by a statutory provision relative to actions for trespass upon real property. See, Annotation, 131 A. L. R. 838; 33 Am. Jur., Libel and Slander, § 354, p. 39, 1957 Cum. Supp.; Old Plantation Corp. v. Maule Industries, Inc. (Fla.), 68 So. 2d 180.

We deem the leading case on the subject to be Woodard v. Pacific Fruit & Produce Co., 165 Or. 250, 106 P. 2d 1043, 131 A. L. R. 832, which was an action to recover damages sustained on account of certain letters, alleged to be false, concerning the title to plaintiff's property. The question in the case was whether or not the action was barred by the statute of limitations. The

Oregon statute provided: "All actions for libel and slander shall be commenced within one year after the cause of action shall have accrued." The plaintiff in the instant case stresses the fact that the word "all" does not appear in the Nebraska statute of limitations on slander and libel. The word "all" was eliminated from the Oregon statute. We see no significance to the plaintiff's contention in this respect as will appear later in the opinion.

As said in Woodard v. Pacific Fruit & Produce Co., *supra:* "Regardless of what may be the proper name for this kind of action, we think it clear that it is based on false and malicious statements made concerning plaintiff's property.

"The question whether an action on the case for damages resulting from the disparagement of title to property is considered the same as an action for libel and slander under the terms of statutes of limitations has been determined adversely to the contention of the plaintiff in Ohio, New York, and Colorado."

In Buehrer v. Provident Mutual Life Ins. Co., 123 Ohio St. 264, 175 N. E. 25, a case squarely in point, the action was for slander to the title of real property. Section 11225 of the General Code provided that actions for libel and slander must be brought within 1 year after the cause accrues. A demurrer to the cross-petition was interposed on the grounds that the action was barred by the statute of limitations. The defendant contended that the action was not brought within 1 year and therefore was barred by the statute of limitations applicable to libel and slander, while the plaintiff maintained that the commencement of the action was limited by the statute applicable to actions for trespass upon real property and could be brought at any time within 4 years. The same contention is here made. The court in the Ohio case, in referring to section 11225 of the General Code, said: "That section comprehends all actions for slander or for libel, and is not limited, in terms, to slander

or libel against the person only; nor is it confined to any particular kind of slander—slander of the person rather than of property; nor can we see any legislative purpose in making such a distinction." It was held that the action was barred by the 1-year period of limitations and that the demurrer was properly sustained.

In Carroll v. Warner Bros. Pictures, Inc., 20 F. Supp. 405, the slander concerned the property of another in a copyright. It was argued that the statute of limitations relative to an ordinary action for slander had no applicability to the cause of action for slander of title as the latter involved an injury to property only and not to the reputation of the person. The court, however, rejected such contention relying largely upon the reasoning of the Ohio court in Buehrer v. Provident Mutual Life Ins. Co., *supra*.

In Colorado, in the case of Bush v. McMann, 12 Colo. App. 504, 55 P. 956, a letter was written by a landowner to a mortgagee of his tenant's chattels located on the mortgaged premises, in which notice was given the mortgagee, at least inferentially, that the plaintiff had not paid his rent and that the defendant would look to the mortgagee for the payment thereof. The statement concerning nonpayment of rent was alleged to have been maliciously false and it was claimed it resulted in the mortgagee foreclosing upon the chattels of the plaintiff to his great loss. The complaint was demurred to on the ground, among others, that the action was not brought within 1 year, and that section 2164 of the General Statutes of Colorado barred within 1 year actions for slanderous words and libel. The court said: "It is provided by our statute of limitations that all actions for slanderous words and for libels shall be commenced within one year, next after the cause of action shall accrue, and not afterwards. * * * Therefore more than a year had elapsed between the time of the service of the notice and the time of the commencement of the action, and the suit was barred."

In the case of Woodard v. Pacific Fruit & Produce Co., *supra,* the court went on to say in substance that the only case in this country which it had found, after diligent research, to be contrary to other jurisdictions herein cited on the subject was Reliable Mfg. Co. v. Vaughan Novelty Mfg. Co., 294 Ill. App. 601, 13 N. E. 2d 518. The opinion of this intermediate appellate court is not published in full in the reports and the decision was handed down by a divided court. The conclusion therein reached cannot be reconciled with that of the Supreme Court of Illinois in Jones v. Barmm, 217 Ill. 381, 75 N. E. 505. In the latter case it was held that, under a statute providing that actions for slander and libel did not survive, an action for slander of title would not survive. In other words, it was held that an action for slander of title, although involving property only, is governed by a statute inhibiting the survival of causes of action in cases of libel or slander. See, also, Old Plantation Corp. v. Maule Industries, Inc., *supra.* We are in accord with this conclusion.

We can see no substantial reason why the Legislature would make any distinction between an action involving defamation of title to property and one based upon defamation of the person. A study of the historical development of the statutes of limitations in this state confirms us in the view that the limitation as to the commencement of actions for libel and slander is the same whether the slander involves property or the person. The action was not commenced within 1 year after the cause accrued. It is therefore barred. See Woodard v. Pacific Fruit & Produce Co., *supra.*

The case of Old Plantation Corp. v. Maule Industries, Inc., *supra,* relied specifically upon the case of Woodard v. Pacific Fruit & Produce Co., *supra.* This was an action for wrongful disparagement and impairment of the vendibility of plaintiff's title to certain real estate. It was held that the 2-year statute of limitations respecting actions for libel and slander, and not the 4-year

statute respecting actions for relief not specifically provided for, governed the action.

The plaintiff makes reference to the case of Deupree v. Thornton, 97 Neb. 812, 151 N. W. 305, L. R. A. 1917C 65, on rehearing, 98 Neb. 804, 154 N. W. 557. In the original opinion the defendants were charged with conspiracy to destroy the plaintiff's business as a hotel keeper, charging his hotel was a house of ill fame. On rehearing, it appears that the court considered the action as one of libel or slander. The court did not distinguish between libel or slander of a person or of property, although the alleged statements were made in large part against the plaintiff's hotel business. The plaintiff makes reference to Judge Letton's concurrence in the conclusion in which he said: "I think the evidence is sufficient to show a concert of action and conspiracy by the members of the town board, but that it fails to show any action by them or either of them within four years, or that the wrongful acts of Hicks committed within four years took place with their knowledge or by their consent, procurement, or approval." It is the plaintiff's contention that the statement made by Judge Letton in concurring in the conclusion indicates that the 4-year statute of limitations rule applied. No authorities are cited on this point in either opinion, except in the opinion on rehearing wherein the court said in a syllabus: "If one of several defendants makes libelous statements concerning plaintiff without the knowledge or consent of the other defendants, evidence thereof is not competent against the other defendants, and an action against the defendant so offending would be barred in one year by the statute of limitations." The court, in dismissing the case, did not hold that any 4-year statute of limitations would be applicable. If any inference may be drawn from the case, it is that the 1-year statute of limitations applied. We are not in accord with the contention of the plaintiff as above stated.

We conclude that the trial court did not err in sustaining the defendants' demurrer. Section 25-208, R. R. S. 1943, is the statute of limitations applicable in the case at bar. The judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.

VICTORIA BARAJAS, APPELLEE AND CROSS-APPELLANT, V. MARIE E. PARKER ET AL., APPELLANTS AND CROSS-APPELLEES.
85 N. W. 2d 894

Filed November 15, 1957. No. 34238.

1. **Automobiles.** A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored automobile to exercise ordinary care to avoid an accident.
2. ———. The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats a recovery.
3. ———. It is the duty of the driver of an automobile on approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger.

