REPORTS OF CASES

DECIDED BETWEEN

AUGUST 20, 1960 and MARCH 17, 1961

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM 1960 and JANUARY TERM 1961

VOLUME CLXXI

WALTER D. JAMES
OFFICIAL REPORTER

GANT PUBLISHING COMPANY
LINCOLN, NEBRASKA
1962

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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MELVIN K. KAMMERLOHR ..... Assistant Attorney General

1 Term expired January 4, 1961
2 Died March 3, 1961
3 Term expired January 4, 1961
4 Term began January 5, 1961
5 Term began January 5, 1961
6 Appointed March 13, 1961
7 Term expired January 4, 1961
8 Term began January 5, 1961

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 Paul White Herbert A. Ronin Elmer M. Scheele	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas, and Washington.	Patrick W. Lynch Lawrence C. Krell James P. O'Brien Donald Brodkey Frank G. Nimtz John E. Murphy John C. Burke Robert L. Smith Paul J. Garrotto	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.	Robert D. Flory Robert L. Flory	Columbus Fremont
Seventh	Fillmore, Nuckolls, Saline, and Thayer.	Joseph Ach	Friend
Eighth	Cedar, Dakota, Dixon, and Thurston.	John E. Newton	Ponca
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne.	Fay H. Pollock George W. Dittrick	Stanton Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster.	Edmund Nuss Norris Chadderdon	Hastings Holdrege
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley, and Wheeler.	William F. Manasil Donald H. Weaver	Burwell Grand Island
Twelfth	Buffalo, Custer, Logan, and Sherman.	S. S. Sidner	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, and McPherson.	John H. Kuns Clarence S. Beck	Kimball North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow.	Victor Westermark	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha, and Rock.	William C. Smith, Jr.	Ainsworth
Sixteenth	Box Butte, Cherry, Dawes, Sheridan, and Sioux.	Albert W. Crites	Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff.	Ted R. Feidler	Scottsbluff
Eighteenth	Gage and Jefferson.	Ernest A. Hubka	Beatrice

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Admitted since the publication of Volume 170

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GEORGE E. OWEN
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TABLE OF CASES REPORTED

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1960

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN P. JENSEN, RESPONDENT.

105 N. W. 2d 459

Filed October 14, 1960. No. 34487.

1. **Continuances.** An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion.
2. **Trial: Judgments.** Where there is a material, genuine issue of fact to be determined, a motion for summary judgment is properly overruled.
3. **Attorney and Client.** A disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong.
4. ———. Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto.
5. ———. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence. That is, the court should be satisfied to a reasonable certainty that the charges are true.
6. ———. The oath taken by a lawyer, as required by statute, requires him to faithfully discharge his 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.

7. ———. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court.
8. ———. A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending 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.
9. ———. 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.
10. ———. The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted by the Supreme Court of this state and those which may from time to time be approved by the Supreme Court of this state.
11. ———. 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 which is unworthy of public confidence constitutes a ground for suspension or disbarment.
12. ———. 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.
13. ———. 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 law.
14. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when 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 adopted one version of the facts rather than the opposite.
15. **Attorney and Client.** In a disciplinary action against an attorney the referee is charged with the duty to determine the truth, and has the right to question witnesses on both sides of the litigation to reach a determination as to the true facts, and by doing so such referee has not committed error.
16. **Attorney and Client: Divorce.** Generally, a contract executed before decree is rendered for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as

against public policy, since because of the lawyer's personal interest in the litigation it tends to prevent a reconciliation between the parties and destroy the family relationship.

17. **Attorney and Client.** The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

18. **Witnesses.** As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.

19. ———. While the plaintiff who calls defendant as a witness cannot impeach his character for veracity generally, the plaintiff may show that the whole or any part of what defendant has sworn to is untrue either by his own examination and the improbability of his story or by other contradictory evidence material to the case.

20. **Equity.** Laches is an equitable doctrine and it does not result from the mere passage of time.

21. **Attorney and Client: Equity.** Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense.

22. **Constitutional Law.** The term "due process of law" has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs, and is satisfied by a proceeding applicable to the subject matter and conformable to such general rules as affect all persons alike.

23. ———. Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

24. **Courts: Attorney and Client.** Each state has complete control over the remedy which it offers to suitors in its courts. The bar committees are clothed by rule with the power to make investigations and to hold hearings in order to determine whether the facts are supported by credible evidence and whether or not such facts are sufficient to warrant the institution of a proceeding to discipline or disbar an attorney.

Original action. *Judgment of suspension.*

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

Joseph T. Votava, Paine & Paine, and *John P. Jensen,* for respondent.

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

MESSMORE, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, relator, against John P. Jensen, a lawyer duly admitted and licensed to practice his profession in this state. On the filing of the complaint the matter was duly referred to a referee for hearing, report, and recommendation. Hearing was had, report made, and the referee found the respondent guilty of unethical and unprofessional conduct. The referee made no special recommendation, but left the matter of discipline to this court. Exceptions were taken by the respondent to both the referee's findings of fact and the recommendation.

The duty rests on this court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt and defeat the administration of justice. We necessarily review the evidence adduced in such proceedings de novo to determine if discipline should be imposed, and, if it should, the extent thereof. See State ex rel. Nebraska State Bar Assn. v. Fisher, 170 Neb. 483, 103 N. W. 2d 325.

Prior to setting forth certain principles which are applicable in disciplinary proceedings, we make reference to certain motions and stipulations filed in this court which motions this court has not ruled upon or disposed of.

On December 24, 1958, there was filed in this court a stipulation wherein the parties, pursuant to an oral agreement made December 5, 1958, and concurred in by the referee, agreed that this cause be set for hear-

ing before the referee on April 20, 1959.

On January 17, 1959, the parties stipulated that all of the evidence taken before the Committee on Inquiry on July 18, and August 6, 1957, all of the evidence offered at the hearing before the Advisory Committee on May 23, 1958, and all depositions taken by either party since these proceedings were filed in this court might be offered and received in evidence the same as if said witnesses were present in court and testified, all subject to the objections as to relevancy, competency, and materiality.

On March 23, 1959, by stipulation of the parties, it was agreed that the relator's objections to the respondent's request for admissions, and relator's objections to respondent's request for interrogatories previously filed in the office of the Clerk of the Supreme Court March 11, 1959, and noticed before this court for hearing on April 6, 1959, might be submitted to the referee for hearing and determination instead of to this court, at such time and place as the referee might determine or designate.

On February 28, 1959, the respondent served request for interrogatories and request for admissions on counsel for the relator. The requests for interrogatories and admissions were of great length and contained certain subparts. The relator made response to some of the requests, a part of which were denied for the reasons stated therein, and the balance were objected to. Such objections were sustained by the referee on April 10, 1959.

On April 17, 1959, respondent filed a motion in this court that this court enter an order holding that the responses of the relator, in legal effect, constituted admissions by the relator of the requests of the respondent and might be relied upon by the respondent as admissions of the relator.

On April 17, 1959, the respondent filed a motion requesting this court to review the order of the referee

as to objections to request for interrogatories and request for admissions, and to rule on the question as to whether or not the respondent was entitled to discovery by request for admissions to interrogatories as provided for in sections 25-1267.37 to 25-1267.39, R. R. S. 1943. The above motions were noted for hearing before this court and were not ruled on for the reason that the matters contained therein were referred to and were before the referee for determination.

Under the circumstances, the motions of the respondent filed in this court on April 17, 1959, were not timely filed and are hereby overruled.

The requests for admissions, which were objected to, were responded to by the relator in good faith as contemplated by section 25-1267.41, R. R. S. 1943. The denied parts were honestly set forth and the reasons given why the relator could not truthfully admit or deny the matter in compliance with subdivision (1) of said section. The trial before the referee proceeded on the theory that such responses were adequate, and evidence was introduced for and against the matters the respondent now seeks to have conclusively established. The respondent's objections should have been directed to the referee.

In the light of the foregoing, we find that the respondent was in no way prejudiced.

On April 17, 1959, the respondent filed a motion in this court for summary judgment. The respondent also moved for a continuance before the referee of this matter until such time as a motion for summary judgment had been ruled upon and until such time as a number of other motions also filed in this court had been ruled upon, and for other reasons not necessary to mention. This motion was overruled.

An application for continuance is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed in the absence of a clear abuse

of discretion. Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

The referee being an arm of the court, his actions providing for and holding a hearing are controlled by the rules relating to such proceedings in a court. The referee therefore did not err in denying a continuance.

With reference to the motion for summary judgment, respondent states that there have been no counter showings filed by the relator, therefore it must be presumed that the showings attached to the motion for summary judgment have been accepted as correct by the relator. This motion was not ruled on by this court for the reason that the whole matter had been referred to the referee.

Section 25-1332, R. R. S. 1943, provides in part: "The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The complaint, the answer thereto, and the reply clearly show that there is a genuine issue of fact to be determined in the instant case, as well as other matters appearing in the transcript relating thereto. The motion for summary judgment is overruled. See Rehn v. Bingaman, 157 Neb. 467, 59 N. W. 2d 614.

On July 3, 1958, the respondent filed a motion in this court that the charges made against him were indefinite and uncertain, and moved that the relator be required to make the complaint more definite and certain. The primary objection to the complaint was that there was a failure to set forth which specific canons of professional ethics the respondent violated, and to set forth what standard of professional conduct, rules or regulations, statutes and laws were vio-

lated by the respondent. On September 26, 1958, this court overruled the above motion.

Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 3, provides in part: "Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness."

In the case of In re Becker, 16 Ill. 2d 488, 158 N. E. 2d 753, it was held: "A disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong, * * *." See, also, 7 C. J. S., Attorney and Client, § 31, p. 775.

There is no doubt but that the respondent knew the charge or charges he was defending against. We find no merit in the respondent's contention.

Considering the respondent's contentions, we set forth certain principles which are applicable in disciplinary proceedings.

"Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto." State ex rel. Nebraska State Bar Assn. v. Fisher, *supra.*

In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the culpability of the person charged must be established by a clear preponderance of the evidence. See State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641. That is, the court should be satisfied to a reasonable certainty that the charges are true. See, Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 1; State ex rel. Nebraska State Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714; State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474.

The oath taken by a lawyer, as required by section 7-104, R. R. S. 1943, requires him to faithfully discharge

his 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. A lawyer owes his first duty to the court. He assumed his obligations toward it before he ever had a client. He cannot serve two masters, and the one he has undertaken to serve primarily is the court. See State ex rel. Nebraska State Bar Assn. v. Palmer, 160 Neb. 786, 71 N. W. 2d 491.

A duty rests on the courts to maintain the integrity of the legal profession by disbarring or suspending 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. See State ex rel. Nebraska State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N. W. 2d 145.

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. See State ex rel. Sorensen v. Scoville, 123 Neb. 457, 243 N. W. 269.

The ethical standards relating to the practice of law in this state are the Canons of Professional Ethics of the American Bar Association which have been adopted by the Supreme Court of this state and those which may from time to time be approved by the Supreme Court of this state. State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583.

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 which is unworthy of public confidence constitutes a ground for suspension or disbarment. State ex rel. Nebraska State

Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136.

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. State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

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

While this case is for trial de novo in this court, we recognize the rule that the referee heard and saw the witnesses as they testified. He had a better opportunity to appraise the credibility of the witnesses than does this court. While this court tries appeals in equity de novo, we must necessarily consider the findings of the referee on matters that are in irreconcilable conflict. Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699; Dunbier v. Rafert, 170 Neb. 570, 103 N. W. 2d 814.

The respondent complains that the referee unduly interrogated witnesses, and indicates that in interrogating the witnesses the referee did so unfairly and not impartially.

There is no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the questions of facts in issue. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

In this action the referee is the trier of facts. The referee is charged with the duty to determine the truth and has the right to question witnesses on both sides of the litigation, which he did. We find no error in the referee's action in such respect. In any event, all the evidence before the referee is before this court to review.

This action charges the respondent with unethical and unprofessional conduct in five separate matters. The answer is of extensive length and comprises a recital of facts in each charge to considerable extent. However, the answer to each charge may be considered as a denial of unethical or unprofessional conduct on the part of the respondent. The reply of the relator contains certain admissions of fact as pleaded in the respondent's answer and denies other facts appearing therein.

The record in this case is rather voluminous. Without repeating all the details and testimony of this lengthy record, we think the following résumé of certain salient, significant facts is sufficient to illustrate and substantiate our decision in this matter.

Paragraph V of the complaint charged the respondent with unethical and unprofessional conduct for failure to deliver the last will and testament executed by Lydia F. Evans and left by her in the respondent's possession after she had made repeated requests of him to deliver to her her last will and codicil attached thereto. The record shows that the respondent first became acquainted with Lydia F. Evans when he drew a will for her in April 1948. There was a petition for the appointment of a guardian filed in the county court of Buffalo County by her son Franklin F. Evans. An answer was filed to this petition on April 26, 1948. This guardianship proceeding was dismissed. The respondent transacted other legal business for Lydia F. Evans on occasions. Later, Lydia F. Evans obtained the will executed by her in April 1948, and destroyed it. Mrs. Evans had three children living, Martha Priebe, Galen Evans, and Franklin F. Evans, and three nephews living, Samuel M. Forney, Maurice May, and John May. Samuel M. Forney was an ordained minister of the Church of the Brethern, the same church Mrs. Evans attended. In January 1951, Samuel M. Forney made an appointment for his aunt, Lydia F. Evans, to

go the office of the respondent to make a will. Forney and the respondent picked her up in the respondent's car. Lydia F. Evans executed a last will and testament on January 22, 1951, and nominated the respondent as executor, giving him full power, at his discretion, to sell at public or private sale any real or personal property without order of the court, and to settle, compromise, or to adjust all claims, charges, and debts in favor of or against the estate. On February 8, 1951, Lydia F. Evans had the respondent make a codicil to her will. The respondent testified that at the time Lydia F. Evans executed the will of January 22, 1951, he wanted to know his specific instructions with reference to the will; that he did not want to be involved in a situation where anybody could come to his office and get the will; and that Lydia F. Evans' instructions to him were as follows: "Mr. Jensen, this I think is the last will that I will ever make. This will is to be kept by you. You are not to give it to anyone. I will not send anyone for it. And if I come up here with anyone, you are not to give it either to them or to me." It appears that the wills executed by Lydia F. Evans in 1948 and 1951 were quite similar. Both wills made provisions for charitable bequests to the church and church-related beneficiaries. Lydia F. Evans' nephew, Samuel M. Forney, was the residuary legatee under the will made January 22, 1951.

On or about January 27, 1951, Franklin F. Evans saw his mother, Lydia F. Evans, going to the respondent's office, so he followed her to the office. Mrs. Evans requested her will, but the lady at the desk told Mrs. Evans she could not give the will to her. Thereafter Franklin and his mother left the respondent's office. At another time, about a week or so later, Franklin F. Evans again saw his mother going to respondent's office, and he again followed her to the office. Mrs. Evans was talking to the respondent's law partner, and Franklin heard her ask for the will. She

received a copy of the will, and Mrs. Evans stated that she wanted the signed copy, but respondent's partner would not give her the original will.

On June 4, 1951, Lydia F. Evans filed a petition in the county court of Buffalo County alleging that she was 82 years of age and, by reason of age and health, she was unable to handle all her business affairs, to wit, the management of her property and the collection of rents, without a conservator to advise her and act for her in such matters, and alleged that her son Franklin F. Evans was a suitable person to act as such conservator. She was represented in such proceedings by the respondent and attorney Worlock. Franklin served as conservator of the estate of Lydia F. Evans until May 20, 1952, when, at her request, the conservatorship was terminated. On December 3, 1952, Worlock mailed the respondent a check for $150 as his part of the attorneys' fees collected in the conservatorship proceedings. There is no question but that the respondent knew and had notice of such proceedings and the manner in which the same were handled and concluded.

Franklin F. Evans testified that on September 14, 1951, he and his mother went to the respondent's office, and when they arrived at said office his mother said she wanted her will. The respondent shouted: "You're not fit to make another will," and he would not give up the will. He further said that he had the interests of other people to protect who were beneficiaries under the will; and that he could not give the will up without a court order. The respondent denied that he ever stated that he would not deliver the will because he had to protect the interests of other people who were beneficiaries under the will.

It appears that on September 14, 1951, both Franklin F. Evans and his mother asked the respondent for Mrs. Evans' will. The respondent testified that on September 14, 1951, when Franklin and Lydia F. Evans were in his office, Franklin was angry and wanted the respondent

to produce the will immediately and give it to his mother. Franklin said that she wanted it turned over to him. The respondent told Franklin that he did not believe, as conservator, Franklin was entitled to the will. The respondent said: "Aunt Liddy, * * * do you want me to give this son of yours this will?" She said: "Well, yes." She further said that Franklin told her if she would get the will and give it to him he would have it fixed so she could give her property to the people to whom she wanted to give it. There ensued some sort of argument and as a result Franklin F. Evans called attorney Worlock to come to the respondent's office. When Worlock arrived, the respondent, Lydia F. Evans, and Franklin F. Evans were in respondent's office. Worlock said: "John, why don't you give Mrs. Evans her will? She is entitled to it." Instead of answering Worlock directly, the respondent said: "Aunt Lydia, I am not going to give you this will. If I give it to you, you will destroy it; you will not be in a position to make another will, and I have the interests of these parties to protect, and I am not going to give you the will."