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

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

Wright, Simmons & Harris, for appellee.

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

YEAGER, J.

This is an action for damages by Victoria Barajas,

plaintiff, and appellee and cross-appellant, for personal injuries, for loss of earnings, for loss of earning capacity, and for medical, surgical, and hospital expenses sustained and which will in the future become necessary, all occasioned by the alleged negligence of Marie E. Parker while she was engaged in the operation of an automobile belonging to Cliff R. Parker which automobile came into collision with an automobile owned and operated by the plaintiff. Marie E. Parker and Cliff R. Parker are defendants and appellants and cross-appellees. A trial of the action was had to a jury at the conclusion of which a verdict was returned, in response to requests for special findings submitted by the trial court, in favor of the plaintiff. The total of her damages was fixed at $22,147.50.

Following the rendition of the verdict the defendants filed a motion for new trial or in the alternative for a judgment notwithstanding the verdict. They had on the trial at the conclusion of plaintiff's evidence and again at the conclusion of all of the evidence moved for a directed verdict. The plaintiff filed a motion for judgment for $22,147.50 or in the alternative for a new trial. The motion of the plaintiff for judgment for $22,147.50 was overruled. The defendants' alternative motion for judgment notwithstanding the verdict or for new trial was overruled. The findings as to damages were accepted by the court. A new trial as to negligence was granted on the motion of the plaintiff.

From this adjudication the defendants have appealed and the plaintiff has cross-appealed.

The defendants have set forth numerous alleged errors which they insist are grounds for reversal as has also the plaintiff. Whether or not any others require consideration depends upon the conclusion reached as to the defendants' third assignment of error which is as follows: "The District Court erred in overruling Defendants' Motion for Judgment Notwithstanding the Verdict."

The point of this assignment of error, as was also true of a point of the motions for directed verdict, was that the plaintiff herself was at the time of the collision guilty of contributory negligence which was sufficient as a matter of law to defeat a recovery of damages by her.

Before proceeding to a consideration of the merits of this assignment of error it appears well to point out that the parties have stipulated that the automobile which was being used by Marie E. Parker was owned by Cliff R. Parker and that at the time in question it was being used for a family purpose. The effect of this is to say that Cliff R. Parker was liable to respond for negligence, if any, of Marie E. Parker.

The collision took place at an intersection of two public highways in Cheyenne County, Nebraska, about 3 miles west of Dalton. The time was about 6:20 p.m. It was in daylight. The weather was good, the atmosphere was clear, and the roads were dry. The plaintiff was traveling northward and Marie E. Parker, who will be hereinafter referred to for convenience as the defendant, was traveling in an easterly direction. The two automobiles came into collision in the intersection. It appears from exhibits that the front end of defendant's automobile struck the automobile of plaintiff on its left side. Neither the plaintiff nor the defendant was able to describe the collision. A witness who was some distance to the east observed the collision but was unable to describe it with any degree of accuracy. The plaintiff was to the right of the defendant with reference to the intersection.

The plaintiff in response to questions described her acts and conduct immediately before and leading up to the collision. She testified that she had no recollection of the collision itself. The pertinent questions and answers on direct examination are as follows: "Q Then tell the jury what happened after that on that day? A * * * I was driving through this dirt road—short

cut, they called it—and I was driving along at this certain time, and all of a sudden, everything went black. I don't remember anything after that. Q Now, the last thing you remember, were you driving? A Yes. * * * Q Now, do you remember how fast you were driving? A About 45 or 50. * * * Q Now, do you know where you were, the last thing you can remember? A No, I don't. I just remember driving along, singing to myself, and then, of course, watching the road straight ahead of me, and after that I went into that blackness, and that is all." Questions and answers on cross-examination were as follows: "Q Now my notes state that you said you were driving about 45 or 50 miles an hour, looking straight ahead. Is that correct? A Yes. Q Now just before the accident, did you see a car or truck or pick-up coming from the right? A No, I didn't. Q Did you look to the right? A I don't believe so. Q Did you see anything coming from the left? A No, I didn't. Q Did you look to the left? A I don't know. Q You don't know? A I don't remember. Q Now, were there any trees to the left as you approached the intersection? A I don't remember any trees. Q Did you see any trees? A No. Q You didn't see any trees? A I don't remember seeing anything. Q It was daylight? A Yes. Q And if there had been trees there, you could have seen them if you had looked? A I suppose. Q Now, did you slow up before the accident, or did you proceed at the same speed you had been traveling? A I think at the same speed. * * * Q Did you apply your brakes before the accident? A No. I didn't know there was going to be one. * * * Q Did you turn to the right? A I don't think so. Q Did you do anything to avoid the accident? A Well, I didn't see any cars or anything, at the corner or anything, so I didn't see any reason to. * * * Q But you didn't look? A No. I was watching my road straight ahead. Q You were looking straight ahead? A Yes. Q So, you looked neither to the right or left? A No. Q You didn't slacken your

speed? A No. Q You did nothing to avoid the accident? A No. Q You were driving along, singing to yourself? A Yes."

With regard to the acts and absence and failure to act and observe, certain questions were asked and answers elicited from plaintiff on redirect examination which will not be quoted herein. The apparent purpose was to leave an inference that what plaintiff said in her direct and cross-examination related to a time prior to her approach to and entry into the intersection and to leave the record with an absence of information as to what she did or failed to do at the time of approach and entry. The questions and answers in this respect demonstrate the futility of the effort when examined in the light of the unequivocal declarations made on direct and cross-examination. The evidence of plaintiff discloses that she performed no act and made no observation in the interest of her own safety as she approached and entered the intersection.

At the intersection involved here the plaintiff had the right-of-way under the facts disclosed. It appears that the plaintiff and defendant approached the intersection at about the same time and at about the same rate of speed. "A motorist entering an intersection from the right is in a favored position and has the right-of-way, other things being equal, but such fact does not do away with the duty of the driver of the favored car to exercise ordinary care to avoid an accident." Evans v. Messick, 158 Neb. 485, 63 N. W. 2d 491. See, also, Parsons v. Cooperman, 161 Neb. 292, 73 N. W. 2d 235; Wendel v. Carlson, 162 Neb. 742, 77 N. W. 2d 212.

Ordinary care to avoid an accident within the meaning of this pronouncement has not been exercised if the driver of an automobile has failed upon approaching an intersection to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid a collision. Such failure would be negligence more than slight as a matter of law and

would defeat a recovery. In Evans v. Messick, *supra,* it was said: "The failure of the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats a recovery." See, also, Wendel v. Carlson, *supra.*

In this case the testimony of plaintiff discloses that the plaintiff did not look in the direction from which the defendant was approaching. This, in the light of the facts and law, amounted to contributory negligence more than slight. It was her duty to look for approaching automobiles and to see those within the radius that denoted the limit of danger. See, Evans v. Messick, *supra;* Miller v. Aitkin, 160 Neb. 97, 69 N. W. 2d 290.

This radius was narrowly limited in the present instance but this could not be a basis for departure from the rule. The ground area itself apparently did not prevent a view of the intersection from ¾ mile to the south and almost ¼ mile to the west. The view however from the south to the west and from the west to the south of the intersection was obstructed by a hedge or row of small trees of a height estimated by witnesses to be from 12 to 30 feet. Vision through the hedge was difficult. The hedge was about 25 feet south of the east and west road. The east end was 42 feet west of the east edge of the north and south road. The radial area was not otherwise described.