Worlock testified that he advised Lydia F. Evans to go to the respondent's office and ask for the will. After this conversation in the respondent's office on September 14, 1951, Worlock, on September 15, 1951, at Lydia F. Evans' request, prepared a revocation of the will of Lydia F. Evans dated January 22, 1951, and the codicil thereto. With respect to the revocation of the will, Worlock talked to Lydia F. Evans alone. She told Worlock that she wanted that will and codicil destroyed; that she did not want another will; that she wanted to revoke her will and the codicil thereto; and that she wanted her property to go to her children.

After the conversation had in the respondent's office between Franklin F. Evans, Lydia F. Evans, and Worlock, the respondent called Samuel M. Forney and told him that Franklin F. Evans had been to the respondent's office trying to get the will, and suggested that Forney

do whatever he felt necessary to protect the rights of Mrs. Evans, Forney, or anyone else. The respondent also called Maurice May and told him to do whatever was necessary to protect his rights relating to the will.

There is testimony by witnesses in behalf of the respondent that under the instructions given to the respondent by Lydia F. Evans it would have been wrong, under the circumstances, for the respondent to deliver the will to Lydia F. Evans.

Lydia F. Evans told her son Galen Evans that she had gone to respondent's office numerous times to get her will, and the respondent would not give it to her. Lydia F. Evans also told several of her friends during the summer of 1951 that the respondent would not let her have her will. She also told her daughter that the respondent would not give her her will and she wanted it back. She also requested her son Franklin to help her get her will back. Later Lydia F. Evans conveyed and transferred her property to her children.

On June 25, 1954, Lydia F. Evans died. The respondent filed a petition in the county court of Buffalo County July 3, 1954, for the probate of the will of Lydia F. Evans, deceased, executed on January 22, 1951. Objections were filed to the probate of the will, together with a copy of the revocation of the will and codicil, on July 30, 1954. Maurice May and the respondent filed a reply on May 11, 1955, showing Dryden and Jensen (the latter being the respondent), and Munro and Parker, as attorneys. The county court rendered judgment against the respondent, and an appeal was taken to the district court. The proponents were represented by attorneys Munro and Parker in the district court. The district court sustained the motion of the contestants against the proponents in part, and instructed the jury that the mental capacity of Lydia F. Evans at the time of the execution of the revocation of her last will and testament had been established by the evidence, and limited the issue in the case to undue influence. The jury found

against the proponents on the issue of undue influence, and this judgment was affirmed by this court. See Jensen v. Priebe, 163 Neb. 481, 80 N. W. 2d 127.

From a review of the record relating to the Evans matter, the evidence is overwhelming that during the time Lydia F. Evans executed her will on January 22, 1951, and the codicil in February 1951, she was mentally competent to do so; and that when she requested the respondent to deliver her will to her on September 14, 1951, and at the time she executed the revocation of her will and codicil on September 15, 1951, Lydia F. Evans was competent to perform such acts. Samuel M. Forney testified that he did not remember a time when Lydia F. Evans was incompetent; and that she was a strong-minded woman, had a mind of her own, knew the nature and extent of her property, and the natural objects of her bounty. Galen Evans, a son of Lydia F. Evans, testified that his mother had a mind of her own. Martha Priebe, her daughter, testified that her mother had a will of her own. In fact, there is no competent evidence that up to the date of her death Lydia F. Evans was incompetent to make a will or revoke a will she had made, or that she could be unduly influenced with reference to her property at any time.

At the time Lydia F. Evans executed her will on January 22, 1951, she was possessed of real estate and personal property of the approximate value of $125,000. The respondent had represented her over a period of years prior to January 22, 1951, and knew the nature, extent, and value of her property. The respondent made no attempt to contact Lydia F. Evans after September 14, 1951, to determine whether she wanted her will, or to suggest that if she would come to the office alone he would deliver it to her, although she lived until June 25, 1954. The record is clear that Lydia F. Evans herself, personally, requested the respondent to deliver her will to her.

In 7 C. J. S., Attorney and Client, § 19, p. 733, it is

said: "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." See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra.*

"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.

We conclude that under the evidence the respondent was duty bound to give Lydia F. Evans her will upon her demand for it. There is no legal or logical reason why the respondent should not have complied with this request. We are in accord with the referee's finding on this matter that the respondent was guilty of unethical and unprofessional conduct.

With reference to paragraph No. VI of the complaint titled the Bentley matter, the complaint alleged in part that on September 14, 1953, the respondent was attorney for William Bentley in the matter of the guardianship of Lillian Bentley alleged to be mentally incompetent, a proceeding in the county court of Buffalo County wherein William Bentley, the son of Lillian Bentley, petitioned that his mother by placed under guardianship. This petition was filed in the spring of 1953, and at all times during said action Lillian Bentley was represented by Ward W. Minor, an attorney at Kearney, Nebraska. The complaint alleged that the respondent went to the Bentley home for the purpose of obtaining a statement from Mrs. Bentley, knowing that she was represented by counsel, and to obtain such a statement without the permission of her counsel. Lillian Bentley and her husband, Bert Bentley, resisted this guardianship. The respondent and Minor discussed this case prior to trial, during the latter part of June or first part of July 1953, at which time Minor suggested

that the respondent talk to Dr. Wiltse who was Lillian Bentley's doctor. Minor testified that he never at any time gave respondent permission to talk to his client, Lillian Bentley, or to her husband Bert Bentley; that he not recall giving permission to the respondent to talk to his client Lillian Bentley; and that he did not recall any other conversation with the respondent about this matter prior to the discussion setting the case for trial, or with respondent's secretary being present, or any conversation between him and the respondent. The respondent testified that Minor told him to see Dr. Wiltse and get a report from him, and early in March 1953, he saw Dr. Wiltse. The respondent did receive a report from Dr. Wiltse dated May 13, 1953. The doctor's report was to the effect that Lillian Bentley's mind was clear; and that she was competent and could comprehend. The respondent further testified that toward the end of June or July 1953, he met Minor in the courthouse and told Minor that William Bentley had told the respondent four or five times that his mother wanted to see the respondent; that there were also certain persons who cared for Lillian Bentley and knew about her condition; and that Minor told the respondent to go and see his client, Mrs. Bentley. The respondent testified that at a later date he telephoned Minor with reference to seeing Mrs. Bentley and told him that if nothing was wrong with her mind, or if she was competent, he would dismiss the guardianship proceedings, and Minor replied: "It's alright; I am sure you will see she is o.k." The respondent's secretary corroborated the respondent's testimony as above set forth, in most respects.

The respondent made arrangements with David Drage, a deputy sheriff of Buffalo County, to take respondent and his secretary to see Mrs. Bentley who lived at Shelton, Nebraska. The reason for this was that Bert Bentley was presumed to be a violent person. The respondent told William Bentley and Drage that he had permission from Minor to talk to Mrs. Bentley. The group

picked up William Bentley in Shelton on the way to the Bentley home. The respondent's purpose in talking to Mrs. Bentley was to see if she was mentally competent, and if he thought she was he was going to dismiss the guardianship proceedings. When the group arrived at the Bentley home, the respondent asked Drage to go into the house first and ask Mrs. Bentley if she wanted to see him. Drage went into the house, and came out and told the respondent that Mrs. Bentley wanted to see him. The respondent went into the house with Drage and met Bert Bentley a few feet inside the kitchen. Bert Bentley told them he did not want anyone talking to his wife. The respondent and Drage then left the house. The witnesses whose statements respondent wanted to take were not present, and the statements were not taken. On no occasion did Mrs. Bentley tell the respondent to get out of the house and stay out, and there was no conversation between the respondent and Lillian Bentley.

The respondent introduced into evidence an exhibit, the deposition of Robert L. Haines, and certain exhibits in addition thereto. The respondent told Drage that he wanted to take a statement from Mrs. Bentley, but did not tell him what it was. In a statement Drage made shortly after the incident he related a different story than that told by him before the Committee on Inquiry. Drage stated that when the party arrived at the house, all three of them got out of the car and proceeded up to the porch where they were met by Bert Bentley. Bert Bentley told them that Drage could go in to see Mrs. Bentley, but the others could not. Drage went into the house and was visiting with Mrs. Bentley when William Bentley, the respondent, and the respondent's secretary came in and stopped just inside the door. Bert Bentley told them to get out. The respondent announced to Bert Bentley: "I am here to take an affidavit from your wife." Bert Bentley refused to allow him to talk to his wife, and an altercation ensued. The respondent and

his party left. Lillian Bentley also told them to get out and leave her alone. Mrs. Bentley's statement was taken by Robert L. Haines, wherein she stated that she never invited the respondent to her home, nor did she give him permission to come to her home, and never gave her attorney permission for the respondent to come to her home. Subsequently, Bert Bentley died.

It is true, the respondent did not have the opportunity to interview Lillian Bentley. He had previously received a report from Dr. Wiltse in which the doctor reported the state of Mrs. Bentley's mind and that it was clear, and she was able to comprehend. Also in this report the doctor explained that Mrs. Bentley previously suffered a stroke and her condition had improved markedly from February 9, 1953. The respondent admits that he intended to talk to Mrs. Bentley, but denies that he intended to take a statement from her.

The relator's contention is that the respondent never received Ward Minor's permission to interview his client, and the mere fact that the respondent was prevented by Bert Bentley from keeping his announced plan does not prevent or excuse him from a violation of Canon 9, Canons of Professional Ethics.

Canon 9 provides in part: "Negotiations With Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel." See, also, Lumbermens Mutual Casualty Co. v. Chapman, 269 F. 2d 478; Turner v. State Bar, 36 Cal. 2d 155, 222 P. 2d 857.

In the light of all the testimony relating to the Bentley matter, we conclude that the respondent violated the Code of Professional Ethics by his conduct, as determined by the referee. As the respondent stated, he could have taken the deposition of Lillian Bentley. True, the evidence in relation to this charge is in irreconcilable conflict, but we, under the rule heretofore announced

relating to an equity action, conclude that the referee did not err as contended for by the respondent.

Paragraph No. IV of the complaint relates to the Molzen matter. The respondent represented Hazel Molzen in a divorce case. She employed him on March 22, 1951. He prepared a petition for divorce in her behalf and filed it on the same date. Her husband, Cecil W. Molzen, was represented by attorney Louis A. Holmes. The defendant's answer was filed June 2, 1951. On July 31, 1951, a decree was entered showing that a trial was had at which evidence was offered by the plaintiff but none by the defendant. On the same day there was filed an agreement in contemplation of divorce signed by Cecil W. Molzen in Minnesota on June 19, 1951. Also on July 31, 1951, the respondent's firm filed an attorney's lien in the district court. The respondent told Mrs. Molzen that the only fair thing to do, since the defendant's property was in Minnesota, was that he should ask the court to fix his attorney's lien at 15 percent, and that he would put it in the decree. Respondent prepared the decree before going into court on the date the trial was had. There was no testimony about attorney's fees at the hearing at the time the divorce was granted to the plaintiff. The respondent had not discussed this 15 percent attorney's lien provision with the district judge before he prepared the decree, but had discussed the matter with his client.

The parties to this divorce action had entered into an agreement and a property settlement whereby the plaintiff was to receive $5,500. Of this amount, $1,000 was received by her as a result of an assignment of a loan made by Cecil W. Molzen, her husband, to her brother. The respondent received in fees for this action the amount of $772.31. On December 4, 1951, Mrs. Molzen discharged the respondent and the members of his firm as attorneys representing her. A motion was filed in her behalf to strike from the decree the provision as follows: "Plaintiff's attorney is given a lien on amounts

due and owing from defendant to plaintiff in the amount of 15%." This motion was based on the fact that such a provision was beyond the authority of the court to enter in the decree, because the same was not shown by the pleadings. The respondent filed his application for leave to intervene, which was granted. The respondent, on April 3, 1953, filed an answer to the plaintiff's motion to strike, in which the respondent asserted his right to the 15 percent attorney's fee lien. The answer also affirmed the fact that the respondent had discussed the 15 percent provision appearing in the decree with his client prior to the entry of the decree. On February 5, 1954, the district court found that the 15 percent provision was included in the journal entry without any evidence having been taken thereon, that no actual agreement had been made, and struck such provision mentioned above from the decree.

The relator contends that the provision set forth in the decree charging 15 percent of the amount of alimony actually to be collected was, in effect, a contingent fee contract. In addition, the relator contends that the entry of the provision in the decree constituted a fraud upon the court.

In State ex rel. Nebraska State Bar Assn. v. Dunker, 160 Neb. 779, 71 N. W. 2d 502, this court said: "Generally, a contract executed before decree is rendered for payment of attorney's fees in a divorce action contingent upon the amount of alimony to be subsequently obtained upon the award of a divorce is void as against public policy, since because of the lawyer's personal interest in the litigation it tends to prevent a reconciliation between the parties and destroy the family relationship." Annotation, 30 A. L. R. 188, cites and discusses authorities supporting such statement. They are too numerous to cite here. See, Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. S. R. 836; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; 17 C. J.

S., Contracts, § 235, p. 618; 5 Am. Jur., Attorneys at Law, § 166, p. 361.

The respondent contends that there was no contract for fees prior to the day the matter was terminated; that, in effect, the provision for 15 percent applied only to the alimony collected after the property settlement was entered into. The defendant, Cecil W. Molzen, had loaned $1,000 to the plaintiff's brother. As a part of the property settlement prior to the divorce, this $1,000 was assigned to Mrs. Molzen. Mrs. Molzen had this $1,000 from her brother and did not want Cecil W. Molzen trying to collect this amount from her brother again. This $1,000 had been paid to Mrs. Molzen a year before when she was in the hospital. No legal services were required to collect this $1,000, other than to include the item in the property settlement agreement, and this fact is admitted by the respondent. It is apparent that the respondent was basing his percentage fee on the total amount of alimony awarded and not just the collection of awarded alimony after the judgment had been rendered. This is wrong and unethical under the holding in State ex rel. Nebraska State Bar Assn. v. Dunker, *supra.*

The respondent prepared the decree and inserted this provision in it. He had not discussed the matter with the district judge before inserting it in the decree. No evidence was presented on the divorce trial concerning the fee. On February 5, 1954, the court found that the 15 percent provision was included in the journal entry without evidence being taken thereon and that no actual agreement had been made, and the court struck that provision from the decree. While it may be assumed that the district judge read the decree, the respondent failed to fully inform the judge as to its provision improperly incorporated therein.

Canon 22 of the Canons of Professional Ethics, provides in part: "The conduct of the lawyer before the

Court and with other lawyers should be characterized by candor and fairness."

We conclude that in the Molzen matter the conduct of the respondent was such that he acted in an unprofessional manner and perpetrated a form of fraud upon the court within the provisions of Canon 22 of the Canons of Professional Ethics. The referee so found and we are in accord with his findings in such respect.

The respondent asserts that the relator offered in evidence all of the testimony of the parties offered before the Committee on Inquiry, all of the evidence in the case of Jensen v. Priebe, *supra,* and other evidence; and that the relator knew, at the time of making such offers, exactly what evidence was contained therein.

The respondent cites Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238, wherein this court said: "As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion." See, also, 58 Am. Jur., Witnesses, § 796, p. 441.

At the trial of this matter before the referee, the relator offered the proceedings before the Committee on Inquiry in evidence, pursuant to a stipulation entered into by the parties herein. The respondent first objected to the reception of this evidence, but subsequently withdrew his objection as to a part of the testimony, and has not claimed error or improper reception of evidence as to the balance thereof.

This court, in Krull v. Arman, 110 Neb. 70, 192 N. W. 961, said, quoting from Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 A. 361: "While a plaintiff who calls defendants as his witnesses cannot impeach their character for veracity generally, he may show that the whole or any part of what they have sworn to is untrue either by their own examination and the improbability of their own story or by other contradictory evidence

material to the case." See, also, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Trask v. Klein, 150 Neb. 316, 34 N. W. 2d 396; Zimman v. Miller Hotel Co., 95 Neb. 809, 146 N. W. 1030.

Under the true rule herein set forth, while a witness may not be impeached by the party calling him, the testimony of such a witness may be contradicted. The evidence submitted by the relator certainly contradicted the testimony of the respondent and was entitled to as much weight as the referee concluded it merited, and as this court concluded it merited on a trial de novo.

The respondent raises the defense of laches, contending that he was prejudiced by the delay in filing and in investigating the charges as shown by the complaint.

In State ex rel. Nebraska State Bar Assn. v. Bates, 162 Neb. 652, 77 N. W. 2d 302, this court said: "Laches is an equitable doctrine and it does not result from the mere passage of time."

Lapse of time since the acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. See State ex rel. Nebraska State Bar Assn. v. Merten, 142 Neb. 780, 7 N. W. 2d 874.

In State ex rel. Nebraska State Bar Assn. v. Bates, *supra,* the court pointed out that the conduct of the respondent in that case continued until July 7, 1948, while the complaint before the Committee on Inquiry was made and filed in November 1954. It appears that in the Bates case a period of a little over 6 years had elapsed. In the instant case the oldest charges appear to be the Molzen divorce action and the action of the respondent relating to the will of Lydia F. Evans. The divorce decree in the Molzen case was entered in 1951, 6 years before the hearing before the Committee on Inquiry. However, the decree of divorce in the Molzen action was modified in 1954. In the Evans will matter the action of the respondent upon which the charge was based was in September 1951. However, the matter was not closed, and the will was contested in the dis-

trict court and which on appeal to this court resulted in an opinion filed in December 1956.

The respondent complains that Lillian Bentley and Bert Bentley are now deceased. Hearings before the Committee on Inquiry on all the charges against the respondent were held in July and August 1957. Bert Bentley died April 6, 1958. The respondent had the opportunity to cross-examine Bert Bentley at the hearing before the Committee on Inquiry, and that evidence was before the referee pursuant to the stipulation of the parties herein. Lillian Bentley died on February 3, 1958. Dr. C. E. Wiltse died in 1958. The respondent, if he desired, could have taken the depositions of the latter two persons mentioned. This matter occurred in 1953.

We conclude that the respondent's defense of laches is without merit.

The respondent contends that he was denied due process of law under Article XIV of the Constitution of the United States and Article I, section 3, of the Constitution of the State of Nebraska. In this connection, the respondent asserts that certain members of the Committee on Inquiry were biased and prejudiced against him, and should have been disqualified from acting on such committee; that the Advisory Committee refused to review this matter; that an investigator, who was duly appointed, solicited complaints against the respondent by interviewing attorneys for that purpose; that the rules governing the hearing before the Committee on Inquiry and the Advisory Committee require secrecy of the proceedings and such rules were violated; and that the respondent made demand of the Committee on Inquiry for documents and papers in the possession of such committee, which the committee refused to produce at such hearing.

The rules creating, controlling, and regulating the Nebraska State Bar Association consist of eleven articles. Without setting forth the substance of each and

every article, suffice it is to say that a Committee on Inquiry is appointed by the Supreme Court in each district court judicial district of the state, and the Advisory Committee appointed by the Supreme Court consists of one member from each Supreme Court judicial district. From a reading of all the rules creating, controlling, and regulating the Nebraska State Bar Association, it is obvious and very apparent that the only function of the two committees, that is the Committee on Inquiry and the Advisory Committee, is to investigate charges against any attorney to determine whether there is proper cause to believe he has been guilty of unethical and unprofessional conduct and has violated the Canons of Professional Ethics.

Under the Revised Rules of the Supreme Court, Part III, Disciplinary Proceedings, Rule 2 provides: "Proceedings for discipline of attorneys may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, * * *."

Rule 3 provides: "Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness. The complaint shall be filed with the Clerk of the Supreme Court, who shall then docket the cause as an original proceeding in the Supreme Court."

Rule 4 provides in part: "Service upon the respondent may be had by serving upon him a copy of the complaint and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the district courts of the state, * * *."

Rule 7 provides in part: "Upon the filing of an answer raising an issue of fact the court shall refer the matter to a member of the bar as referee. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the

pleadings. The referee shall have all powers of a referee in civil actions in the courts of Nebraska. The referee shall observe the rules of evidence applicable in civil actions in the district courts of the State of Nebraska. * * * The referee shall make a written report stating his findings of fact and recommendations. * * * and the referee shall promptly transmit to this court his report, together with such record so certified."

Rule 10 provides: "The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate."

It is noted that the rules of the Nebraska State Bar Association and the rules of the Supreme Court, as they relate to disciplinary matters, provide two separate and distinct procedures. The rules of the Nebraska State Bar Association provide for a judicial district Committee on Inquiry and a state Advisory Committee. The procedure therein set forth is primarily for the purpose of conducting an investigation, which investigation may be formal or informal. The purpose of this procedure is to make sure that no unwarranted complaints are filed against attorneys. By this means the charges against attorneys are investigated, and if sufficient facts appear to indicate that he might be guilty of a violation of a Canon of Professional Ethics, or might be subject to disciplinary action on the facts of each individual case, a complaint shall be lodged against him in the Supreme Court of the State of Nebraska.

In Chicago, B. & Q. R. R. Co. v. Headrick, 49 Neb. 286, 68 N. W. 489, this court said: "The term 'due process of law' has been often defined as such an exertion of the powers of government as are sanctioned by the settled maxims of the law and under such safeguards for the protection of individual rights as those safeguards prescribed for the class of cases to which the one in question belongs. (Cooley, Constitutional Limitations, 355.) * * * but is satisfied by a proceed-

ing applicable to the subject-matter and conformable to such general rules as affect all persons alike."

In Reed v. Reed, 70 Neb. 779, 98 N. W. 73, it is said: "Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained."

In Ripley v. Godden, 158 Neb. 246, 63 N. W. 2d 151, this court said: "The indispensable elements of due process are a tribunal with jurisdiction, notice of a hearing to the proper party, and an opportunity for a fair hearing according to applicable procedures."

In the instant case the relator has fully complied with these indispensable elements. A complaint was duly filed in the Supreme Court of this state; the respondent had full and complete notice of the same; he was given an opportunity to answer the complaint, which he did, at length; the issues were joined; a hearing was had, pursuant to the stipulation of the parties herein, before a referee duly appointed by this court; and evidence was heard on behalf of the relator and on behalf of the respondent. There can be no question, in the light of the decisions of this court, but that this court has jurisdiction to entertain disciplinary matters against lawyers admitted to the practice of law in this state.

It appears that the respondent primarily predicates denial of due process of law before the Committee on Inquiry and the Advisory Committee of the Nebraska State Bar Association. In the case of In re Sparrow, 338 Mo. 203, 90 S. W. 2d 401, it was pointed out that each state had complete control over the remedy which it offers to suitors in its court. The bar committees were clothed by rule with the power to make investigations and to hold formal hearings. Such investigations and hearings were found to be summary in character and not adversary in any proper sense but were intended to determine whether the facts were supported by credi-

ble evidence and whether or not such facts were sufficient to warrant the institution of a proceeding by information to discipline or disbar. The court said: "Subsequent subsections deal with the filing of information, issuance of summons, joinder of issue by answer, trial 'as in extraordinary legal remedies, always saving to each side a reasonable opportunity to present evidence and to be heard.' Thus the rights of confrontation of witnesses and due process of law are plainly and adequately safeguarded. It is plain also that the summary investigations and hearings provided for do not invade or impair any constitutional right of the person whose professional conduct is subjected to the preliminary enquiry."

As stated in the case of In re Conner, 357 Mo. 270, 207 S. W. 2d 492: "Procedure in disbarment is seldom uniform, varies widely with the state or Federal jurisdiction in which the action is pending and seldom follows any local code of civil procedure. Generally, the judicial department of the jurisdiction involved adopts and uses any procedure it deems appropriate to disbarment."

From our research, we have no doubt but that the matters relating to discipline, suspension, reprimand, or disbarment of attorneys practicing before the courts of each state are subject to the rules promulgated for that purpose. It is clear that the preliminary proceedings before the Committee on Inquiry and the Advisory Committee were merely investigating proceedings which neither end in any decree or establish any right. We conclude that the respondent was not denied due process of law in this case. The respondent's contention in such respect is without merit.

We have herein set forth certain of the charges against the respondent made by the relator in the complaint. We have carefully reviewed the record as it relates to all of the charges set forth in the complaint. The record shows that the respondent has failed to demonstrate loyalty and fidelity to his clients and to

meet the trust placed in him by them. In addition, in the practice of his profession he has not shown fairness and candor in his dealing with other lawyers, and has not dealt candidly with the facts in cases handled by him. It is also apparent from the record that the respondent has failed to uphold the honor and dignity of the legal profession.

The respondent has been actively engaged in the practice of law in this state for 28 years, with a rather large and extensive practice. Due to such practice, he should have been, and obviously was, well aware of the Canons of Professional Ethics which controlled his conduct while engaged in the practice of law. In view of the facts herein set forth, and all of the circumstances disclosed by the record relating thereto, we find that the ends of justice will be properly served by suspending the respondent from the further practice of law for a period of 1 year, the same to go into effect when 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. In the event he fails to comply with the order as heretofore set forth, the suspension provided herein shall become permanent.

Judgment of suspension accordingly. All costs of this proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.

DALE VOSS, JR., DOING BUSINESS AS TODD FINANCE CO., APPELLEE, V. ROLAND LINN, DOING BUSINESS AS HIWAY MOTOR CO., APPELLANT.

105 N. W. 2d 383

Filed October 14, 1960. No. 34785.

1. Contracts. A fundamental and indispensable basis of an enforceable agreement is a meeting of the minds of the parties thereto.
2. ———. When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying, or contradicting the express terms contained in the writing.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Affirmed.*

McCarthy & Kneifl, for appellant.

S. W. McKinley, Jr., and *Richard L. Jandt*, for appellee.

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

YEAGER, J.

This is an action by Dale Voss, Jr., doing business as Todd Finance Co., plaintiff and appellee, against Roland Linn, doing business as Hiway Motor Co., defendant and appellant, to recover $5,500 on a written guaranty of payment of money on a conditional sale contract entered into between one Christian Voss, signed Chris H. Voss, and the defendant, which contract was purchased by plaintiff and assigned by defendant to the Todd Finance Co., the name in which the plaintiff was conducting his business, with a written guaranty that the defendant would pay to the plaintiff the amount of the obligation of the contract in the event of the failure of Christian Voss so to do.

The case was tried to a jury and at the conclusion of

the evidence the court directed a verdict in favor of the plaintiff and against the defendant. A verdict was accordingly returned. Judgment was duly rendered on the verdict. A motion for new trial was filed which was overruled. From this verdict, the judgment, and the order overruling the motion for new trial the defendant has appealed.

By the petition it was declared in substance, to the extent necessary for the purposes of this opinion, that on or about June 28, 1957, the defendant sold five motor vehicles or trucks to Christian Voss for $6,500 under a conditional sale contract upon which there was a balance due of $6,000 when the contract was assigned for a valuable consideration to the plaintiff; that with the assignment the defendant gave the plaintiff a written guaranty of payment providing that if Christian Voss defaulted in the payment of any installment the defendant would on demand pay to plaintiff the full unpaid amount; that Christian Voss made default; and that demand was made for the balance due which was $5,500 no part of which had been paid. The prayer of the petition was for judgment for $5,500 with interest at the rate of 5 percent per annum from the date of the commencement of the action and costs. Copies of the conditional sale contract and the written guaranty were attached to and made a part of the petition.

To the petition the defendant filed an answer which, among other things, included a general denial. Neither specific pleadings nor evidence negatives the execution of and delivery of either the conditional sale contract, the assignment thereof, or the guaranty pleaded. Further, lack of consideration is not pleaded.

As affirmative defenses the defendant seeks to avoid the obligation of these instruments by an alleged oral agreement made prior to or contemporaneous with the written instruments that their obligation would be met otherwise than as therein provided and that thus the defendant would not be required to perform according

to the terms of the guaranty; by a purported oral agreement entered into subsequent to the original transaction which took the place of the original obligation; and in part by a claim that plaintiff collected money which should have been applied in payment of the obligation of the conditional sale contract, which was not so applied.

The plaintiff filed a reply in which he denied generally the allegations of the answer except such as were admitted to be true. The reply sets forth that one Armon Todd was agent of the plaintiff in the transaction. This is of importance since all acts and doings on behalf of the plaintiff were done and performed by Armon Todd.

The theory on which the court sustained the motion for directed verdict and rendered its judgment was that the plaintiff had proved the pleaded cause of action and that there was no competent evidence adduced or offered to support a defense.

As grounds for reversal the defendant has set forth three assignments of error. The first is a general contention that the court erred in sustaining the motion for new trial. This is obviously erroneous. It is clear that the intention was to say that the court erred in sustaining the motion for directed verdict. It will be so treated. The second is that the court erred in refusing to admit evidence of promises made by plaintiff which induced defendant to sign the contract. This must refer to the written guaranty and not the conditional sale contract since the contract was signed by Christian Voss or, as it appears thereon, Chris H. Voss. The defendant signed only as a witness to the signature of Voss. By the third assignment of error it is asserted that the court erred in refusing to admit testimony "relative to subsequent agreement based on consideration whereby appellee promised to hold appellant harmless in the event appellant stored trucks for appellee."

At the close of the evidence it conclusively appeared that the conditional sale contract had been executed and

delivered and the assignment was made and delivered all as pleaded by the plaintiff in his petition, with adequate proof of consideration. There was no substantial evidence to refute the proof of plaintiff that there was a default on the part of Christian Voss and that the balance due was the amount for which judgment was rendered.

This brings us to the question of whether or not there was error in the refusal to admit testimony as to inducement to the signing of the contract or, as is apparently meant, the guaranty.

Only two witnesses testified on behalf of the defendant. One of these was the defendant himself. No question was asked of him relating to the subject of inducement, and of course no offer of proof in this area was made.

Christian Voss was the other witness. The following question was propounded to him: "Q Did you hear Mr. Todd make any promises to Mr. Linn relative to the payments to be made under this contract?" Objection was made. The objection was sustained. The following question, which related to and was obviously an elaboration of the previous question, was propounded: "Q And prior to the execution of this contract?" Objection to this question was sustained. Thereupon the following offer was made: "Defendant offers to show by this witness that prior to the execution of this contract and the signing thereof by the defendant and the said Chris Voss, that Armon Todd promised the defendant Ole Linn that if he would sign said contract and if the plaintiff failed to collect within 90 days from the Macy Construction Co. the payments thereunder, that the defendant Roland Linn would be held harmless * * *." Objection to this offer was made and sustained.

If it be assumed that the purported promise contained in the offer was true and related to a subject which if established could be regarded as a defense to the action of plaintiff, and accordingly the rejection of the offer was erroneous, still in the state of the record here it could not be regarded as material. The record

is devoid of any evidence or offer of evidence the tenor or effect of which was to say that the defendant signed any document in reliance upon any such promise. The nearest approach is a purported conclusion in the offer, rendered inadmissible by the terms of plaintiff's objection, that Christian Voss would testify that the defendant refused to sign until the promise was made.

A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties. See, Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op Ins. Co., 147 Neb. 1093, 26 N. W. 2d 122; Griggs v. Oak, 164 Neb. 296, 82 N. W. 2d 410.

There having been no evidence or offer of evidence of the essential elements of any enforceable oral agreement, on that ground the court did not err in sustaining the objection to the offer of the purported evidence of inducement.

There is another reason why it was not error to reject this offer. Proof of the agreement, if there was one, would not defeat the right of the plaintiff to recover on the guaranty. The controlling rule is as follows: "When a written contract has been unconditionally delivered in the sense that it is intended to take effect as a legal obligation, a contemporaneous oral agreement, providing that the contract is not to be performed if a certain condition or contingency occurs, cannot be shown, as such testimony would have the effect of adding to, varying or contradicting the express terms contained in the writing." Security Savings Bank v. Rhodes, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412. See, also, Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N. W. 2d 132.

As to the third assignment of error there was no evidence whatever adduced or offered that there was a subsequent agreement to hold the defendant harmless. It is true that a question was responded to in which the defendant gave testimony relative to an agree-

ment but on motion the answer was stricken by the court and objection to the question sustained. The subject was not pursued further. There is no merit to the assignment of error.

For the reasons herein stated the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

COUNTY BOARD OF SUPERVISORS OF PLATTE COUNTY, NEBRASKA, EX OFFICIO THE COUNTY BOARD OF PUBLIC WELFARE, APPELLANT, V. LESTER W. BREESE ET AL., APPELLEES.

105 N. W. 2d 478

Filed October 14, 1960. No. 34788.

1. Statutes. A legislative act operates prospectively only unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
2. Liens. A positive legislative enactment prescribing conditions essential to the existence and preservation of a statutory lien may not be disregarded.
3. ———. A lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the statute. It cannot be extended by the court to a case not within the terms of the statute.
4. Statutes. If a right has been created by statute which did not exist in the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed.
5. Statutes: Actions. A legislative body which creates a right of action has power to determine the conditions under and the time within which it must be brought.

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

C. Thomas White, for appellant.

Edward Asche, for appellees.

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

BOSLAUGH, J.