In the light of the record in this case it must be said that the plaintiff failed to exercise ordinary care to avoid the accident in which she was involved in consequence of which she was, as a matter of law, guilty of contributory negligence more than slight and is thereby barred from recovery. Accordingly the trial court should have sustained the motion of the defendants for judgment notwithstanding the verdict. This conclusion renders unnecessary a consideration of the other

errors assigned on appeal and cross-appeal.

The order of the district court granting a new trial is reversed and the cause remanded with directions to sustain the motion of defendants for judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT M. FRASIER, APPELLANT, V. A. D. GILCHRIST ET AL., APPELLEES.
86 N. W. 2d 65

Filed November 15, 1957. No. 34241.

1. **Negligence: Trial.** It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence.
2. ———: ———. Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
3. ———: ———. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.

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

Morrison, Lyons & Starrett, for appellant.

Russell & Colfer, for appellees.

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

WENKE, J.

This is an appeal from the district court for Hitchcock County. It involves a tort action brought by Robert M. Frasier whereby he seeks to recover dam-

ages from Arnold D. Gilchrist and Larry D. Gilchrist because of personal injuries suffered in an accident which he claims was caused by negligent acts of the defendant Larry D. Gilchrist. Issues were joined, including the defense of contributory negligence, and the cause was tried to a jury. The jury found for defendants. Thereupon plaintiff filed a motion for new trial and has appealed from the overruling thereof.

The accident in which appellant was injured happened on Thursday, August 4, 1955, about 7:15 p.m. at a point on U. S. Highway No. 6 in Hitchcock County which is a short distance east of Beverly, Nebraska, and about 50 to 100 feet west of a bridge located on said highway.

In the summer of 1955 appellee Arnold D. Gilchrist, his wife Frances, and their son, appellee Larry D. Gilchrist, who was then 19 years of age, were engaged in the business of custom combining wheat with an International self-propelled combine. The Gilchrists lived on a farm near Kingman, Kansas. They used a 2-ton Ford Cabover truck and a ¾-ton Dodge pickup truck to haul the combine from one place to another. They completed their summer's work on the farm of Mr. Peterson near Gurley, Nebraska, and thereupon prepared to take the combine back to their farm near Kingman. Appellee Arnold D. Gilchrist had returned to Kingman some 2 weeks prior thereto. In order to haul the combine the header or cutter bar was removed from the main part thereof, and placed on a two-wheel trailer specially built for that purpose. The header bar was 15 feet 8 inches long and the trailer bed 16 feet long. The header bar was firmly fastened lengthwise on the bed of the trailer, being bolted and chained thereto. This trailer was attached to the Dodge pickup truck with a 2½ to 3-foot steel tongue fastened by a hitch to the rear thereof. However, the feeder housing extended out over the left side of the trailer, which had a 6½-foot wheel base. In fact, when the feeder bar was in place on the trailer it had an over-all width of more than 8

feet so a special permit was necessary to lawfully haul it over the public roads of Nebraska. Such a permit Frances Gilchrist obtained on August 3, 1955, from the proper authorities at Bridgeport, Nebraska. The main part of the combine was pulled on its own wheels by the Ford truck. The Gilchrists started for home on August 4, 1955. As they passed Beverly, Nebraska, going east, Frances Gilchrist was driving the Ford truck pulling the main part of the combine. She was in the lead. Following her at a distance of not over 300 feet was the Dodge pickup, being driven by appellee Larry D. Gilchrist. Riding with Larry was Wendell Keller, a young man who had been helping the Gilchrists and who was returning to his home. He was a neighbor and good friend of Larry D. Gilchrist.

On August 4, 1955, appellant was helping his friend, Kenneth Daniher, move the furniture of Daniher's mother from McCook to Palisade, Nebraska. The furniture was loaded on two pickup trucks, one a ¾-ton 1953 Chevrolet and the other a ½-ton 1955 Ford. They left McCook with these loaded pickup trucks sometime between 6:15 and 6:30 p.m. on that day, Daniher driving the Chevrolet and appellant the Ford. They proceeded on U. S. Highway No. 6 and as they approached Beverly, Nebraska, going west, the truck Daniher was driving was in the lead. It was some 2½ to 3 blocks ahead of the Ford.

The surface of the highway at the point involved was oil mat. It was 24 feet wide with a white line down the center thereof. The accident, which seriously and permanently injured appellant's left arm, resulted from the feeder housing, particularly a cast iron pulley located thereon, coming in contact with the left side of the Ford pickup truck appellant was driving. At the time of the accident the surface of the highway was dry and visibility good although the sun had either set or gone behind some clouds. At the place where the accident occurred the highway was straight and level al-

though, at a point about ⅜ of a mile east of the bridge, there was an S curve and a slight rise in the highway caused by a knoll.

Appellant contends the trial court erred by giving instructions Nos. 2, 9, and 12. Instruction No. 9 relates to the defense of contributory negligence whereas instruction No. 12 relates to the special permit already referred to. Appellant contends it was error to submit to the jury the specifications of negligence set out in instruction No. 9 because they find no support in the evidence. Reference is also made to instruction No. 2 which submitted the issues raised by the pleadings of the appellees and included the defense of contributory negligence. Of course the correctness of instruction No. 2, as to the issue of contributory negligence, would depend upon whether or not instruction No. 9 was proper. Instruction No. 9, insofar as here material, provides:

"In this case the defendants contend that the proximate cause of the collision, causing the injuries and damages to the plaintiff, if any, was due to negligence on the part of the plaintiff in one or more of the following particulars:

"(a) That plaintiff failed to yield one-half of the main traveled portion of said highway to the pickup being operated by the defendant, Larry D. Gilchrist;

"(b) That plaintiff was driving said Ford pickup to the left of the center of said highway at a place where the highway was wide enough to permit his driving on the right half;

"(c) That plaintiff failed to keep a proper lookout for the vehicle being operated by Larry D. Gilchrist, and failed to turn to the right to avoid colliding with the header bar;

"(d) That plaintiff operated his vehicle at a speed greater than was reasonable and proper with regard to the traffic, use and condition of the highway.

"While the burden of proof is upon the defendants to

establish the foregoing contentions of contributory negligence, you are instructed that this issue, as well as all other issues, must be determined by you from a careful consideration of all the evidence in the case."

It is stated in appellant's brief that: "There is absolutely no evidence in the record to sustain any of these allegations of contributory negligence and the submission of any one of them to the jury, constitutes reversible error." This requires a review of the evidence adduced subject to the following principles:

"It is the duty of the trial court, without request, to submit to and properly instruct the jury upon all the material issues presented by the pleadings and the evidence. This rule applies to the affirmative defense of contributory negligence." Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578. See, also, Harding v. Hoffman, 158 Neb. 86, 62 N. W. 2d 333.

"In determining the sufficiency of evidence to sustain a verdict it must be considered most favorably to the successful party, any controverted fact must be resolved in his favor, and he is entitled to the benefit of inferences reasonably deducible therefrom." Snyder v. Lincoln, 153 Neb. 611, 45 N. W. 2d 749.

"Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury." Pierson v. Jensen, 150 Neb. 86, 33 N. W. 2d 462.

The first and second specifications of negligence alleged by the appellees in their answer as being contributory to the accident and submitted to the jury by the court's instruction No. 9 are substantially identical and will be considered together.