The circumstances important to this litigation are not in dispute. Katherine Breese, also named in the record as Katherine W. Breese, the wife of Orrin C. Breese, was for many years the record owner of a tract of land which is involved and precisely described in this case. It was a residence property on which the named parties lived with their two sons until they became adults and left the home. Katherine Breese and Orrin C. Breese continued to make their home on the property until the death of each. Orrin C. Breese was a teamster. His employment was not generally continuous or greatly remunerative. He was during the difficult years of the thirties also engaged in custodial work at a bakery. His wife was not employed at any time outside of the home. The income of the parents was frequently less than their necessitous requirements. They had during a period of about 30 years different loans from a money-lending agency at Columbus which were secured on their home property.

Lester W. Breese, the younger son, hereafter referred to as appellee, during the later years he was living at home with his parents paid them for his board and room. He left home in 1926 and was in business in Fremont until 1947. In the early part of 1926 he arranged a loan of $1,300 which was secured on the home of his parents, the proceeds of which were used by them in repairing and making livable the house in which they lived and in paying past-due bills which they had accumulated. The indebtedness of $1,300 and interest was paid by appellee in installments of $14.95 each month. Thereafter appellee paid his parents $10 to $15 a month. Appellee later paid the expense of a new roof, painting, and repair work on the home of his parents at an expense to him of about $550. His

father, because of age and illness, could not handle coal for the furnace and appellee had it changed over for burning oil as fuel at an expense to him of about $160. The contributions by appellee to his parents were measured by the need of the parents. When they needed something he got it for them until he was disabled and could hardly care for himself.

The older son, Archie Breese, resided and was employed in Chicago. He substantially assisted his parents but the exact extent thereof is not shown by the record. The death of Archie Breese was caused by an accident in Chicago in the fall of 1945 but before October 22, 1945. Appellee took his father to Chicago and they attended the funeral of Archie Breese.

After appellee and his father returned from attending the funeral in Chicago the parents, Katherine Breese and Orrin C. Breese, on October 22, 1945, conveyed by deed the real estate involved in this case from themselves to themselves as joint tenants with right of survivorship and the same day the parents conveyed by warranty deed the identical real estate to their sole surviving child, Lester W. Breese, subject to a reservation in the deed of a life estate in the real estate to the grantors or the survivor of either of them. The last deed was executed and duly delivered to appellee that day but it was not recorded until after the death of his father, Orrin C. Breese, at the request and insistence of the father who died May 11, 1952. The deed was recorded on June 2, 1952. The deeds were prepared by an attorney in his office at Columbus after consultation with the parties.

Appellee was disabled by illness in the year 1946 and he was unable to care for or to further contribute to his parents. Katherine Breese and Orrin C. Breese each made application for old age assistance, the former on October 25, 1946, and the latter on October 31, 1946. The applications were each approved and assistance benefits were paid Katherine Breese for the period of

September 1947 to May 1952 in the sum of $1,433.20 and to Orrin C. Breese for the period September 1947 to April 1952 in the sum of $1,184. A certificate of award of old age assistance to Orrin C. Breese and Katherine Breese was recorded in the office of the register of deeds of Platte County on September 7, 1947. Appellee regained his health and the attorney for appellee at his request advised the county welfare director of Platte County on May 15, 1952, 4 days after the death of Orrin C. Breese, that appellee desired to and would care for the needs of his mother and that assistance benefits for her should be discontinued. The attorney also told the director at that time of the deed of the real estate to appellee. Appellee did care for his mother thereafter until her death and he paid the expense of her last illness and burial.

The statement of the claim of appellant as set forth in its petition, to the extent it is important to this discussion, is that Orrin C. Breese and Katherine Breese, hereafter called recipients, while receiving old age assistance payments from Platte County had an interest in the real estate involved herein; that a certificate of award of old age assistance payments made to recipients is recorded in the mortgage records of the register of deeds of that county; that Orrin C. Breese died May 11, 1952, and Katherine Breese died September 14, 1957; that recipients received old age assistance payments in the respective amounts above stated; and that the amounts thereof constitute a valid, subsisting lien against the real estate involved in favor of Platte County, prior and superior to any right, title, or interest which any of the defendants in the case have or claim in or to the real estate. The relief sought was a determination of the amount of the lien; that it be adjudged to be a first encumbrance on the real estate; that the lien be foreclosed; and that the premises be sold and the proceeds be applied to the payment of the lien.

Appellee admitted that the beneficiaries had an in-

terest in the real estate involved while they were receiving old age assistance payments from Platte County; that they received old age assistance payments in an amount unknown to appellee; that a certificate of award was recorded on September 7, 1947, as alleged by appellant; and that the recipients died on the respective dates alleged. Appellee denied all other assertions of appellant. The cross-petition of appellee asserted that on October 22, 1945, recipients as joint tenants were owners of the real estate involved herein and that on that date they conveyed it to appellee subject to a life estate therein for the life of the grantors and for the life of the survivor of either of them; that the deed was recorded June 2, 1952, in the deed records of Platte County; that the conveyance of the real estate to appellee by the recipients was not made to attain old age assistance payments but in consideration of benefits conferred upon them and improvements made on the real estate by appellee for the benefit of recipients; that the old age assistance payments made to recipients or either of them were based on their respective needs and not in reliance of ownership by or interest of the recipients in said real estate; that the filing of the certificate of award and the commencement of these proceedings were a cloud upon the title of appellee to the real estate and he was entitled to have it removed and the title thereto quieted in him; and that the conveyance of the real estate by the recipients to appellee was made within 2 years prior to the application of each of the grantors for old age assistance benefits and this action was commenced on April 1, 1959, which was more than 1 year after the death of both of the recipients. Appellee asked the court to deny appellant any relief, to cancel the claim of lien recorded as aforesaid, and to quiet title to the real estate in appellee.

The district court found generally for appellee and against appellant and that it had no cause of action against appellee, rendered judgment of dismissal of the

action of appellant, and quieted title to the real estate in appellee. The motion of appellant for a new trial was denied and this appeal is from the action of the trial court denying the motion.

There was no lien in this state because of the receipt of old age assistance payments by anyone when the deed was made and delivered by the recipients to appellee for the real estate involved on October 22, 1945. Section 68-268, C. S. Supp., 1939, providing for a lien for any old age assistance benefits received by a recipient thereof on any real estate owned by him, as that section was amended by Chapter 4, section 1, page 66, Session Laws of Nebraska, Fifty-fourth (Extraordinary) Session, 1940, was repealed by act of the Legislature of 1941. Laws 1941, c. 169, § 3, p. 671. That act of the Legislature had an emergency clause and was in force and effect upon the passage and approval of the act May 12, 1941.

Section 68-215.01, R. R. S. 1943, was enacted by the Legislature at its session in 1947. Laws 1947, c. 221, § 1 (2), p. 711. It is as follows: "The assistance benefits any recipient of old age assistance shall receive shall be a lien on any real estate owned by the recipient of such assistance from and after the date of the filing of the certificate as provided in this section. Whenever a certificate is issued for such assistance to any person in whom the title to any real estate is vested, a copy of such certificate shall be indexed and recorded in the manner provided for the indexing of real estate mortgages in the office of the register of deeds or county clerk of the county in which the real estate is situated and such recording and indexing shall constitute notice of such lien." This statute became effective September 7, 1947. Alexanderson v. Wessmann, 158 Neb. 614, 64 N. W. 2d 306. This legislative act operates prospectively only because there was no legislative intent and purpose clearly disclosed for it to

operate retrospectively. Arterburn v. Vandemoer, 157 Neb. 68, 58 N. W. 2d 606.

It is indisputable that commencing with May 12, 1941, and continuing to September 7, 1947, there was no provision of law in Nebraska for a lien on real estate because of the payment or receipt of old age assistance. It was in this period that the deed was made and delivered by the parents of appellee to him for the real estate involved in this case. The deed was legal, valid, and effective. It was not affected by the legislative act of 1947 quoted above, passed almost 2 years after the deed was made and delivered. The making and delivery of the deed violated no prohibition or restriction of law. It had the authorization and sanction of law when it was executed and delivered. It vested title to the real estate in appellee subject only to the life estate reserved therein. The grantors in the deed owned only a life estate in the real estate when the applications were made by them for old age assistance and thereafter until the death of each of them. When they received old age benefits the real estate was not owned by them beyond their life estate. The deed had been since October 22, 1945, a legal, valid conveyance of the fee of the real estate to appellee. The decision of the trial court favorable to appellee was correct.

Section 68-215.05, R. R. S. 1943, which was Laws 1947, c. 221, § 3, p. 711, provides: "The county attorney, when directed either by the county board of public welfare or State Director of Public Welfare, shall bring such proceedings as are necessary to enforce the payment of old age assistance claims by setting aside any conveyance of real estate * * * made by any person receiving old age assistance benefits when such conveyance was made without payment of adequate consideration and with the intent to aid such person to receive old age assistance benefits."

Section 68-215.07, R. R. S. 1943, which was Laws 1951,

c. 211, § 2, p. 773, contains these relevant provisions: "Any conveyance or transfer of real estate by a recipient of old age assistance or by an applicant for old age assistance within two years prior to the making of application may be set aside at any time until one year after the death of such recipient in all cases where such conveyance or transfer is made to a child * * * without adequate consideration. * * * Such action to set aside transfers of real estate * * * may be brought in the name of the county board of public welfare of any county in the proper court having jurisdiction; Provided, if the county board of public welfare fails to bring such action prior to three months before the expiration of the time to commence the action, then the action may be brought by the State Director of Public Welfare in the name of the State of Nebraska."

The deed to appellee was made and delivered October 22, 1945. The application of Katherine Breese for old age assistance was made October 25, 1946, and the application of Orrin C. Breese for old age assistance was made October 31, 1946. Orrin C. Breese died May 11, 1952, and Katherine Breese died September 14, 1957. This action was not commenced until April 1, 1959. The deed in question was made to appellee by the recipients of old age assistance benefits within 2 years prior to the making of the applications by the recipients. This action was not commenced until more than 1 year after the death of each of the recipients. This case was and is within the bar of the very statute which appellant must rely upon for the relief sought. The action was barred by the statute more than 6 months before it was commenced. § 68-215.07, R. R. S. 1943.

Appellant seeks in this case to have the benefit of an alleged statutory lien. A lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the

statute. It cannot be extended by the court to cases not within the statute.

Interurban Constr. Co. v. Central State Bank of Kiefer, 76 Okl. 281, 184 P. 905, states: "The rule of construction of lien statutes which create a right and provide a remedy is: That in all such cases the requirements of the statutes and conditions prescribed in the statutes are the measure of the right, and the court cannot declare purposeless and useless that which the Legislature has made a condition of the lien."

In Serasio v. Sears, 58 Ariz. 522, 121 P. 2d 639, the court considered a statutory provision that to keep alive a judgment and to continue the lien thereof after a stated period, an affidavit of renewal was required to be made within a designated period and a copy of the affidavit properly certified by the clerk of the superior court was required to be filed with the county recorder. Such an affidavit was made but a certified copy of it was not procured or filed as the statute required. The court said: "That was necessary to continue the lien * * *. If defendant Serasio ever had a lien it was by virtue of the statute and, to be valid, the law giving the right must have been complied with."

Gau v. Hyland, 230 Minn. 235, 41 N. W. 2d 444, contains this: "The provision of § 256.26, subd. 6, that an old age assistance lien 'shall attach to all real property then owned by the recipient * * *' defines and limits the property chargeable with such a lien. It is to be remembered that the old age assistance lien is a statutory one. The property chargeable with a statutory lien and the character, conditions, and extent thereof are to be ascertained from the terms of the statute. * * * By express terms of the statute, an old age assistance lien attaches to 'real property' and to only such thereof as is 'owned by the recipient.' "

United States v. Beaver Run Coal Co., 99 F. 2d 610, contains the following: "Notwithstanding its failure to comply with the requirements of the very act cre-

ating its lien, the United States contends its lien is entitled to priority in this case. * * * This contention can not be sustained. Whether a statute creating a lien is to be given a liberal or a strict construction, it is well established that 'the character, operation and extent of the lien must be ascertained from the terms of the statute which creates and defines it, and the lien will extend only to persons or conditions provided for by statute, and then only where there has been at least a substantial compliance with all the statutory requirements.' * * * Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded."

The court said in Augustine v. Congregation of the Holy Rosary of Pompeii, 213 Wis. 517, 252 N. W. 271, the following: "Under those provisions (Sec. 289.06, Stats. 1931) no lien given by ch. 289, Stats., shall exist and no action to enforce such a lien shall be maintained unless the complaint was filed as well as served within the prescribed period. As to plaintiff's claim for a lien, that period expired on November 13, 1932. Thereafter, by virtue of the unambiguous terms of the very statute under which he claims a right to have a lien, no such lien shall exist and no action can be maintained to enforce it. * * * After the expiration of that prescribed period, the court, as it rightly ruled, was without discretion to avoid that statutory bar as to the lien by enlarging that period for the filing of a complaint on plaintiff's motion."

In Gile v. Atkins, 93 Me. 223, 44 A. 896, 74 Am. S. R. 341, the court said: "The statutory lien, therefore, continued in force until the beginning of the 11th day of January, 1899, and then expired. The plaintiff's attachment was not made till the next day, January 12th, when the lien no longer existed. * * * But the plaintiff insists that the defendant is estopped from questioning the seasonableness of the attachment, be-

cause when apprised, some two months previous, of the plaintiff's intention to enforce his lien, he assured the plaintiff the colt was foaled on July 20th and thereby induced the plaintiff to delay the attachment. * * * the lien in this case was created solely by statute and had such duration only as the statute gave it. Its entire vitality was dependent on the terms of the statute. * * * It could derive no life, nor prolongation of life, from any statements of the defendant * * *. There was no lien on the colt of any kind or extent outside of the statute. * * * One of those terms is that the attachment should be made before the colt was six months old. There is no provision that the parties, either or both, by estoppel or in any other way, may substitute a later date for the attachment."

De Gooyer v. Northwest Trust & State Bank, 130 Wash. 652, 228 P. 835, declared: "Statutes creating liens are in derogation of the common law and are to receive a strict construction. * * * Their operation will not be extended for the benefit of those who do not clearly come within the terms of the act. It is true that § 1209, Rem. Comp. Stat. (P.C.S. 9665b), provides that the lien laws shall be liberally construed with the view to effecting their object. This means that when it has been determined that persons come within the operation of the act it will be liberally applied to them."

Rent-A-Car Co. v. Belford, 163 Tenn. 590, 45 S. W. 2d 49, asserts: "When a lien comes into existence by force of a statute, it must be measured by that statute, and can have no greater force than the statute gives it."

Birmingham Trust & Savings Co. v. Louisiana National Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600, states: "The lien being created by statute, is limited in operation and extent by the terms of the statute, and can arise and be enforced only in the event and under the facts provided for in the statute."

The statutes noted above are indispensable to the

cause of action asserted by appellant. §§ 68-215.01 and 68-215.07, R. R. S. 1943. These created a right that did not exist at common law. A condition precedent to the enjoyment of the right was a compliance with the requirements imposed, one of which was that an action to test the validity of any conveyance of real estate made by a recipient of old age assistance to a child of the recipient within 2 years prior to the making of the application by the recipient for the assistance must be brought within 1 year of the death of the recipient. This is by the statute made a condition to the right and of the remedy. Appellant could not comply with this indispensable requirement because the period allowed within which the case was required to be commenced had elapsed when these proceedings were instituted. It has often been said and recently repeated by this court that where a right has been created by statute which did not exist in the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed. Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898. The observation made in Swaney v. Gage County, 64 Neb. 627, 90 N. W. 542, is appropriate: "It must be conceded that the legislative body, which created the right of action, had absolute power to determine the conditions under which it must be brought * * *. Without such a law the plaintiff in this case would have had no right of action at all * * *."

The judgment should be and it is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

ROSS NISI AND MARY NISI PALMESANO, ADMINISTRATOR AND ADMINISTRATRIX OF THE ESTATE OF MARTHA NISI, ALSO KNOWN AS MATTIA NISI, DECEASED, APPELLEES, V. CHECKER CAB CO., A CORPORATION, APPELLANT.

105 N. W. 2d 523

Filed October 21, 1960. No. 34774.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Appeal and Error.** It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
3. ———. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.
4. **Automobiles: Evidence.** A qualified expert, upon laying a proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied.
5. ———: ———. Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter.
6. **Automobiles: Negligence.** Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence.
7. ———: ———. In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossings at intersections. The driver of an automobile owes to one crossing a street at a point not a regular crossing the duty of reasonable and ordinary care under the circumstances.
8. ———: ———. The operator of an automobile equipped with headlights as required by statute, who does not observe a pedestrian until just before striking him, is not conclusively guilty of negligence. Under such circumstances it is clearly a question

for the jury. The question whether the defendant should have seen the deceased, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide.

9. ———: ———. In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury.

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

Gross, Welch, Vinardi, Kauffman & Schatz, for appellant.

Albert Lustgarten, Schrempp & Lathrop, and *Henry C. Rosenthal, Jr.,* for appellees.

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

MESSMORE, J.