Appellant testified that after he had crossed the bridge and while driving on his side of the road he saw the oncoming Dodge pickup truck pulling the trailer

head out into the center of the highway; that he then turned the pickup truck he was driving off the highway trying to avoid the oncoming truck and trailer, getting the right wheels thereof onto the shoulder of the road; that the trailer being pulled by the Dodge pickup blacksnaked, the feeder housing thereon striking the side of the truck he was driving; and that the injury to his left arm resulted therefrom. The evidence of Kenneth Daniher and Virginia Frasier, appellant's wife, support what appellant testified to in this regard. However, appellee Larry D. Gilchrist testified he noticed the Ford pickup when it was on the bridge and that it was then "Pretty close to the center"; that as it passed it was "awful close"; that as he watched in his rear view mirror he saw a "bunch of dust from the combine"; that it hit and there was a thump; and that he was sure "they were on my side." Gilchrist also testified he found a large piece of the pulley that had been broken off by the impact, together with smaller pieces thereof, lying on the highway about a foot south of the center line. We think this evidence presented a jury question on this issue and it was therefore proper to submit it.

The third specification relates in part to the first two insofar as it claims the appellant "failed to turn to the right to avoid colliding with the header bar." The evidence we set out in relation to the first two specifications submitted would have application to the foregoing part of the third. However, the first part deals with the claim that appellant "failed to keep a proper lookout for the vehicle being operated by Larry D. Gilchrist." Appellant testified he saw the Dodge pickup truck and trailer as he approached the bridge when it was approximately a block and a half, or more, west thereof; that he had no trouble seeing it; that he did not notice the feeder housing although he noticed there was something on the trailer; and that he did not notice a flag on the feeder housing, although he admits that "If I had my attention directed on a red flag I probably would have

seen it if it was there." Appellee Larry D. Gilchrist testified there were three red flags on the trailer, one at each end and one on the feeder housing, the latter being fastened to the pulley by a wire. In view of this evidence we think the question of whether or not the appellant maintained a proper lookout was a question for the jury.

The fourth specification submitted the issue as to whether or not appellant operated his vehicle at a speed greater than was reasonable and proper with regard to the traffic, use, and condition of the highway.

As stated in Novak v. Laptad, 152 Neb. 87, 40 N. W. 2d 331, quoting from Folken v. Petersen, 140 Neb. 800, 1 N. W. 2d 916: " '* * * the lawfulness of the speed of a motor vehicle within the prima facie limits fixed is determined by the further test of whether the speed was greater than was reasonable and prudent under the conditions then existing.' "

We have already referred to the highway, its construction, and condition. There were no traffic conditions involved and visibility was good. The only evidence as to speed was that appellant was going 40 to 45 miles an hour. This was not in violation of the maximum then permitted. It is true that Frances Gilchrist testified the pickups were coming at a high rate of speed as they approached her and described their passing the Ford truck she was driving "as a zip zip." But this testimony is not evidentiary of the actual speed the Ford pickup was traveling. We have searched the record for evidence to support this specification but find none. We think the trial court was in error in doing so and that the appellant was prejudiced thereby. As stated in Novak v. Laptad, *supra:* " 'The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it.

" 'Ordinarily, contributory negligence is a question for the jury; but, where there is no basis in the evidence

for a finding of contributory negligence, it is error to instruct on the subject and thereby to submit to the jury an issue which is outside the evidence.' Hartford Fire Ins. Co. v. County of Red Willow, 149 Neb. 10, 30 N. W. 2d 51." See, also, Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439.

In their answer appellees alleged that they "had procured a permit from the State of Nebraska allowing them to operate on the highways of said state a vehicle more than eight feet in width, which permit was valid and effective." This was in answer to appellant's alleged specification of negligence "That the defendant, Larry D. Gilchrist, was operating and driving said motor vehicle knowing that the same was more than 8 feet in width and in violation of the laws of the State of Nebraska." The effect of appellant's reply was to deny that appellees had procured a permit. At the trial appellees introduced, without objection, a "Special Single Trip Permit for the Movement of a Grain Combine," movement thereof to begin on August 4, 1955, and over several highways, including No. 6. As hereinbefore stated the trailer, when loaded with the header or cutter bar of the combine, was more than 8 feet in width.

Section 39-719, R. R. S. 1943, provides: "No vehicle shall exceed a total outside width, including any load thereon, of eight feet, except vehicles now in operation, which by reason of the substitution of pneumatic tires for other types of tires exceed the above limit."

However, section 39-721, R. S. Supp., 1955, pursuant to which this permit was issued, provides, insofar as here material that: "* * * the Department of Roads and Irrigation may issue a special permit in writing for a period not to exceed ten days for the moving over the highways of the state of vehicles, combination of vehicles, or other objects, which must of necessity be moved over the highways to reach their intended destinations, such vehicles or objects exceeding the

limitations provided herein and provided in any other statute of this state relating to height, width, length, and weight. The Department of Roads and Irrigation may impose such conditions and regulations for each such permit as may be necessary, * * *." The permit issued imposed numerous conditions as a basis for its lawful use.

In regard to this issue the trial court, by its instruction No. 12, advised the jury that "if you find that the defendants have established by a preponderance of the evidence that at the time involved herein the Department of Roads and Irrigation had issued a special permit for moving the combine belonging to the defendant, A. D. Gilchrist, then if you so find, it was not unlawful to operate a trailer conveying such combine or a part thereof, even tho you may find that the outside width of such trailer including its load exceeded eight feet." There is ample evidence in the record to sustain such a finding by the jury.

In regard thereto appellant contends it was error for the trial court to instruct the jury that it is not unlawful to operate an over-width vehicle upon a highway if the Department of Roads and Irrigation issues a permit therefor, where the permit shows on its face that it is subject to certain conditions and requirements imposed by the Department of Roads and Irrigation under statutory authority. It is not contended that the reception of the special permit was in error, but that the court erroneously permitted the jury to find the effect thereof by its instruction No. 12. It should be understood there is evidence other than the special permit itself to show what was done to obtain it and the purpose for which it was obtained. The evidence adduced shows, without dispute, that Frances Gilchrist applied for and received the special permit introduced for the purpose of moving the Gilchrists' combine from Gurley, Nebraska, to the Kansas line.

What appellant alleged in his petition as a basis for

recovery in regard to this issue we have hereinbefore set forth. It was general in its character and did not allege as a basis for recovery any failure on the part of appellees to comply with any of the specific provisions contained in the special permit, the performance of which was a prerequisite to its lawful use. If appellant wished to raise and have submitted as a basis for recovery the failure of the appellees to comply with any or all such provisions as were imposed by the Department of Roads and Irrigation relating to the lawful use of the special permit he should have specifically raised them. Under the general allegations as here made by appellant we think the trial court properly submitted the issue as to whether or not the Gilchrists were moving the combine, or any part thereof, in violation of the laws of Nebraska.

In view of what we have said herein we find the judgment of the district court overruling appellant's motion for a new trial was in error and the motion should have been sustained. We therefore set aside the district court's judgment so doing with directions that it enter an order granting appellant a new trial.

REVERSED AND REMANDED.

YEAGER, J., participating on briefs.

BERT ARMBRUSTER ET AL., APPELLANTS, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLEE.
86 N. W. 2d 56

Filed November 15, 1957. No. 34251.

1. **Trial.** If a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it.
2. **Waters.** 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, 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 power of eminent domain.

3. ———. Where the flow of water in a well-defined course which seeks its discharge in a neighboring stream is interfered with to the injury and damage of a neighboring proprietor an action in equity is available to prevent such interference.

4. **Constitutional Law: Eminent Domain.** The right to maintain an action for recovery of damages based upon Article I, section 21, of the Constitution of Nebraska, is not dependent upon whether or not a claim for damages has been filed by the person whose property is taken or damaged.

5. **Constitutional Law: Drains.** For the taking or damaging of property outside the boundaries of a drainage district liability attaches under Article I, section 21, of the Constitution of Nebraska, and notice to the drainage district pursuant to section 31-451, R. R. S. 1943, is not a condition precedent to the maintenance of an action for damages.

6. **Actions.** Where land outside the district has been and is being damaged by a drainage district an action for equitable relief and one for damages may be joined.

7. **Equity.** Where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.

8. **Appeal and Error.** Where it appears that the dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial.

APPEAL from the district court for Stanton County: LYLE E. JACKSON, JUDGE. *Reversed and remanded.*

R. M. Mueting and *R. J. Shurtleff*, for appellants.

Thomas L. Grady, for appellee.

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

YEAGER, J.

This action as originally instituted was for mandatory injunction by Bert Armbruster and Irene Arm-

bruster, husband and wife, and joint owners of a half section of land in Stanton County, Nebraska, plaintiffs and appellants herein, against Stanton-Pilger Drainage District, defendant and appellee. Later an amended and supplemental petition was filed. By this petition the plaintiffs renewed their application for mandatory injunction and in addition sought a judgment for damages. Issues were joined and a trial was had to the court. At the conclusion of the evidence of plaintiffs, on motion of the defendant, the petition of plaintiffs was dismissed. A motion for new trial was filed by plaintiffs which was overruled. From the order overruling the motion for new trial and the decree dismissing the action the plaintiffs have appealed.

The amended and supplemental petition embraces all of the essential features of the original petition with additions, hence for the purpose of this opinion reference will be made to it as the petition.

The factual situation upon which the determination depends substantially declared by the petition and disclosed by plaintiffs' evidence is that during, prior, and subsequent to 1950 and 1951, the plaintiffs were the owners of the north half of Section 24, Township 23 North, Range 2 East of the 6th P.M., in Stanton County, Nebraska; that the land was used for agricultural purposes and on it were barns, sheds, feeding yards, fences, and residence buildings; that about 200 acres were irrigated and highly productive; that prior to 1950 and 1951 the Elkhorn River extended from west to east in loops or in a meandering course about ½ mile to the north of this land; that a stream known as Cedar Creek entered plaintiffs' land from the south at a point near the southeast corner and extended northward leaving the land through the north line, and from there flowed on northward and prior to 1950 and 1951 emptied into the Elkhorn River; that no part of plaintiffs' land is within the Stanton-Pilger Drainage District except the northwest 40 acres which 40 acres are not involved in

the matters to which this action relates; that in 1950 and 1951 the defendant, a duly and regularly organized drainage district, constructed a channel, referred to as a pilot channel, across the body of land within one of the loops for the passage of water which otherwise would have run through the old river channel; that this cut across the channel of Cedar Creek and caused the water from Cedar Creek to empty into this channel rather than into the old channel of the Elkhorn River; that the base or bottom of this pilot channel was several feet below the base or bottom of Cedar Creek and of the Elkhorn River; that this brought about a drop or waterfall where the water from Cedar Creek emptied into the channel; that the condition thus created by the defendant caused the channel of the creek to erode upstream in Cedar Creek thus deepening and widening the creek; that the defendant was notified of the erosion but took no steps to prevent it; that the erosion has continued until it has reached to and into the portion of the creek within plaintiffs' land where it has caused and will continue to cause irreparable damage to plaintiffs' land, the use thereof, and the buildings and structures thereon; and that there are means and methods whereby the defendant could have prevented the damage and injury which has ensued and which if employed can prevent further damage and injury, which means the defendant has failed to employ although it has had notice and knowledge of the condition which exists and its probable future consequences.

There is no substantial contention that the defendant lacked power and right to construct the channel as it did, but only that injunction is available to plaintiffs to protect them against further injury and damage in view of the fact that protective measures are reasonably available, and that the plaintiffs are entitled to recover damages for the injuries already sustained.

The plaintiffs alleged that they made attempts to protect against the condition and the consequences there-

of of which they complain and in connection therewith they have alleged damages in the amount of $11,377. They have alleged damage occasioned by the cost of repairs in the amount of $1,611.25. They have also alleged damage to land and business operations in the amount of $45,000. The total of these is $57,988.25.

The prayer is for a mandatory injunction requiring the defendant to do that which is necessary to protect the land and improvements thereon from further damage, and for a judgment for the amount of the damage already sustained.

As pointed out, the action was dismissed at the close of plaintiffs' evidence. Under these circumstances the record must be considered in the light of whether or not a cause of action for the relief prayed has been proved. For this purpose the court must accept as true the evidence of the plaintiff and any reasonable conclusions deducible from it. In Adams v. Adams, 156 Neb. 778, 58 N. W. 2d 172, it was said: "If a defendant in a suit in equity moves at the close of the evidence of the plaintiff for a dismissal of the suit for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it." See, also, Paul v. McGahan, 152 Neb. 578, 42 N. W. 2d 172; Busteed v. Sheffield, 153 Neb. 253, 44 N. W. 2d 471. Of course the evidence must be in proof of the subject matter in an action which the plaintiff has the right to maintain.

The cause of action as pleaded by the plaintiffs was sustained by the evidence. This has already been pointed out. That is to say that they have proved the acts charged against the defendant and that they were thereby damaged. The defendant however contends substantially that no right to injunctive relief may flow therefrom to the plaintiffs. It contends further that if the plaintiffs ever had any right in the premises such rights were for the recovery of damages in an action at law. It contends however if the plaintiffs ever had a

right of action at law for damages that action has been barred by the provisions of section 31-451, R. R. S. 1943. By the terms of this statutory provision an action for damages against a drainage district organized under the laws of Nebraska arising out of the construction, operation, or maintenance of any of the ditches, embankments, or other works of improvement of the district may not be maintained unless actual notice in writing, describing fully the cause of damage, the nature of the injury complained of, and the time and place where the damage occurred shall have been filed with the secretary of the board of directors within 30 days after the occurrence of the injury. There is an exception to this which has no significance in this case. There is no evidence that the notice specified in the provision was given.

In defense against the prosecution of plaintiffs' claim for damages in this action the defendant, as pointed out, urges that the plaintiffs have no right of action in equity, hence a trial of that portion of the pleaded cause of action may not be tried in this action in equity but should, if such a right of action exists, be tried to a jury.

In proper sequence the first question for consideration is that of whether or not the plaintiffs have on the pleadings and proof any right to the equitable relief which they seek. The answer to the question must be resolved in favor of the plaintiffs.

In Roe v. Howard County, 75 Neb. 448, 106 N. W. 587, 5 L. R. A. N. S. 831, which was an action for mandatory injunctive relief and for damages, it was 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." Injunctive relief was granted and damages were also awarded. This statement was approved in Purdy v. County of Madison, 156 Neb. 212, 55 N. W. 2d 617, in which mandatory relief was granted by this court. See, also, County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N. W. 2d 507.

The facts in these cases were different from those in the case at bar but it may not well be said that they called for the application of principles different from those which are controlling herein. They do however have application to the rights and liabilities in instances where there has been interference with the natural flow of waters. It must be said therefore that the plaintiffs stated a cause of action which if sustained by evidence would entitle them to mandatory injunctive relief. It must be said further that the evidence adduced was prima facie sufficient as proof of the right to such relief.