This is an action at law brought in the district court for Douglas County by Ross Nisi and Mary Nisi Palmesano, administrator and administratrix of the estate of Martha Nisi, also known as Mattia Nisi, deceased, against the Checker Cab Company, a corporation, defendant, to recover damages for the wrongful death of plaintiffs' decedent caused by the negligence of a driver of one of defendant's taxicabs. The jury returned a verdict in favor of plaintiffs and against the defendant, assessing the amount of recovery for plaintiffs in the sum of $8,868.15. The defendant filed a motion to set aside the verdict and for judgment in accordance with its motion for directed verdict at the conclusion of the plaintiffs' evidence and at the conclusion of all of the evidence. This motion was overruled. From the overruling of defendant's motion, the defendant perfected appeal to this court.

The plaintiffs' petition, insofar as it need be con-

sidered here, alleged in substance that on or about May 30, 1958, at about 9:20 p.m., Martha Nisi was proceeding from the west to the east side of the street in front of or to the east of the premises described as 1234 South Tenth Street in the city of Omaha; that as she reached a point at about the center of the street she was then and there struck by a northbound Checker cab operated by the driver, Stanley W. Hartwell, in the course and scope of his employment with the cab company; and that as a result of such collision Martha Nisi was thrown to the street and killed. The plaintiffs further alleged that the death of Martha Nisi was directly caused by the negligence of the driver of such taxicab in the following respects: (1) In operating the taxicab at such time at an excessive rate of speed; (2) in his failing to keep a proper lookout at such time and place; (3) in failing to keep the taxicab under proper control; and (4) in failing to operate the taxicab on the right or east side of the street.

The first cause of action alleged in the plaintiffs' petition related to the loss of services to the surviving husband and the second cause of action related to burial expenses and other expenses incident thereto.

For answer to the plaintiffs' petition the defendant admitted that the plaintiffs were the duly authorized, appointed, qualified, and acting administrator and administratrix of the estate of Martha Nisi, deceased, and were residents of Omaha; that the defendant was engaged as a common carrier in the taxicab business in the city; and that at the time and place set out in the plaintiffs' petition an accident occurred and as a result thereof the plaintiffs' decedent met death. The defendant's answer denied all other allegations contained in the petition, and further denied that its driver was negligent. The answer then claimed that the sole and proximate cause of the accident and resulting death of Martha Nisi was her contributory negligence which was more than slight in failing to cross the street on a

crosswalk; in failing to keep a proper lookout or to take precautions for her safety; and in moving into the path of the defendant's vehicle. Defendant prayed that the plaintiffs' petition be dismissed.

For reply to the defendant's answer, the plaintiffs denied all of the allegations contained in such answer which were not admissions of plaintiffs' petition.

The defendant assigns as error (1) that the trial court erred in overruling defendant's motion for directed verdict at the conclusion of plaintiffs' evidence and at the conclusion of all of the evidence; (2) that the trial court erred in overruling the defendant's motion to set aside the verdict and judgment and for judgment in accordance with the motion for directed verdict; and (3) that the trial court erred in refusing to hold that the plaintiffs' decedent was guilty of contributory negligence as a matter of law.

The following rules of law are applicable to this case.

In Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144, this court held: "A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. It is presumed in such an action that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. See, Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

The record shows that a police officer of the city of Omaha assigned to the traffic investigation division of

the police department arrived at the scene of the accident shortly after 9:20 p.m., on May 30, 1958. Upon arriving at the scene, he found a vehicle and the body of a female person. The pavement was dry and it was generally clear that evening. He made an investigation in the 1300 block on South Tenth Street. He testified that the block constitutes several blocks between William Street and Pierce Street, with no intervening cross streets between those two streets; and that the closest stop-and-go signal is on South Tenth and William Streets, approximately 4 blocks from the general scene of the accident. He asked the driver of the Checker taxicab, which was the vehicle he found at the scene of the accident, to tell him and to show him approximately where the party stepped from the curb and where she was struck. The driver pointed out a place in front of 1315 South Tenth Street, on the east side of the street. This witness further testified that South Tenth Street is 50 feet 2 inches wide. The taxicab was approximately 69 feet north of the point where the driver of the taxicab indicated it struck Mrs. Nisi. There was a white line in the center of South Tenth Street. This street runs north and south. From his investigation, the officer determined that there were skid marks approximately down the center of the white line, and some skid marks slightly west of the center line. The skid marks extended backwards from the right rear wheel of the taxicab and east of the center line of the pavement. The skid marks began in front of the residence at 1315 South Tenth Street and continued northward and ended at the rear wheels of the taxicab. The body of Mrs. Nisi was found 23 feet 8 inches from the left front wheel of the taxicab and 21 feet 9 inches from the right front wheel of the taxicab. The body was lying on its back. He could see a bone sticking through the skin on one of the legs, and the face was covered with blood. He further testified that in the area where the accident occurred the

speed limit was 25 miles an hour. This witness further testified that he smelled alcohol on the breath of the driver of the taxicab.

On cross-examination this witness testified that there were large trees on both sides of South Tenth Street with branches hanging over the street; and that the taxicab driver said when he first saw Mrs. Nisi she was right in front of the cab, when it hit her. He asked the cab driver to tell him approximately where Mrs. Nisi walked out from the curb. The driver went over to the front of 1315 South Tenth Street and pointed to the curb in front of that address, stating that was where Mrs. Nisi came from, going from the east to the west.

On re-direct examination this witness testified that he took the cab driver back and showed him the skid marks.

Across the driveway north of the mortuary hereinafter referred to there is a street light. This light is approximately 20 feet above the street and on an arm extending 10 to 12 feet from the west curb on South Tenth Street.

A captain of the Nebraska Safety Patrol testified that he had been associated with the patrol for 22 years and was in charge of the education and training division of the patrol. In 1944, he was awarded a fellowship by Northwestern University in the study of traffic administration, including specialized study of the investigation of physical facts. He had classwork, and conducted tests at various speeds with different types of automobiles to compute various speeds from various stopping distances, and made skid mark and speed computations. Following his work at Northwestern University he conducted a training course for new officers in the Nebraska Safety Patrol, and was an instructor in the field of skid marks. This witness testified that he made an examination in the area between William and Pierce Streets on South Tenth Street in the fore part of April 1959;

and that the surface of the street was an asphalt-type pavement with coarse sand ground into the asphalt. He further testified that in arriving at an estimate and opinion relating to the speed of the taxicab as judged from the skid marks, he would take into consideration the type of paved surface of the street, the grade, and the condition of the pavement, whether it was wet or dry. The weight of the automobile would make a very slight difference with respect to figuring speed from skid marks. The condition of the tread on the tires would not make any difference on the stopping distance. He further testified that with respect to skidding with the wheels locked, the cramping of the wheels to the right or left makes no difference in the driver's ability to stop the car; and that after the brakes are locked the driver would be unable to steer the car as the wheels would be unable to turn. He further testified that assuming a grade of 5.4 percent on South Tenth Street, where the taxicab left a total of 69 feet of skid marks, he would estimate the speed of the taxicab to have been 34 or 35 miles an hour, which would be a minimum speed. He further testified that the normal reaction time in a situation where something unexpected comes up and it is necessary to decide what to do and then act, would be about three-quarters of a second, and that a car traveling 34 or 35 miles an hour would travel about 38 feet during three-quarters of a second. He repeatedly stated that the formula used by the Nebraska Safety Patrol actually favors the driver, and is a computation that is very lenient.

On cross-examination he testified that the length of the wheelbase of a car is not subtracted from the length of the skid marks in figuring the speed of the car.

A draftsman in the public works department of the city of Omaha fixed the grade on South Tenth Street between William and Pierce Streets at 5.4 percent.

A doctor testified that after the accident, when Mrs. Nisi's body was brought to the hospital, he examined

the body and pronounced her dead. He further examined the body and found that she had a laceration on the scalp, many bruises, abrasions, and scrapes on the skin, and dirt and gravel were ground into the skin. She also had compound fractures of the left leg and the right arm. The skin was broken, and the bones were protruding through the skin.

Dr. Levine, an expert on blood analysis who makes analyses for the Omaha police department to disclose the alcoholic content, analyzed the blood of the taxi driver and testified that it had an alcoholic content of .125 percent. This witness further testified that where the content is between .1 and .125 percent, the reaction time is slowed, as well as a person's judgment. At .125 percent, deterioration of vision, judgment, muscular activity, and reflex action begins.

The driver of the taxicab was taken to the police station and interviewed by a captain of police. A written statement was taken from him, which he signed. At the trial he was questioned about this statement. He was asked if he saw Mrs. Nisi before the right front fender of the cab struck her. He answered that she was from 2 to 4 feet in front of the right front fender when he first saw her. He did not remember telling anyone that he did not see her until the right front fender of the taxicab struck her. He was handed the statement containing his signature, and he recalled that the statement was taken the night of the accident. He testified that he possibly made the statement that he did not see Mrs. Nisi until she was in front of the taxicab, but he was so nervous at the time that he could not say whether he did or not.

Just prior to the accident Mrs. Nisi attended a wake at the Salanitro Mortuary which is on the west side of South Tenth Street about midway between William and Pierce Streets. The distance between these two cut-through streets is approximately 900 feet. Mrs. Nisi lived with her husband and son on South Ninth

Street, almost directly east of the Salanitro Mortuary. She bade some acquaintances at the wake goodbye and left the mortuary. Just after she left, someone came into the mortuary and said there had been an accident to someone who had just left the mortuary.

A witness for the defendant testified that when the accident occurred he was driving his 1950 blue Buick about 20 or 25 feet behind the taxicab. When he entered South Tenth Street at William Street, from the west, he had observed the northbound taxicab. At the time the taxicab went through the intersection it was traveling, according to the best judgment of this witness, approximately 25 miles an hour. This witness testified that after he got onto South Tenth Street he was traveling about 10 car lengths behind the taxicab; that the lights on the taxicab were on; and that he was gaining on the taxicab and supposed he was 6 car lengths behind the taxicab when something unusual happened. He further testified that the taxicab was traveling where normal traffic travels. Cars were parked on both sides of the street. This witness stopped his car 2 car lengths behind the taxicab. He got out of the car and walked to the back of the taxicab. He saw no skid marks. At the scene of the accident there were trees on each side of the street and it was rather dark in that area.

The driver of the taxicab testified that he reported for work at the taxicab company about 5:30 p.m. He had made seven trips up to the time of the accident, the last one being from the Burlington bus depot to a hospital. After he discharged that passenger, he started to return to the depot and was proceeding north on South Tenth Street. He went through the intersection of South Tenth and William Streets when the green light was in his favor, and was followed by another vehicle that had been waiting for the light so that it could turn left on South Tenth Street. This driver further testified that he went down the incline, and it was

rather steep to the north, and when he had traveled two-thirds of the block down such incline, all at once, just in front of his right headlight and within a few feet, a lady stepped out in front of the cab. It was rather dark along there. When the lady stepped out, he applied his brakes and swerved the taxicab to the left, which would be to the west, and the lady must have become confused because she took another step after he had seen her. He further testified that when he first saw Mrs. Nisi she was a little bit to the right of the right headlight; and that at that time she was facing west and, according to this witness' testimony, had apparently taken another step just after he saw her. When the taxicab struck Mrs. Nisi, she fell back over the right fender of the taxicab. It traveled approximately 30 to 35 feet before coming to an abrupt stop. The sudden stop threw her forward directly in front of the taxicab at a slight angle toward the center of the street. The front end of the taxicab was across the center line to the west, and the rear wheels of the taxicab were to the east. This witness further testified that at the time of the accident Mrs. Nisi was wearing dark clothing.

On cross-examination this witness testified that on the day of the accident he arose at 3:30 or 4 p.m., and drank a bottle of beer in his room. He further testified that he had dinner at the Avalon Bar and Restaurant around 7:15 p.m., and stayed there probably 20 or 25 minutes. He further testified that there was a dent on the top of the right front fender of the taxicab.

With reference to the speed of the taxicab, the expert witness testified that he estimated the speed of the taxicab at the time of the accident to be 34 or 35 miles an hour. Such speed was over the maximum speed limit allowed for travel in the area in which the accident occurred.

In Tate v. Borgman, 167 Neb. 299, 92 N. W. 2d 697, this court held: "A qualified expert, upon laying a

proper foundation, may give his opinion as to the speed of an automobile, based on the length of skid marks made by it when brakes were applied."

In Koutsky v. Grabowski, 150 Neb. 508, 34 N. W. 2d 893, this court held: "Various factors, such as skid marks, distance traveled after impact, and force of impact, constitute pertinent evidence in arriving at an estimate of the rate of speed of an automobile, either by those involved in an accident or those in authority investigating the accident immediately thereafter. See 5 Am. Jur., Automobiles, § 630, p. 850." See, also, Shields v. County of Buffalo, *supra*.

In Tempero v. Adams, 153 Neb. 331, 44 N. W. 2d 604, this court held: "Proof of violation of a statute or city ordinance relating to speed does not of itself establish negligence in an action for damages but it is evidence which is to be considered in determining whether a party is guilty of negligence."

It appears that Mrs. Nisi, in order to arrive at a crosswalk, would have had to walk about 390 feet to William Street, or a greater distance to Pierce Street, to arrive at any marked or unmarked crosswalk. Under the statute and the city ordinance of the city of Omaha, a pedestrian crossing a street at any point other than within a marked or unmarked crosswalk shall yield the right-of-way to vehicles upon the street. Notwithstanding such provisions, every driver of a motor vehicle shall exercise due care to avoid colliding with any pedestrian upon a roadway and shall give warning by sounding the horn when necessary, and shall exercise proper precautions.

In Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607, this court said: "In the absence of a prohibition by statute or ordinance a person may cross a street at any place and is not limited to crossings at intersections. The driver of a motor vehicle owes to one crossing a street at a point not a regular cross-

ing the duty of reasonable and ordinary care under the circumstances, * * *."

In the instant case the physical facts show that Mrs. Nisi was near the center of the street when the taxicab struck her. The taxicab was moving in a straight line north to the point of impact. There were no automobiles approaching with blinding headlights, nor any other reason given by the driver of the taxicab for his failure to see Mrs. Nisi until the defendant's taxicab struck her.

This court said in Anderson v. Nincehelser, 152 Neb. 857, 43 N. W. 2d 182: "The operator of an automobile equipped with headlights as required by statute, who does not observe a pedestrian until just before striking him, is not conclusively guilty of negligence. Under such circumstances it is clearly a question for the jury. The question whether the defendant should have seen the deceased, and the inferences to be drawn from the evidence adduced, are matters of evidence which a jury must decide."

"In those cases where reasonable minds may differ on the question of whether or not the operator of an automobile exercised the care, caution, and prudence required of him under the circumstances of the particular situation the issue of negligence on the part of the operator is one of fact to be determined by a jury." Miers v. McMaken, 147 Neb. 133, 22 N. W. 2d 422.

We have heretofore set out evidence concerning the odor of intoxicating liquor on the breath of the taxicab driver as observed by the investigating officer, and the percentage of alcoholic content of his blood as testified to by an expert on the subject. This evidence was admitted upon the issue relating to the driver's control of the taxicab at the time of the accident. The trial court did not instruct the jury on the question as to whether or not the driver of the taxicab was under the influence of intoxicating liquor. This evidence was properly admitted as evidence of negligence when

coupled with the physical acts or omissions, lack of control, or diminution of vision in the operation of the taxicab, and was for the consideration of the jury. See Gilliland v. Wood, 158 Neb. 286, 63 N. W. 2d 147.

The defendant pleaded the defense of contributory negligence on the part of the decedent. This is an affirmative defense which the defendant was obligated to prove by a preponderance of the evidence.

There were no objections on the part of the defendant to the instructions given by the trial court. The trial court properly instructed the jury with reference to the charges of negligence against the driver of the taxicab and the affirmative defense of contributory negligence, pleaded by the defendant, on the part of the decedent.

In the light of the evidence heretofore set out, the jury could find by a preponderance of the evidence that the defendant's driver was guilty of negligence in one or more of the elements of negligence pleaded in the plaintiffs' petition as heretofore set forth.

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

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MARY JAROSH, APPELLEE, V. GEORGE VAN METER ET AL., APPELLANTS.
105 N. W. 2d 531

Filed October 21, 1960. No. 34783.

1. **Trial.** In a case where a motion was made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case submitted to a jury which returned a verdict contrary to the motion, and thereafter a motion for a judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

2. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
3. ———. It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.
4. **Torts: Negligence.** A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrongdoer, or were the natural consequences of his original wrongful act.
5. **Negligence.** Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause.
6. ———. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
7. **Automobiles: Negligence.** A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger.
8. ———: ———. While the driver of an automobile across intersections where there are no traffic signals is charged with notice that a pedestrian has the right-of-way, and is required to accord such to the pedestrian, yet as between intersections the automobile has the right-of-way and the driver has a right to assume that pedestrians will observe this rule. He is not required to anticipate that a pedestrian will violate the rule.
9. ———: ———. This court has held many times that the violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. The mere fact that a pedestrian walks across a street between intersections contrary to ordinance is not of itself negligence. But, one who does so must necessarily be required to exercise a greater degree of care than one who walks across a street at an intersection or a crosswalk

where protection is afforded by giving the pedestrian the right-of-way.