The next question for consideration is that of whether or not the plaintiffs' right of action for damages was barred by the failure to give the notice provided for by section 31-451, R. R. S. 1943. The answer to this question must also be resolved against the defendant. This court said in Bridge v. City of Lincoln, 138 Neb. 461, 293 N. W. 375, in which case the validity of a charter provision requiring notice as a condition precedent to the right to recover damages was brought into question, by quotation from Livingston v. County Commissioners of Johnson County, 42 Neb. 277, 60 N. W. 555: "'To give section 21 of article 1 of the Constitution full effect it is necessary that a corporation which proposes to appropriate private property for public use shall take such steps as may be necessary to determine the amount of damages resulting from such appropriation and provide payment therefor. This duty should be in no way dependent upon whether or not a claim for

damages has been filed by the person whose property is to be taken.' "

Further in the opinion it is said: "An unliquidated claim, as used in the charter provision, does not include a claim for compensation for the taking or damaging of private property for public use. It follows that, in an action to recover compensation for the taking or damaging of private property for a public use, based upon the constitutional provision, it is not necessary for the plaintiff to plead or prove that she filed a claim therefor with the defendant city as provided by the charter."

Article I, section 21, of the Constitution of Nebraska, is as follows: "The property of no person shall be taken or damaged for public use without just compensation therefor."

In Quest v. East Omaha Drainage Dist., 155 Neb. 538, 52 N. W. 2d 417, this court said: "In an action for damages based upon Article I, section 21, of the Constitution of Nebraska and against a drainage district organized under the provisions of Chapter 31, article 4, R. S. 1943, for the damaging of private property for a public use, it is not necessary for plaintiff to plead or prove that he filed a notice as provided by section 31-451, R. S. 1943." This statement was approved in McGree v. Stanton-Pilger Drainage Dist., 164 Neb. 552, 82 N. W. 2d 798. The action here is by facts alleged based upon Article I, section 21, of the Constitution of Nebraska.

In McGree v. Stanton-Pilger Drainage Dist., *supra,* it is made clear that in a situation where property outside the boundaries of the district is taken or damaged liability attaches for violation of Article I, section 21, of the Constitution, and that the notice exacted by section 31-451, R. R. S. 1943, is not necessary. In that case it was said: "When land is taken outside the boundaries of the right-of-way condemned, it constitutes a second taking of private property for a public

use and liability attaches therefor under Article I, section 21, of the Constitution."

The conclusion reached is that the plaintiffs were entitled to maintain their action in damages and that the evidence adduced by them was sufficient prima facie to sustain a recovery.

The remaining question to be considered is that of whether or not the plaintiffs had the right to join in one and the same action their cause of action for equitable relief and the one for damages. This question like the other two must be answered favorably to the plaintiffs.

The case of Brchan v. The Crete Mills, 155 Neb. 505, 52 N. W. 2d 333, is one wherein this court reviewed many cases from this and other jurisdictions on the question of whether or not an action for damages could properly be joined with one for equitable relief, the right to both flowing from the same act or acts. It was there held that they could be so joined. In the opinion the following was quoted with approval from Schreiner v. Witte, 143 Neb. 109, 8 N. W. 2d 831: " 'It is a well-settled principle of equity jurisprudence that, where a court of equity has obtained jurisdiction of a cause for any purpose, it will retain it for all, and will proceed to a final determination of the case, adjudicate all matters in issue, and thus avoid unnecessary litigation.' "

The applicable rule in the light of the conclusions reached herein is stated in Paul v. McGahan, *supra*, as follows: "Where it appears that such dismissal of a plaintiff's cause of action was erroneous, the parties are entitled to be placed in the same position they were in before the error occurred, which requires the cause to be remanded for a new trial."

The decree of the district court is accordingly reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

R. B. "DICK" WILSON, INC. OF NEBRASKA ET AL., APPELLANTS, V. E. DOROTHEA AND CORWIN J. HARGLEROAD, A COPARTNERSHIP, DOING BUSINESS AS HARGLEROAD VAN & STORAGE COMPANY, APPELLEES.

86 N. W. 2d 177

Filed November 22, 1957. No. 34214.

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 it does not admit the pleader's conclusions of law or fact.
2. **Public Service Commissions: Carriers.** The powers and duties of the Nebraska State Railway Commission under the Constitution, in the absence of specific legislation, include the regulation of rates, service, and general control of common carriers.
3. ———: ———. The Legislature by specific legislation may prescribe the powers which the Nebraska State Railway Commission may exercise over the regulation of rates, service, and general control of common carriers.
4. **Public Service Commissions: Automobiles.** The Legislature has the right to prescribe how the Nebraska State Railway Commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for the operation of motor vehicles for hire in intrastate commerce.
5. **Public Service Commissions.** The power of the Nebraska State Railway Commission to issue a certificate of public convenience and necessity is grounded on the filing of an application, the giving of notice to interested persons, and a hearing.
6. ———. A certificate of public convenience and necessity issued without the filing of application therefor, the giving of notice to interested persons, and a hearing is void.
7. **Injunctions: Carriers.** An action for injunctive relief by an interested party may properly be maintained against a party who is engaged in intrastate commerce as a common carrier under a void certificate of public convenience and necessity.
8. **Public Service Commissions: Carriers.** The operation by a party as a common carrier under a void certificate of public convenience and necessity in the area of one holding a valid certificate is the invasion of a property right of the holder of the valid certificate.

APPEAL from the district court for Adams County: EDMUND P. NUSS, JUDGE. *Reversed and remanded.*

Viren, Emmert, Hilmes & Gunderson and *Robert S. Stauffer,* for appellants.

Jack Devoe, James E. Ryan and *Conway & Irons,* for appellees.

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

YEAGER, J.

The petition in this case alleges that the plaintiff R. B. "Dick" Wilson, Inc., a corporation, and six other plaintiffs are the holders of certificates of public convenience and necessity issued by the Nebraska State Railway Commission whereby they are authorized to transport as common carriers in intrastate commerce crude petroleum, its refined products, and its byproducts. The areas of transportation are described but necessity to set this out does not appear. They are appellants herein. They will be hereinafter referred to as plaintiffs.

The petition further alleges in substance that E. Dorothea and Corwin J. Hargleroad, a copartnership, doing business as Hargleroad Van & Storage Company, defendants and appellees, were on October 24, 1945, issued a certificate of public convenience and necessity by the Nebraska State Railway Commission to transport intrastate as a common carrier in the areas served by the plaintiffs, products including those authorized by the certificates of public convenience and necessity issued to the plaintiffs, which certificate so issued to the defendants was void for the reason that it was issued without authority of law, and that by reason of the operation of the defendants under the void certificate the plaintiffs have and will in the future suffer irreparable damage and injury. The plaintiffs prayed that the defendants be enjoined from operating as a common carrier in intrastate commerce until they have obtained a valid certificate of public convenience and necessity.

To the petition the defendants filed a demurrer on the grounds: (1) That the petition did not state a cause of action; (2) that the court has no jurisdiction of the subject matter; (3) that the Nebraska State Railway Commission has sole and exclusive jurisdiction over the issuance, modification, amendment, suspension, or revocation of certificates of public convenience and necessity and exclusive control over common carriers; and (4) that a certificate of public convenience and necessity is not a proper subject matter for jurisdiction of the courts. The demurrer is in essence a general demurrer with specifications stated as to why it is contended that the petition does not state a cause of action.

The demurrer was sustained and the action dismissed. From the decree sustaining the demurrer and the order dismissing the action the plaintiffs have appealed.

The determination of the matters presented on this appeal must be made agreeable to the following rule: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact." In re Estate of Halstead, 154 Neb. 31, 46 N. W. 2d 779. See, also, Boettcher v. County of Holt, 163 Neb. 231, 79 N. W. 2d 183.

At the outset of the consideration of the appeal it appears well to say that, taking the allegations as true, as they must be taken for the purpose of the present determination, the defendants were without a valid certificate. Their certificate was issued without authority of and contrary to law, and operation under it was by declaration of statute unlawful.