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

Collins & Collins and *Story, Pilcher, Howard & Hickman,* for appellants.

Tesar & Tesar, for appellee.

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

WENKE, J.

This is a tort action which was originally brought in the district court for Douglas County by Mary Jarosh against George Van Meter, Frank Odorisio, and Richard Murray for the purpose of recovering damages she sustained by reason of injuries suffered in a car-pedestrian accident. Plaintiff recovered a verdict against all of the defendants and judgment was entered thereon. Defendants thereupon filed motions for either a new trial or for a judgment notwithstanding the verdict and have taken this appeal from the overruling thereof.

Appellants Frank Odorisio and Richard Murray contend the evidence adduced at the trial does not show that the panel truck, owned by Odorisio and double parked by his employee Murray, was a proximate cause of the accident and that they are therefore entitled to a judgment notwithstanding the verdict. Appellant George Van Meter contends that the evidence adduced at the trial shows appellee was, as a matter of law, guilty of contributory negligence to a degree that, under the comparative negligence doctrine, it defeats any right she might otherwise have to recover against him and that, by reason thereof, he is entitled to a judgment notwithstanding the verdict. In determining these contentions the following principles are applicable:

"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." Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040.

"Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination." Thomas v. Owens, 169 Neb. 369, 99 N. W. 2d 605.

"A motion for a directed verdict or for a judgment notwithstanding the verdict admits, for the purposes of a decision of the motion, the truth of the material and relevant evidence on behalf of the party against whom the motion is directed, and he is entitled to have each controverted fact found in his favor and have the benefit of fair inferences deducible from the evidence." Spracklin v. Omaha Transit Co., 162 Neb. 351, 76 N. W. 2d 234.

"In a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict." Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144.

The accident, in which appellee was injured, happened about 3:15 p.m., on December 20, 1957, at a point on South Tenth Street, which is in the city of Omaha, just west of the entrance of Saint Josephs Hospital. Saint Josephs Hospital is located along the east side of

South Tenth Street between Castelar and Martha Streets. In front of the hospital, and along the east curb of South Tenth Street, is an area 95 feet long wherein buses and cabs may stop at the curb to load and unload passengers. It is designated as being for that purpose by signs at each end of the area and by the curb being painted yellow. South Tenth Street, from curb to curb, is 40 feet wide and surfaced with asphalt. It had a white line painted down the center thereof. Martha Street joins South Tenth Street from the west and forms a T intersection. The intersection is about 40 to 50 feet north of where the accident happened. Castelar Street is the first east-west intersecting street to the south of the place where the accident happened. The evidence shows that South Tenth Street is heavily traveled by vehicles and it is also frequently crossed by pedestrians going to and from the hospital. However, the place where appellee attempted to cross was neither an intersection nor a marked crosswalk; in fact, it was in an area located between intersections.

On the day involved appellee, who lives at 2315 South Eleventh Street, had gone to a grocery store on South Tenth Street to buy groceries. After doing so she boarded a bus, northbound on South Tenth Street, to return home. As was her custom she alighted from the bus, after it had stopped in front of the hospital, and waited for it to travel on north before proceeding west across South Tenth Street. As she stood there waiting for the bus to go on to the north she looked both to the north and south to see if any traffic was approaching thereon from either direction in order to determine if it was safe for her to cross. At this time she noticed a panel truck to her left or south was double parked on the east side of South Tenth Street or in the lane for vehicles traveling thereon to the north. This was the truck owned by appellant Odorisio and being driven by his employee appellant Murray. It appears there was a car parked at the curb and that Murray, in the course

of his duties as an employee of appellant Odorisio, double parked the panel truck alongside of this car, parallel thereto and about 1½ feet therefrom.

After the bus had gone on north and after she had looked to see if any traffic was coming from either the north or south on South Tenth Street, appellee proceeded to cross South Tenth Street toward the west at a point about 12 to 15 feet north of the parked panel truck. At about the time this was happening appellant Van Meter was approaching South Tenth Street on Castelar Street driving his 1954 Hudson sedan. At South Tenth Street he stopped at a stop sign and while so stopped he observed the panel truck double parked in the driving lane for northbound traffic. After doing so Van Meter entered the intersection and drove north on South Tenth Street in the driving lane for northbound traffic. As he approached the parked truck he turned to the left to pass it, there being no other traffic from either the north or south at the time.

As he turned to the left to pass the parked truck the left wheels of his car went across the center line of South Tenth Street some 18 inches because the parked truck did not leave him sufficient room to pass it without doing so, its west side being within 6 or 7 feet of the center line of South Tenth Street. Appellant Van Meter could not see through the panel truck because of the nature of its construction, so he was not able to see what was on South Tenth Street in front of it until his car was abreast of it. When it was he saw appellee in the street some 12 or 15 feet ahead of the truck and about 2 feet west of the west side thereof, if extended north. He testified he immediately applied his brakes, which skidded his front tires some 15 feet; that he hit appellee and knocked her to the pavement; that he hit her with his car just to the left of the center of the front end thereof and at a point in the street some 3 feet east of the center thereof; and that he traveled about 4 feet after doing so. Appellee testified she continued to look

both to the north and south as she crossed South Tenth Street but saw no traffic coming thereon from either direction; and that she was looking west when she was hit, which was just to the west of the center thereof, but never saw the car of appellant Van Meter before it hit her.

There is really no dispute in the record except that relating to the point where appellee says she was hit. Appellee testified it was to the west of the center line of South Tenth Street while Van Meter testified it was about 3 feet east thereof.

We shall first consider the contention of appellants. It is, of course, the duty of the trial court to submit to the jury all material issues presented by the pleadings which find support in the evidence adduced. See, Frasier v. Gilchrist, 165 Neb. 450, 86 N. W. 2d 65; Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758; Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352.

"Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

Appellant Murray, by double parking the panel truck of appellant Odorisio, violated certain ordinances of the city of Omaha relating to the use of its streets by vehicles being operated thereon. We have held that such violation is evidence of negligence which a jury is entitled to consider upon the question of whether actionable negligence exists. See, Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N. W. 2d 680; Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569; Hersh v. Miller, 169 Neb. 517, 99 N. W. 2d 878. And, in this respect, where separate independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages though the act of one of them alone might not have caused the injury. See, McClelland v.

Interstate Transit Lines, 142 Neb. 439, 6 N. W. 2d 384; Shupe v. County of Antelope, *supra.*

However, to be actionable, such negligence must have been a or the proximate cause of the injuries for which damages are sought to be recovered. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619. "Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." Shupe v. County of Antelope, *supra.* As stated in Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117: "It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." However, as stated in Paup v. American Telephone & Telegraph Co., 124 Neb. 550, 247 N. W. 411: "A tort-feasor is answerable for all the consequences that, in the natural course of events, flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or were the natural consequences of his original wrongful act." In Frerichs v. Eastern Nebraska Public Power Dist., *supra,* we said: "In distinguishing between proximate cause and condition this court said in Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N. W. 117: 'To constitute proximate cause, under authority of the adjudicated cases, the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen might probably occur as the result. It is not sufficient that the negligence charged does nothing more than furnish a condition by which the injury

is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury.' " As we said in Shupe v. County of Antelope, *supra,* by quoting from Rulane Gas Co. v. Montgomery Ward & Co., 231 N. C. 270, 56 S. E. 2d 689: "Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause." Therein we also said, by quoting from Cooley on Torts, § 52, p. 133: "But if the acts or neglects were not concurrent in time, and the party last in fault was chargeable with some duty to the other which, if performed, would have prevented the injury, the law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it."

"Ordinarily, where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate cause." Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551. See, also, Hersh v. Miller, *supra.*

Appellee was fully aware of the parked panel truck before she left the east side of South Tenth Street to cross while appellant Van Meter had become aware of its being parked where it was even before he entered South Tenth Street. Under these circumstances, with the parties being fully aware of the parked panel truck and there being, at the time, no other traffic on South Tenth Street to interfere with their use thereof or to divert their attention, we think the parked truck merely created a condition of which the acting parties were fully aware and in no way was it a proximate cause of the accident in which appellee was injured.

Other jurisdictions, under comparable situations, have come to the same conclusion. See, Geisen v. Luce, 185 Minn. 479, 242 N. W. 8; Powers v. Standard Oil Co., 98 N. J. L. 730, 119 A. 273; DeLuca v. Manchester Laundry & Dry Cleaning Co., Inc., 380 Pa. 484, 112 A. 2d 372; Baker v. Cities Service Oil Co., 321 Ill. App. 142, 52 N. E. 2d 284. As stated in Powers v. Standard Oil Co., *supra*: "In such a situation cause necessarily comprehends an efficient operating force or situation, by intervention or otherwise, without which the accident could not have happened. In this situation the truck was an immobile, inactive instrumentality, incapable in its inactive condition of perpetrating harm or damage. The fact that its reversed situation made its position upon the street at that point a violation of the Traffic law, did not confer upon the truck either activity or force, so as to constitute it an active efficient instrumentality for harm. Its violation of the Traffic law created simply a superadded visible condition upon the street, which was perfectly obvious to the wayfarer, and imposed upon him or her, as a consequence, the necessity for corresponding care or precaution in the use of the highway. For the patent violation of the Traffic law the remedy rested with the constituted municipal authorities, but its actual existence as an obvious fact to be reckoned with could not be ignored by the traveling public, and did not exempt the wayfarer from the exercise of the legal duty of due care under the existing conditions."

Under the circumstances herein disclosed by the evidence adduced we do not think there is any evidence upon which a jury could base a finding to the effect that the parked panel truck was a proximate cause of the accident and, in view thereof, appellants Odorisio and Murray were entitled to have their motion for a directed verdict, based on that contention, sustained and are now entitled to have their motion for judgment notwithstanding the verdict sustained.

We come then to appellant Van Meter's contention

that the trial court should have sustained his motion for a directed verdict because appellee was guilty, as a matter of law, of contributory negligence sufficient, under the comparative negligence doctrine, to defeat any right she might otherwise have to recover against him.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." Corbitt v. Omaha Transit Co., *supra.*

We have said that when a pedestrian crosses the street at an intersection, and the same would be true at a marked crosswalk, that: "On reaching the intersection, he would look both to his right and to his left. Seeing that no cars were coming from the right that would endanger him before reaching the center of the street and determining that he could safely cross in front of cars coming from his left, he would proceed, being watchful of the cars whose traffic lanes he was crossing. Arriving in the center of the street, he would devote the greater part of his attention to cars coming from the south (right) whose traffic lanes he would cross in reaching the other side of the street, being alert, however, at all times, to the possibility that a car might appear where normally it would not be expected." Belville v. Bondesson, 130 Neb. 926, 266 N. W. 901. However, as stated in Doan v. Hoppe, 133 Neb. 767, 277 N. W. 64: "A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger." Therein we went on to hold that: "We have come to the conclusion that one who crosses a street between intersections, contrary to the provisions of a city ordinance, is required

to keep a constant lookout for his own safety, and if he fails to so do he is guilty of contributory negligence as a matter of law." See, also, Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613; Wilson v. Wiggins, 155 Neb. 382, 52 N. W. 2d 248.

"While the driver of an automobile across intersections where there are no traffic signals is charged with notice that a pedestrian has the right of way, and is required to accord such to the pedestrian, yet as between intersections the automobile has the right of way and the driver has a right to assume that pedestrians will observe this rule. He is not required to anticipate that a pedestrian will violate the rule." Doan v. Hoppe, *supra.*

Here the evidence shows appellee violated certain ordinances of the city of Omaha by crossing South Tenth Street where she did. However, as stated in Doan v. Hoppe, *supra*: "This court has held many times that the violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. The mere fact that a pedestrian walks across a street between intersections contrary to ordinance is not of itself negligence. But, one who does so must necessarily be required to exercise a greater degree of care than one who walks across a street at a crosswalk where protection is afforded by giving the pedestrian the right of way." See, also, Trumbley v. Moore, *supra.*

Here the evidence shows appellee was crossing South Tenth Street from east to west at a point between intersections and not where it was marked as a crosswalk. She testified she could not see to the south when she first left the east side of the street, although she looked, because of the parked panel truck which she observed; that she could see to the north but no traffic was coming from that direction, although South

Tenth Street, at this location, is normally heavily traveled by vehicles and also frequently crossed by pedestrians going to and from the hospital; that she continued to look both north and south and did so at a point where she could see past the parked panel truck but saw no traffic coming from either direction; that she then continued on west across the street and was hit by appellant Van Meter's car after she had crossed the center line, not having seen the car before it hit her; and that she was looking west at the time she was hit. Appellant Van Meter testified that after he had turned his car to the left to pass the parked panel truck he could not see ahead of the truck before he came abreast of it because of the nature of the truck's construction; that when he came abreast of the truck he saw appellee going west across South Tenth Street some 12 or 15 feet ahead of the truck; that when he saw her she was some 2 or 3 feet west of a line extended north from the west side of the parked truck; that he immediately applied his brakes and slid his front tires, which left tracks on the pavement for a distance of 15 feet; that he could not avoid hitting appellee; that he hit her with the front of his car when she was some 3 feet east of the center line of South Tenth Street; and that his car traveled forward a distance of 4 feet after hitting her.

The only dispute in the evidence relates to where appellee was with reference to the center line of South Tenth Street when she was hit. There is no evidence that appellant Van Meter's car was being driven at an unreasonable rate of speed under the circumstances. In fact, the evidence adduced would indicate he was traveling at a reasonable rate of speed. There was no other traffic on South Tenth Street at the time to divert the attention of either appellee or appellant Van Meter. Appellee testifies that when she got to where she could look past the parked truck to the south that she did so but saw no car approaching from that di-

rection. Under the undisputed evidence adduced appellant Van Meter's car had then turned out to pass the parked truck and had to be in plain sight. Appellee cannot excuse her failure to see this car approaching from the south merely by saying she looked and did not see it. She was duty bound to look and see what was in plain sight. Her failure to do so and then stepping out in front of the oncoming car at a time and place when the driver thereof could not avoid hitting her was contributory negligence of such a degree that it defeated, as a matter of law, any right she might otherwise have against appellant Van Meter. In view thereof, appellant Van Meter's motion for a directed verdict, based thereon, should have been sustained and he is now, by reason thereof, entitled to have his motion for a judgment notwithstanding the verdict sustained.

Appellants raise two contentions relating to their motions for new trial which have merit. However, in view of what we have herein said and held it would serve no useful purpose to discuss them. We reverse the judgment of the trial court and remand this cause to it with directions to enter a judgment for the appellants in accordance with our opinion, taxing all costs to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

MARTIN WARE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

105 N. W. 2d 570

Filed October 21, 1960. No. 34797.

1. **Rape.** In a prosecution for rape, if the prosecutrix testifies to facts constituting the crime charged and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be corroborated on material points by other evidence to sustain a conviction of the accused.

2. ———. It is not essential in such a case that the prosecutrix be corroborated by other evidence as to the principal act constituting the offense, but it is indispensible that she be corroborated as to facts and circumstances which tend to support her testimony as to the principal fact in issue.
3. **Criminal Law.** Where time is not an ingredient of a crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations.
4. ———. Where the undisputed evidence shows that the criminal act charged, if committed, was not barred by the statute of limitations, a failure to instruct as to the statute of limitations is not prejudicially erroneous.
5. ———. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed unless there appears to be an abuse of discretion.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

W. D. O'Shaughnessy, for plaintiff in error.

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

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

CARTER, J.

The defendant below was convicted of the crime of statutory rape, charged to have been committed on or about December 28, 1958, upon Patty Lou Kinney, a female child of the age of 12 years. The plaintiff in error, hereafter referred to as the defendant, was sentenced to serve 5 years in the State Penitentiary. He seeks a review by petition in error to this court.

The prosecutrix testified that she was born on September 19, 1946, and was 12 years of age on the date of the alleged offense. Her testimony is that she attended a picture show with the defendant, his wife, and small son on the evening of December 28, 1958, and after the show, at about 11:30 p. m., she went to their one-room

apartment with them. She testified that defendant, with the assistance of his wife, forcibly had sexual relations with her at that time. Defendant and his wife thereafter accompanied her to her home. Prosecutrix made no complaint to anyone until she discovered that she was pregnant. She gave birth to a child on September 21, 1959. The defendant and his wife deny the act charged on December 28, 1958. The defendant admitted to two police officers that he had sexual relations with the prosecutrix in an automobile at the rear of his home a few days after Christmas, 1958. He gave a written statement to this effect to the deputy county attorney and to a court reporter who reduced it to writing. At the trial defendant testified that he had never had sexual relations with the prosecutrix and that he had admitted it to the police and given a written statement admitting it because he desired to protect his wife from a charge of rape, pending against her.

The defendant contends that his motion for a directed verdict should have been sustained, primarily because the act charged on December 28, 1958, was not corroborated. In a prosecution for rape, if the prosecutrix testifies to facts constituting the crime, and the accused unequivocally denies the commission of the offense, the testimony of the prosecutrix must be corroborated on material points by other evidence to sustain a conviction. Peery v. State, 163 Neb. 628, 80 N. W. 2d 699. While the testimony of the prosecutrix was most unusual, and was given after she admitted she was mad at defendant's wife, yet the admission made by the defendant to two police officers and the written admissions given to the deputy county attorney and to the court reporter are corroborative of the charge. The fact that the prosecutrix gave birth to a child within the period of gestation is also corroborative to some extent. It is true that the defendant denied the truth of the admissions at the trial, but this creates a question for the jury to determine as to which time he was telling the truth.

The evidence of the prosecutrix that defendant had sexual relations with her on or about December 28, 1958, when she was 12 years of age is sufficiently corroborated to sustain a conviction. Miller v. State, 169 Neb. 737, 100 N. W. 2d 876; Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380; Hudson v. State, 97 Neb. 47, 149 N. W. 104.

Defendant contends that the trial court erred in giving instruction No. 10. By this instruction the court instructed the jury that under the evidence in this case the date of the offense is not an essential element in the crime of rape as charged in the information. Ordinarily the court is required to charge that the crime was committed on the date charged, or within the time limited by statute for the prosecution of the offense. Sledge v. State, 142 Neb. 350, 6 N. W. 2d 76; Rema v. State, 52 Neb. 375, 72 N. W. 474; Palin v. State, 38 Neb. 862, 57 N. W. 743.

In the instant case the trial court did not instruct that the jury must find that the act charged was committed within 3 years of the date charged in the information. The undisputed evidence shows that prosecutrix had known the defendant for only 7 months prior to the date the offense was charged. The defendant admits that he had known prosecutrix since the preceding summer. Under this evidence the offense charged could not have occurred at a time when the 3-year statute of limitations would have application. Under such a situation it is not prejudicial to the defendant for the trial court not to instruct with reference thereto. Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649.

The defendant contends that the sentence of 5 years is excessive. The statutory penalty for the offense charged is from 3 to 20 years in the penitentiary. There is nothing in the record to indicate an abuse of discretion by the trial court. Under such circumstances the rule set forth in Miller v. State, *supra,* is controlling.

We find the record to be free from error prejudicial

to the rights of the defendant, and the judgment is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE PRESCRIPTION OF REASONABLE RATES AND CHARGES FOR MOTOR CARRIERS OF PROPERTY FOR HIRE.
L. E. WHITLOCK TRUCK SERVICE, INC., APPELLANT, V. SHIPPERS OIL FIELD TRAFFIC ASSOCIATION, APPELLEE.
105 N. W. 2d 588

Filed October 21, 1960. No. 34808.

1. **Public Service Commissions: Motor Carriers.** The Nebraska State Railway Commission has authority to prescribe reasonable rates and charges for the transportation of property by common carrier under the provisions of section 75-241, R. S. Supp., 1959.
2. ———: ———. Where the evidence is in conflict in a hearing before the Nebraska State Railway Commission to fix the rates and charges which a common carrier may charge for the transportation of property, the power to resolve such conflicts rests with the commission and not the courts.
3. **Public Service Commissions.** An order of the Nebraska State Railway Commission which ignores the undisputed or admitted facts and a proper application of the law to such facts is arbitrary and unreasonable.
4. **Public Service Commissions: Appeal and Error.** Rulings of the Interstate Commerce Commission in dealing with the subject of transportation by common carriers in interstate commerce may properly be considered by the Nebraska State Railway Commission, and by this court on appeal therefrom, when dealing with comparable situations in intrastate commerce.
5. **Public Service Commissions: Motor Carriers.** An increase in the rates of a common carrier of intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service.
6. **Public Service Commissions: Appeal and Error.** An order of the Nebraska State Railway Commission that is arbitrary and unreasonable will be vacated and set aside on appeal to this court.

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

Nelson, Harding & Acklie, for appellant.

Robert E. Powell and *Philip Bolian*, for appellee.

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

CARTER, J.

This is an appeal from an order of the Nebraska State Railway Commission denying the application of L. E. Whitlock Truck Service, Inc., for an increase in the motor vehicle common carrier rates and charges for the transportation of oil-field equipment, commodities, and supplies in Nebraska intrastate commerce. The primary issue is whether or not the proposed rates and charges were fair and reasonable for the transportation of such commodities in intrastate commerce.

The authority of the commission to prescribe reasonable rates and charges for the transportation of property by common carrier is contained in section 75-241, R. S. Supp., 1959. The record shows that the application was denied after notice was given and a hearing held. It is the contention of the applicant that the order of the commission denying his application is arbitrary, unreasonable, and contrary to law. In this respect it is the rule that where there is evidence supporting factors which are inconsistent or in conflict with other recognized factors, the power to decide ordinarily rests with the commission and not the courts. Under such circumstances this court will not substitute its judgment for that of the commission. Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331; Chicago, B. & Q. R.R. Co. v. Herman Bros., Inc., 164 Neb. 247, 82 N. W. 2d 395. The powers of the commission may not, however, be whimsically exercised. The commission may not disregard undisputed or admitted facts, although it may resolve con-

flicts in the evidence. The exercise of power by the commission without a proper application of the law to undisputed or admitted facts is an arbitrary exercise of power which the courts are required to correct. Chicago & N. W. Ry. Co. v. Save the Trains Assn., 167 Neb. 61, 91 N. W. 2d 312.

Applicant's evidence is substantially as follows: L. E. Whitlock Truck Service, Inc., has assets of $647,260.73. In 1959 the revenue received for all services rendered as a common carrier amounted to $1,238,905.20. The total cost of operation was $1,321,829.26. The loss sustained for the year, including interest and other nonoperating expenses, was $103,680.91. The ratio of revenue to expense was 100 to 108.04. This indicates a loss of 8.04 cents on each dollar expended.

Objection was made to an item of expense in the amount of $18,000 for uncollectible revenue. The evidence shows that this was in fact a reserve fund created at the rate of $1,500 a month to apply against uncollectible revenue at the close of the accounting year. No accounting had been had at the time of the hearing and there was no evidence of facts or past experience that would justify the item of $18,000 as an expense. Applicant admits the nature of the item and that it is an improper charge to the extent that it exceeds the amount of uncollectible revenue. Under the circumstances shown in the record the $18,000, or any part thereof, was not established as a proper item of expense. Applicant's claimed loss should be reduced by $18,000, leaving applicant's gross loss at the figure of $85,680.91, according to its own records. The operating loss of the applicant, exclusive of interest on current and equipment obligations less other income amounting to $20,756.85, is $64,924.06.

The record shows that applicant has intrastate authority in Nebraska, Oklahoma, Kansas, Colorado, and South Dakota, and interstate authority between points in Oklahoma, Kansas, Nebraska, South Dakota, North

Dakota, Wyoming, Colorado, and Utah. The evidence shows that in April 1959, applicant sold its intrastate business in Kansas for a substantial sum, reserving its interstate rights and some minor intrastate authority. The amount so received was not included in applicant's balance sheet showing the operational loss hereinbefore indicated. The objector appears to argue that this is a matter to be considered in determining whether or not an increase in rates and charges should be granted. The record also shows that applicant purchased the operating rights and business of a competitor at Sidney, Nebraska, in January 1959. We fail to see where the sale in Kansas and the purchase in Nebraska are material to the issue before the commission, particularly if the more applicable formula to be used is the ratio of revenue to expense as the parties seem to agree.

In relating expense of operation to revenue for the purpose of obtaining a rate increase for a common carrier, an efficient operation of the carrier's business is contemplated. It stands to reason that inefficient management or operation cannot afford a basis for an increase in rates and charges for the transportation of designated commodities by all common carriers transporting the same commodities under the same conditions. Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra.*

The objector contends, although no proof was offered by it, that applicant's expense for maintenance and repairs was excessive because of a lack of competence on the part of applicant's truck drivers and drivers' helpers. The applicant admits however that there is merit in this assertion. The evidence shows that applicant had 40-odd trucks domiciled in Nebraska, some of which had a carrying capacity of 36,000 to 38,000 pounds. The evidence further shows that oil drillers and oil producing companies pay a much higher rate of pay to truck drivers and drivers' helpers than applicant can pay under existing rates and charges. This results in

a large turnover in truck drivers and helpers and a reduced efficiency in the operation of his trucks, which bears directly upon the cost of their maintenance. Whitlock testified that if the requested increase in rates and charges were allowed by the commission, a portion of it would be used to raise the rates of pay of drivers and helpers, and to establish a training program for them which would tend to reduce the maintenance costs on this expensive equipment. It is the contention of the applicant that unless a compensatory rate structure is fixed by the commission such costs cannot be assumed and that, as an alternative, it would discontinue the service before losses absorbed the assets of the company. It may be pointed out in this connection that the commission has established no formula for ascertaining the ratio of operating revenue to operating expenses in this type of operation. The amount spent for maintenance by the applicant in 1959 is not questioned. Applicant states that it was abnormally high because of unusual climatic conditions during the early months of 1959. Whitlock testified that the first 4 months of 1959 were the worst with which he had ever contended and that these conditions did bring about abnormal maintenance. He testified that this application for a 10 percent increase in distance rates and the varying percentage of increases and charges for labor and accessories did not take into consideration the additional expenses growing out of the unusual climatic conditions in 1959 and, if they were proper to be included, an increase of rates and charges by 20 percent would be required. While the exhibits offered in evidence appear to include all expenses of the applicant, including the unusual maintenance expense in early 1959, the amount of the increase requested would not cover such additional operational costs and return an adequate compensation to the applicant for the service rendered. We point out that by giving the evidence its most favorable import to the objector, that is, by dis-

allowing the $18,000 uncollectible revenue item as an expense and disregarding interest costs and other income during the year, the operating loss would be $64,924.06. This involves a ratio of revenue to expense of 100 to 105.2.

There appear to be two methods used in calculating whether or not a rate will yield an adequate return. The first method is to provide a reasonable return upon the amount of the investment. The second method is by the operating ratio rule, a ratio of operating revenue to operating expenses. The reasoning for the application of the ratio rule is set out in County Board of Arlington County, Va. v. United States, 101 F. Supp. 328. It is usually applied where revenue and expense is greatly in excess of the capital investment. The railway commission of this state has not adopted a rate-fixing formula for the class of cases we have before us. It is evident from the record that it considered the ratio method in the instant case and the parties apparently are in accord that it affords the proper formula. While we have no established ratio by the commission which can be said to provide for a reasonable rate in such cases, the matter has been before the Interstate Commerce Commission. While the holdings of that body are not necessarily controlling, they may properly be considered under our holding in Preisendorf Transport, Inc. v Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865. In Fares, Motor, Between Northern Kentucky and Cincinnati, 62 M. C. C. 67, an operating ratio of 100 to 92 before income taxes was held to be reasonable. In Transcontinental and Western Increases, 61 M. C. C. 755, a ratio of 100 to 93 was approved as the basis for a reasonable rate. This leads us to the conclusion that under the evidence in this case that was not in dispute, an increase in rates was required and the refusal to increase them was arbitrary. This is necessarily based on the evidence that the relation of operating revenue to operating expense in the ratio

of 100 to 93 will produce a compensatory return.

The objector produced evidence of oil drillers and producers who object to the increased rate application for the reason that it will increase their costs which are already high. These witnesses represent companies which provide approximately 5.06 percent of applicant's intrastate revenue in Nebraska. They admit that applicant should be permitted a rate that would return a reasonable profit. The mere fact that it will increase their costs of operation is not a controlling factor since an increase in transportation rates always increases the cost to users of the service. Some 20 users of the service provided by applicant indicated their support of the application, 2 of them having representatives present to testify. These users of the service provide 64.81 percent of applicant's intrastate revenue in Nebraska. Their evidence may be summarized as follows: Their companies are in business to make a profit and they agree that applicant is likewise entitled to a reasonable profit from its operations. They freely admit that they desire this needed service at as low a rate as they can obtain it. They testify to added considerations. Whitlock testified applicant had 40-odd large trucks. They testify that applicant could "rig down," transport, and "rig up" a 500,000 pound drilling rig in one movement in one day. It requires 15 trucks for such a movement and the applicant usually has them available. The 15 trucks so used had an original cost value of approximately $315,000. The two competitors in the field have less equipment and are not ordinarily in a position to transport the larger oil drilling rigs with the efficiency and dispatch as the applicant. The evidence is that these companies are faced with a $700 daily expense which can be saved in certain instances by using applicant's equipment. In other words, they prefer to support applicant's request for an increase to an abandonment of its service because of the resulting savings to their companies.

Applicant's two competitors, whom we shall refer to as Neff and Gettel, did not appear for or against the application. The objector asserts this is a circumstance for a denial of the increase. The evidence shows that applicant, Neff, and Gettel filed a joint application for a rate increase which was heard by the commission on September 22 to 25, 1959, and denied on October 2, 1959. The evidence shows that applicant invited them to join in the present application but, not hearing from them, concluded to make application on its own. Why neither party called Neff or Gettel to testify is not shown by the record. The inference to be drawn from this, if any proper inference is warranted, is that Neff and Gettel deemed existing rates noncompensatory in view of their previous action in the matter.

It is contended that the requested rates, if granted by the commission, would be discriminatory as to Nebraska interstate users of the service. The evidence shows that the intrastate rates in neighboring states and the interstate rate are for all practical purposes the same as the existing intrastate rates in Nebraska. From this it is argued that a presumption of the reasonableness of the Nebraska rates arises. It is further argued that the Nebraska commission, if it raised the Nebraska rates and charges, would as a matter of law impose a discriminatory rate as to interstate users in Nebraska and intrastate users in neighboring states. We see no merit in this contention. An increase in the rates of a common carrier of intrastate commerce over the interstate rates for the same service is not discriminatory as to interstate users of a similar service. Chicago, Milwaukee, St. Paul & P. R. R. Co. v. State of Illinois, 355 U. S. 300, 78 S. Ct. 304, 2 L. Ed. 2d 292. Such a contention if adopted by the Interstate Commerce Commission and neighboring state regulatory commissions would result in a freezing of established rates and charges from which there could be no escape irrespective of the evidence. Such is not the law. Whitlock testified that applicant is filing or

has filed similar applications before the other commissions but, because the major part of its revenue is derived in Nebraska, it elected to first present its application to the Nebraska commission. We find nothing in the record that limits its right to so proceed.

We hold that a grant of an increase in rates and charges required by the evidence in such a case as we have before us would not be unlawful as being discriminatory. While the existing rates for the same service in other jurisdictions may create a presumption of reasonableness, such a presumption may be overcome by evidence.

A common carrier is bound to carry at equal rates for all customers in like condition and, ofttimes what appears to be an economic discrimination is not an unjust discrimination inhibited by sections 75-501 and 75-502, R. R. S. 1943. When competitive conditions are different, different rate levels can be justified without subjecting them to a charge of unjust discrimination. Consequently a state commission may properly fix reasonable rates calculated to return a reasonable profit for the services rendered, even though they exceed established interstate and intrastate rates in other jurisdictions; provided, of course, that the evidence sustains the rate because of the existing circumstances and operating conditions. Chicago, B. & Q. R. R. Co. v. Herman Bros., Inc., *supra;* Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra.*

We conclude that the Nebraska State Railway Commission is authorized to prescribe reasonable rates and charges for the transportation of oil-field equipment, commodities, and supplies in Nebraska intrastate commerce. We further conclude that the undisputed evidence in this case, under a proper application of the law, requires that an increase in rates be granted for the performance of the services designated in the application and that the order denying the application is arbitrary and unreasonable. We likewise hold that an order

granting an increase in common carrier rates on specified commodities is not ipso facto discriminatory merely because it exceeds the interstate rate or the intrastate rates of neighboring states.

It is not the province of this court on an appeal from the Nebraska State Railway Commission to fix rates for common carriers. That is the exclusive function of the commission. If an order made by the commission is arbitrary and unreasonable in that it fails to properly apply the law to undisputed evidence the court may properly so declare and set aside such order. The order of the commission denying the applicant relief in the instant case is therefore set aside as arbitrary and unreasonable.

REVERSED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROBERT MORSE, APPELLEE, IMPLEADED WITH MARK B. TINSLEY ET AL., APPELLANTS.
105 N. W. 2d 572

Filed October 28, 1960. No. 34795.

1. **Bail.** If the surety on a bail bond fails to deliver his principal into the custody of a proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited.
2. ———. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody, the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him; and upon failure of the principal to so appear, the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond.
3. ———. A judgment rendered on account of a forfeited bail bond may not exceed the amount of the penalty of the bond.

APPEAL from the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded.*

Heiss & Lammers and *Webb, Kelley, Green & Byam,* for appellants.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for appellee.