The powers and duties of the Nebraska State Railway Commission and the limitation of the power thereof are found in Article IV, section 20, Constitution of Nebraska, as follows: "There shall be a State Railway Commission, * * *. The powers and duties of such commission shall include the regulation of rates, service and general

control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The Legislature in pursuance of this grant of power to it did with propriety establish rules and regulations for the application for and the issuance of certificates of public convenience and necessity for motor vehicle common carriers. In the case of In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418, it was said: "In conformity with the constitutional provision, the legislature has the right to prescribe how the Nebraska state railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate." See, also, In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552; In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413.

In pursuance of the power granted, the Legislature enacted what now appears as section 75-228, R. R. S. 1943, which provides: "It shall be unlawful for any common carrier by motor vehicle subject to the provisions of sections 75-222 to 75-250 to engage in any intrastate operations on any public highway in Nebraska unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the State Railway Commission authorizing such operations." This of course contemplates a certificate which has validity.

Section 75-229, R. R. S. 1943, provides certain essential requirements antecedent to the issuance of a valid certificate as follows: "Application for certificates shall be made in writing to the State Railway Commission, be verified under oath, and shall be in such form and contain such information as the commission shall by regulation require. Upon filing of such application the commission shall serve notice by mail upon all interested parties." This court has held that no certificate

is valid in the absence of compliance with these requirements.

In the case of In re Application of Richling, *supra*, it was said: "The power of the railway commission to issue a certificate of convenience and necessity is grounded on the filing of an application, the giving of notice to interested persons, and a hearing. * * * We are required to say that the railway commission failed to comply with sections 75-228, 75-229, and 75-230, R. R. S. 1943, and consequently failed to comply with the conditions precedent to the issuance of a valid certificate of convenience and necessity." See, also, In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603.

In the present instance there was a total failure to give notice to interested parties and to have a hearing on the application.

In the light of the Constitution, the statutes, and the decisions of this court it becomes apparent that it must be held for the purposes of this case that the defendants had no recognizable certificate of public convenience and necessity and that their operation, as charged in the petition, was unlawful.

An effect of the decree sustaining the demurrer is to say that notwithstanding this the plaintiffs may not maintain this action for the reason that the court has no jurisdiction to entertain it. The theory is that the Nebraska State Railway Commission has original and exclusive jurisdiction over the question of whether or not the defendants may operate as it is contended that they were operating.

The cases cited by the defendants do not support this theory and neither do the statutes. It is true that by section 75-225, R. R. S. 1943, the State Railway Commission has been granted general supervision and control over motor carriers, but nothing contained therein or elsewhere has been found the effect of which is to say that the courts are without jurisdiction to render relief against acts which are effectually prohibited by the

statutes giving the Nebraska State Railway Commission control over common carriers by motor vehicles.

In Northern Pacific Ry. Co. v. Bennett, 83 Mont. 483, 272 P. 987, it was said: "The possession of the required certificate is a prerequisite to the operation of a motor vehicle for hire under such an Act as ours, and operation without it may be enjoined by the courts * * * and a railway company showing material loss by reason of the illegal operation of a bus line in competition with it has such an interest as entitles it to prosecute such an injunction proceeding." The opinion in Union Transfer & Storage Co. v. Huber & Huber, 265 Ky. 736, 97 S. W. 2d 609, supports this principle. We think the principle embodied in these cases is legally sound and should be adhered to. The potential of the opposite view points to alarming possibilities. It would leave the door open to the issuance by the commission at its will of void certificates and unlawful motor carriers on the highways to the injury and damage of properly authorized carriers with resort directly for redress only to the commission. If the right to injunction in instances such as this does not exist danger similar to that contemplated by the following from the opinion in In re Application of Airline Ground Service, Inc., 151 Neb. 837, 39 N. W. 2d 809, becomes readily apparent: "If the interpretation thus made is not the correct one, it could well result in an administrative tyranny over common carriers by the use of temporary or interim orders."

Furthermore there is a clear indication in the statute itself that the Legislature never intended to leave the question of the violation of the powers declared by the act to exclusive determination by the commission. Section 75-249, R. R. S. 1943, made provision for criminal prosecution and punishment of persons knowingly and willfully violating the provisions of the act. This was a part of the act from the beginning. This section was amended in 1951 but this characteristic was not re-

moved. See § 75-249, R. S. Supp., 1955. This of course contemplates jurisdiction of courts. It appears unreasonable to say that the courts have this right, but that the power of injunction is denied where such violations also impair the substantial rights of parties.

The effect of the fourth ground of the demurrer is to say that the plaintiffs had no rights which were subject to protection by injunction, hence there was nothing over which the courts could exercise jurisdiction.

The contention, as we interpret it, is that a certificate of public convenience and necessity is not in any true sense property and it does not create or confer upon the holder any vested right, therefore he has no right in circumstances such as have been pleaded in the petition which may be protected by injunction.

It is true that a certificate of public convenience and necessity is not property, it is personal in nature, but is in the nature of a permit or license. In Effenberger v. Marconnit, 135 Neb. 558, 283 N. W. 223, it was said: "A certificate of convenience and necessity issued by the railway commission is in the nature of a permit or license, personal in its nature, and is not property in any legal or constitutional sense." See, also, In re Application of Neylon, *supra;* In re Application of Petersen & Petersen, Inc., 154 Neb. 877, 50 N. W. 2d 222.

It does not follow from this that certificate holders do not have the right to protest and receive protection against those who have without authority of law entered into operations within the field covered by their certificates.

The statute by its terms tacitly recognizes that certificate holders do have rights flowing from their certificates which they are permitted to protect. See §§ 75-229 and 75-230, R. R. S. 1943. Under these provisions a certificate holder is entitled to notice of a lawful application of another for a certificate of public convenience and necessity for operation in the area covered by his certificate and to an opportunity to protest. In

re Application of Richling, *supra*. This alone would be sufficient justification for saying that a certificate holder has a right under his certificate to take action to prevent one who is operating unlawfully and without any authority from continuing to operate to his injury and damage.

The certificate, as has been said, is not property but is only in the nature of a license. It does not follow however that the certificate holder does not have property rights flowing from the certificate while it is in force and effect. Under the certificate he is entitled to perform the service contemplated thereby and to make lawful charges. It cannot well be said that when his opportunity for service and for the making of profit has been impaired that a property right has not been involved.

In Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483, the court held that a permit in essence the same as a certificate of public convenience and necessity in this state was more than something in the nature of a license, but in commenting on the question of whether or not a property right was involved by invasion of its grant, said: "While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. * * * The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law." See, also, Northern Pacific Ry Co. v. Bennett, *supra;* Union Transfer & Storage Co. v. Huber & Huber, *supra*. The conclusion reached is that the cause of action

pleaded was predicated upon a right cognizable by a court of equity.

The district court erred in sustaining the demurrer to the petition and in dismissing the action. The decree and order in these respects is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM WISNIESKI, APPELLANT, V. HENRY MOELLER ET AL., APPELLEES.
86 N. W. 2d 52

Filed November 22, 1957. No. 34234.

Negligence. A person who knowingly and of his own volition exposes himself to obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care.

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

Sidner, Lee, Gunderson & Svoboda, for appellant.

Healey, Davies, Wilson & Barlow, Patrick W. Healey, and *Richards, Yost & Schafersman,* for appellees.

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

SIMMONS, C. J.

This is an action for damages for personal injuries arising out of an accident involving two automobiles. Plaintiff was a guest passenger in one of the cars. He sued the owner of the car in which he was riding, alleging gross negligence. He sued the owner of the other car, alleging negligence. Issues were made and trial was had. At the close of plaintiff's case-in-chief, each defendant made separate motions for directed verdict or dismissal. The court sustained each motion and dismissed the action as to each defendant.

Plaintiff filed a motion for a new trial. It was overruled. Plaintiff appeals.

We affirm the judgment of the trial court.

It was stipulated that the cars involved in this accident were family purpose cars. The drivers of the cars were sons of the owners. The action is against the owner of each car.

Plaintiff was a guest passenger in the Plymouth car owned by defendant Navratil. We will hereafter refer to it as the Plymouth car. Navratil by answer denied gross negligence, and alleged that the proximate cause of the accident was the negligence of the driver of the Moeller car. It was a Ford. It will be hereafter referred to as the Ford car. Navratil also alleged contributory negligence of the plaintiff and assumption of risk.

Moeller, owner of the Ford car, by answer denied negligence, alleged contributory negligence, and alleged that the proximate cause of the accident was the gross negligence of the driver of the Plymouth car. He further alleged that the plaintiff and the other occupants of the Plymouth car were engaged in a joint enterprise to run down and stop the Ford car and inflict bodily harm to its occupants. The reply was a general denial except as to allegations which were admissions against interest.

The plaintiff in a motion for a new trial alleged several of the grounds set out in section 25-1142, R. R. S. 1943. He then alleged error as to sustaining the motion of defendant Moeller and error as to sustaining the motion of defendant Navratil, and that the court erred in not submitting to the jury the question of which party's negligence, if any, was the proximate cause of the injury.

Each of the defendants here contends that the one motion was insufficient and rely on the rule stated in Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N. W. 2d 397, that where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct, and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is

insufficient, and it should be overruled if the verdict is good as to any one of the defendants. The motion here does not fall within the restricted scope of that rule. We hold the motion sufficient.

We go, then, to the evidence and issues presented.

Plaintiff called and offered the evidence of all the available witnesses and participants in the events of the afternoon resulting in the accident. The evidence of the occupants of the Ford car was, in many respects, in direct conflict with that of the occupants of the Plymouth car. In detail the evidence of witnesses within each group showed discrepancies. In part the evidence of each group was in accord with the other.

All witnesses agree that there were three occupants in the Ford car and four occupants, including the plaintiff, in the Plymouth car. One of the occupants of the Plymouth car was killed in the accident and plaintiff was seriously injured.

The evidence is in accord that the two cars and occupants were in the city of Dodge at the same time on a Sunday afternoon.

The evidence of the Ford car occupants is that near the city auditorium the Plymouth car came by them and that an occupant of the Plymouth car cursed the occupants of the Ford car and told them to get out of town. The evidence of the Ford car occupants is that they drove to the west side of the city of Dodge where they passed the Plymouth car and the driver of the Ford car told the occupants of the Plymouth car that he did not like to be called names. The occupants of the Plymouth car denied these two statements and stated they had no knowledge of the presence of the Ford car in Dodge.

The Ford car left Dodge and proceeded in the general direction of Wisner. A mile or more out, while the Ford car was traveling on a graveled road 14 or more feet in width, at a speed of 45 to 50 miles an hour, the Plymouth car overtook and ran into the rear of the Ford.

All witnesses agree as to that and that it was not a severe bump. After this collision neither car stopped. The Ford car proceeded on down the road and went toward Wisner, and the Plymouth car followed. After a short distance, the hood of the Plymouth car came loose and flew up. The car was stopped. The occupants got out and pulled the grille into place so as to hold the hood down. They then agreed that they would run down the Ford car and find out why it did not stop at the scene of the collision. The plaintiff and the driver of the Plymouth car both agree that was their plan. There is no dispute about it. The four men then got into the car and proceeded to execute the plan, without protest or disagreement among them.

At that time the Ford car had about 5 minutes' head start. Several miles further, and about a mile from the scene of the accident, the two cars went past a farm house at about 60 miles an hour, the Ford leading and the Plymouth following at about a 40 to 50-foot intervening distance. Both cars were traveling in the center of the road at that time. Occupants of the Ford car testified that when they observed the Plymouth car following and closing the interval between them, the Ford car was accelerated to its maximum speed of from 70 to 80 miles per hour. The traveled portion of the highway at this point was graveled and from 16 to 18 feet in width. The ditch alongside the road was not deep, and was estimated by one witness at 1½ feet below the road at its lowest point. The above evidence is not in serious dispute.

Occupants of the Ford car testified that when the Plymouth car got close to them, someone in the Plymouth car shook a wrench or jack handle at them. The occupants of the Plymouth car deny that evidence.

Occupants of the Plymouth car testified that when they were 25 or 30 feet behind the Ford car, the driver of the Plymouth car blew its horn; that the Ford car then pulled to the right; that the Plymouth car started

to pass on the left; and that the Ford car then pulled back into the center of the road so that its left side was about 3 feet over the center of the traveled portion of the road.

The Plymouth car then veered to the left so that its two left wheels were off the graveled portion of the road, and was tipping slightly. In that position, with two wheels off and two wheels on the graveled portion of the road, the Plymouth car proceeded a distance of 326 feet; then veered to the right, went across the highway a distance of 51 feet, struck a guy wire on a telephone pole and rolled over, and came to rest a distance of 707 feet from the place where the wheels first were off the graveled portion of the road.

Occupants of both cars testified that there was and was not contact of the two cars before the Plymouth turned off the road as above stated. The evidence is that there was a dent in the gravel pan of the Ford car at its left rear. There was no sign of an impact on the left side of the Ford car. Photographs of the car sustain this evidence.

The driver of the Plymouth car testified as follows: "Q- There was a car going down the center of the road in front of you and you gave him your horn and tried to pass that car going faster than 60? A- How else would you pass? Q- You didn't have to pass did you? A- How else could I stop him? Q- Did you have to stop him? A- I wanted to know why he didn't stop."

Plaintiff argues here that he has produced evidence in conflict from which the jury could arrive at the conclusion that the accident was caused by the Plymouth car running into the rear of the Ford car a second time with the resultant loss of control and that if the jury so believed, then he would be entitled to a judgment against the owner of the Plymouth car. Or the jury could disbelieve that evidence and find that the cause of the accident was that of the Ford car in veering to the left and forcing the Plymouth car off the road, and that he would

be entitled to a judgment against the owner of the Ford car.

This presents a question of the right of a plaintiff to knowingly produce conflicting evidence on material facts and then be permitted to go to a jury and ask it to choose which evidence is true and which is false. We need not determine that question.

The evidence of the plaintiff and his witnesses from the Plymouth car shows without dispute the following facts: Following the rear end collision with the Ford car, the occupants of the Plymouth car, including the driver and plaintiff, got out of the car and pulled the grille into place so as to hold the hood down. They then agreed to follow or "run down" the Ford car, stop it, and find out why it did not stop. They then got into the Plymouth car and proceeded to execute that plan. They did it without regard to the safety of the occupants of either car, to legal speed limits, the condition of the road, or the rights of other users of the highway. All of the occupants of the Plymouth car, including the plaintiff, participated in the execution of the plan. It affirmatively appears that after the chase began, no occupant of the Plymouth car made any protest as to what was being done or how it was being done.

We recently restated the rule that a person who knowingly and of his own volition exposes himself to obvious danger cannot recover damages for any injury which he might have avoided by the use of reasonable care. Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551.

Here there is no evidence of the use of reasonable care. It affirmatively appears that no care was used.

The trial court did not err in sustaining the motions to dismiss the causes of action.

The judgment of the trial court is affirmed.

AFFIRMED.

YEAGER, J., participating on briefs.