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

BOSLAUGH, J.

Mark B. Tinsley and Earlene Tinsley were charged with the possession by them in Scotts Bluff County of tools suitable for breaking and entering with the intention to use them for a burglarious purpose. The offense ascribed to them was a felony. § 28-534, R. R. S. 1943. The county court of Scotts Bluff County, in which proceedings were initiated, required the accused to appear in the district court for that county and fixed bail for each of the accused in the sum of $5,000 for his and her release respectively from custody. The accused each tendered an appearance bond in that amount executed by them respectively as principal and signed by the Summit Fidelity and Surety Company as surety. The bonds were accepted, approved, and filed by the county court and accused were thereupon released from custody.

Mark B. Tinsley and Earlene Tinsley will be referred to herein as accused except when they and the Summit Fidelity and Surety Company are spoken of collectively they will be designated appellants. State of Nebraska will be designated appellee.

The condition of each of the bonds was that the accused named therein would personally appear in the district court for Scotts Bluff County on the first day of the next jury term of that court and from time to time as ordered by it until the final determination of the cause and that accused would not depart the court without leave.

The first day of the next jury term of the district

court for that county after the bonds were furnished and approved was July 13, 1959. Transcript of the proceedings had in the cause in the county court was filed in the district court June 9, 1959, and on that date an information charging the accused with the crime described above was filed in the district court. The accused or either of them did not appear in the district court July 13, 1959. The accused were located and taken into custody at South Gate, Los Angeles County, California, shortly before December 7, 1959. They were returned to Scotts Bluff County by representatives of the surety and were arraigned in the district court on that date on the charge above described. The district court, on motion of the county attorney made on behalf of appellee, found a breach of each of the bonds furnished by the accused and adjudged a forfeiture of each of them. Thereafter the district court held a hearing at which the interested parties introduced evidence and presented arguments, at the conclusion of which the court found that judgment should be rendered on the two bonds against appellants for the sum of $9,500 and that the surety should be granted a reduction of the total of the two bonds of $500 on account of expenses of the surety in returning the principal in each of the bonds from Los Angeles County, California, to Scotts Bluff County, Nebraska. A judgment was rendered by the district court against appellants for $9,500 on the appearance bonds furnished by the accused because of their default in failing to perform the requirements of the bail as above recited and the forfeiture of the bail as previously adjudged by the district court. Their motion for a new trial was denied and from that ruling they have prosecuted this appeal.

There is no issue of fact in this case. The existence, validity, effectiveness, and breach of each of the bonds were established. The accused or either of them did not appear in or attend court as the bonds required. The principals in the bonds were then fugitives from

justice attempting to escape detection by officers of the law and they were successful in that respect for a period of about 6 months. A case for forfeiture of each of the bonds and judgment for the penalty of each thereof was complete. It is provided by statute that if there is a breach of condition of a bail bond, the court shall declare a forfeiture of the bail; and when a forfeiture has been had, the court shall, on motion, enter judgment and execution may issue thereon. §§ 29-1106 and 29-1108, R. R. S. 1943.

If the surety on a bail bond fails to deliver his principal into the custody of the proper officer of the law or to procure his attendance in court as the bond requires, the liability of the makers of the bond for the penalty thereof becomes absolute and the bond should be forfeited. A bail bond is a contract between the surety and the State that if the latter will release the principal from custody, the surety will undertake that the principal will appear personally at any specified time and place to answer the charge made against him; and upon failure of the principal to so appear, the makers of the bond become absolute debtors of the State in the amount of the penalty of the bond. When a surety makes a bail bond it assumes the risk involved if its faith in the principal is misplaced. State v. Honey, 165 Neb. 494, 86 N. W. 2d 187.

Appellants argue that the judgment rendered herein is void because it is in excess of the jurisdiction of the district court. It was stipulated by appellee and appellants that a hearing of the motion for judgment on the order of forfeiture of the bonds of Mark B. Tinsley and Earlene Tinsley should, without notice to appellants or any of them, be held commencing at 10 o'clock on the morning of January 9, 1960. The hearing was held at that time and the judgment was rendered that day. There were present the county attorney of Scotts Bluff County representing appellee, the attorney representing the appellants, and an officer of the surety.

They all participated in the hearing. The bail bonds were furnished, accepted, and filed in the case. The district court had jurisdiction of the subject matter and of the parties interested in the proceeding for the forfeiture of the bonds and the entry of judgments for the liability thereon. The argument of appellants in this respect is incorrect. Section 29-1106, R. R. S. 1943, directs: "When there is a breach of condition of a recognizance, the court shall declare a forfeiture of the bail." Section 29-1108, R. R. S. 1943, provides in part: "When a forfeiture of a recognizance has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond, the obligors submit to the jurisdiction of the court * * *. The liability upon the bond may be enforced on motion without the necessity of an independent action."

The accused each separately furnished a bail or appearance bond of $5,000. Mark B. Tinsley was not a party to, had no connection with, and was not liable for any amount on the bond given by Earlene Tinsley. Likewise she was not interested in or liable for any amount of the bond furnished by Mark B. Tinsley. The liabilities of the accused were several and not joint. Appellants say the joint judgment against them is void as to the principal named in each of the bonds respectively because the liability of each principal was not in excess of $5,000 but the court rendered judgment against each of them and the surety for $9,500.

The motion of appellants for a new trial separately specified: (1) Error in the assessment in the amount of the recovery in that it is too large, being based upon both bonds; (2) that the decision is not sustained by the evidence; and (3) that the decision is contrary to law. A judgment against Mark B. Tinsley on account of the bond furnished herein by him could not legally have been for more than $5,000, the amount of the penalty of the bond. Likewise a judgment against Earlene

Tinsley on account of the bond furnished by her herein could not legally have been for more than $5,000, the amount of the penalty of her bond. The rendition of a judgment herein for $9,500 against each of the accused was incorrect as to the amount of the recovery, was not sustained by evidence, and was contrary to law. The judgment being erroneous as to each of the principals cannot be sustained as to the surety. There should have been a judgment on the bond furnished by Mark B. Tinsley against him and the surety thereon for an amount not in excess of the penalty of the bond and a separate judgment on the bond furnished by Earlene Tinsley against her and the surety thereon for an amount not in excess of the penalty of the bond. A judgment on account of a breach of the condition of a bail bond may be rendered for the full amount of the penalty of the bond but not for more.

In People v. Parisi, 217 N. Y. 24, 111 N. E. 253, Ann. Cas. 1916C 111, the court said: "This recognizance is executed under a statute for the purpose of securing and insuring the performance of an act and not for the payment by the principal of moneys and in such a case the general rule seems to have been early established both in England and in this state that the recovery should be limited by the penalty."

In United States v. Broadhead, 127 U. S. 212, 8 S. Ct. 1191, 32 L. Ed. 147, it is stated: "These cases are suits brought upon two bonds given by John F. Broadhead and his sureties, conditioned for his appearance in the District Court of the United States for the District of California, to answer two separate indictments for making and forging checks on the Assistant Treasurer of the United States at San Francisco. The penalty of each of these bonds was $5000, and, according to well settled principles, no interest can be recovered in such a suit as this, nor can any recovery be had beyond the amount prescribed in these instruments, except for costs."

It is declared in Empire State Surety Co. v. Lindenmeier, 54 Colo. 497, 131 P. 437, Ann. Cas. 1914C 1189: "It is a general rule, and well settled, that sureties are liable only to the extent of the penalty of the bond."

People v. Hanaw, 106 Mich. 421, 64 N. W. 328, was an action on a recognizance furnished by Joseph Gregory upon an information which charged him with the offense of breaking and entering in the nighttime a certain shop with intent to commit larceny. Concerning the judgment which was rendered on the recognizance the court said: "We think error was committed in entering judgment for interest on the amount of the recognizance from the date of forfeiture. * * * The judgment will be modified, and a judgment entered in this court for the penalty of the bond, $600, and costs of the court below." See, also, 8 C. J. S., Bail, § 106, p. 210; 6 Am. Jur., Bail and Recognizance, § 221, p. 156.

The judgment should be and it is reversed and the cause is remanded to the district court for Scotts Bluff County for further proceedings according to law.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

JOHN STOLLER ET AL., APPELLEES, V. STATE OF NEBRASKA, APPELLANT.
105 N. W. 2d 852

Filed October 28, 1960. No. 34798.

1. **Pleading.** A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.
2. ———. A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
3. **Statutes.** A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enact-

ing clause or of excepting something from its operation which would otherwise have been within it. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails.

4. **Contracts: Statutes.** Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government.
5. **Public Lands.** The rights of a lessee of school lands are determined by the law as it was at the time the lease was made and the lessee may not thereafter be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.
6. **States.** The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract.
7. **Public Lands: Mines and Minerals.** Where the state has given a contract to sell school land, and agreed to give a deed in fee simple when the contract was paid in full, the fact that after said contract of sale was given the Constitution of Nebraska was amended, making it illegal to deed any mineral rights on school land, would not prevent the state from conveying said land under the terms of the original contract.
8. ———: ———. The acceptance and recording by a vendee of a deed from the Governor of the State of Nebraska, conveying a portion of the state's common-school lands, and containing mineral reservations, which reservations were unauthorized and invalid, will not estop such vendee from afterwards demanding a proper deed of conveyance without such invalid reservations or having his title quieted against such reservations.

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

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

Fred T. Hanson, for appellees.

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

CHAPPELL, J.

Plaintiffs, John Stoller and Lydia Stoller, brought this action against defendant, State of Nebraska, seeking to quiet title to the oil, gas, and mineral rights on described school lands allegedly owned by plaintiffs in Red Willow County, and to enjoin defendant from asserting any rights therein. Defendant filed an answer to plaintiffs' petition, and plaintiffs demurred generally thereto. The demurrer was sustained and, defendant having elected not to plead further, a judgment was rendered in favor of plaintiffs and against defendant which quieted the title in plaintiffs as prayed. Thereupon defendant appealed to this court, assigning that the trial court erred in sustaining plaintiffs' demurrer and rendering judgment for plaintiffs. We do not sustain the assignment.

The sole question presented is one of law, arising out of the judicial construction and application of certain statutes under admitted facts. More particularly, the question is whether the statutory right given a contractual purchaser of school lands to redeem, and his timely exercise of such right after declared forfeiture of such contract by the Board of Educational Lands and Funds, creates a new contract of purchase under statutes then existing, or simply restores to and preserves in the purchaser his original vested contractual rights.

In that connection, plaintiffs' petition as summarized alleged that they were owners of described school lands as tenants in common; that on or about November 22, 1892, such lands were leased by defendant in writing as provided by law to one Josef Kroupa, which lease was duly approved by and is of record in the office of the Board of Educational Lands and Funds, hereinafter called the board; that at the time said lease was executed, statutes were in force and a part of said lease which provided that lessees of school lands should have a right or option on application and surrender of such lease to purchase the leased lands for their appraised value, but

at not less than $7 per acre, and obtain fee simple title thereto, which became a vested right of lessee, his successors, and assigns; that on or about September 4, 1899, lessee Josef Kroupa sold and assigned said lease in writing to Jacob Fichtner for valuable consideration, which assignment was duly approved by and is of record in the office of the board; that on or about January 21, 1908, Jacob Fichtner sold and assigned said lease in writing to G. H. Fichtner for valuable consideration, which assignment was duly approved by and is of record in the office of the board; that on or about August 25, 1917, G. H. Fichtner, being the owner of said lease by said assignments, duly made application to purchase said lands under such right or option; that he surrendered said lease, and on said date two written certificates or contracts of sale were duly executed and delivered to him covering the described lands here involved, which are of record in the office of said board; that contrary to law and the vested rights of G. H. Fichtner as assignee of said lease and option to purchase a fee simple title free of all reservation, there was inserted in each of said certificates of sale a reservation to the state of all oil, gas, and designated minerals on said lands; that on or about March 9, 1937, G. H. Fichtner and wife, Olga Fichtner, sold and assigned said contracts in writing to the Department of Banking of the state for valuable consideration, which assignments were duly approved by and are on file in the office of said board; that on or about March 29, 1937, the Department of Banking duly sold and assigned said certificates of sale and its rights thereunder in writing to plaintiff John Stoller, for valuable consideration, which assignments were duly approved by and are of record in the office of the board, whereby plaintiff John Stoller became owner of the rights of the lessee and his assigns under said option and the rights of the purchaser under the sales made pursuant thereto; that prior to April 8, 1946, said John Stoller completed all payments

required to be made under the contracts of lease and purchase and applied for a deed to the land requesting same to vest title in plaintiffs as joint tenants with right of survivorship; that in response to such application, the state issued and delivered plaintiff a deed designating "John Stoller and/or Lydia Stoller" as grantees, without express language of joint tenancy or survivorship, which cast a cloud on and rendered doubtful the nature of the title intended to be conveyed and vested in grantees; and, that contrary to law and the vested rights of plaintiff John Stoller as assignee to have conveyed to him or to the persons designated by him a fee simple title free of all reservations, the deed issued by the state on April 8, 1946, a copy of which was attached to and made a part of plaintiffs' petition, contained a provision reserving in the state all coal, oil, salt, mineral, and other natural resources. Plaintiffs' prayer was for a judgment quieting title to such oil, gas, and mineral rights in plaintiffs, and declaring them to be owners of said lands as joint tenants with right of survivorship.

Defendant's answer admitted all allegations of plaintiffs' petition except as allegations thereafter made by defendant might tend to controvert same, in which event they were denied. Defendant then alleged that on May 11, 1936, the board, by order pursuant to notice, as provided by law and duly spread upon its official records, declared a forfeiture of the sale contracts theretofore issued to G. H. Fichtner on or about August 25, 1917; that by virtue of statutes then existing, the interest in the land covered by such contracts reverted to the state the same as though no sale had ever been made; that on or about March 10, 1937, pursuant to a statutory right then existent, the purchaser or his assignee, the Department of Banking, paid all delinquencies and interest which had accrued with respect to payments on such sale contracts and redeemed same, which redemption was duly noted and recorded on

the official records of the board; and that by virtue of the forfeiture of 1936 and the redemption of 1937, new sale contracts for purchase of the land involved came into being and were subject to a 1920 amendment of the Nebraska Constitution, Article III, section 20, which prohibited alienation of the mineral rights on state educational lands. Defendant prayed for a judgment quieting title in it to the oil, gas, and mineral reservations inserted in plaintiffs' deed, and prayed for a denial of the relief sought by plaintiffs except with regard to their prayer for an order finding that plaintiffs as grantees in the deed should be held to be joint tenants with right of survivorship.

In the judgment rendered by the trial court sustaining plaintiffs' demurrer to defendant's answer and quieting title to plaintiffs as prayed by them, the court found and adjudged that the declaration of forfeiture alleged in defendant's answer was subject to the right of redemption; that the redemption so prayed had the legal effect of restoring plaintiffs' predecessor in title to all the rights such purchaser had prior to such declaration of forfeiture; that such rights were prior to and not subject to the Constitution of 1920; and that therefore defendant's answer did not constitute a defense to any relief sought by plaintiffs. In that connection, defendant's contention and argument were and are that upon declared forfeiture by the board all interest in the land covered by the lease and contract of sale reverted or turned back to the state, the same as if "such lease or sale had never been made"; that to "redeem" means a "buying back" or a "repurchase"; that "redemption" after declared forfeiture created new contracts of purchase rather than a restoration or preservation of the original contracts; and that since such new contracts came into existence after 1920, then Article III, section 20, Constitution of Nebraska, which prohibited the state from alienating the oil, gas, and mineral rights in making

such contracts, had application and controlled in the situation presented.

Upon such premise also, defendant relied upon section 72-219, Comp. Stat. 1929, as amended by Laws of Nebraska, 1935, Chapter 163, section 12, page 605, which provides in part: "If the amounts due are not paid within ninety days from the date of the service of such notice, the contract of lease or sale may be, by said board, declared forfeited and the lands therein described shall revert to the state the same as though such lease or sale had never been made. * * * Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies, fees and costs of forfeiture at any time before the advertising of such land to be leased at public auction is completed: * * *."

However, as we view it, such statute has no application here, and assuming, for purpose of argument only, that it did, no contention is alleged or made by defendant that "all delinquencies, fees and costs of forfeiture" were not paid before the "advertising of such land to be leased at public auction" was "completed," as provided in the 1935 act, or were not paid before "such land" was "advertised to be leased at public auction," as provided by section 72-219, Comp. Stat. 1929, as it existed prior to the amendment of 1935.

As we view it, section 3831, Cons. St. 1891, is applicable and controlling in this case. Such section and others in pari materia therewith were in force and a part of the lease contract here involved, which was executed on November 22, 1892, and gave the lessee a right or option to purchase such lands as claimed by plaintiffs. Section 3831, Cons. St. 1891, provides in part: "If any lessee of educational lands shall be in default of the semi-annual rental due the state for a period of six months, or any purchaser of educational lands be in default of the annual interest due the state for one year, the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee or purchaser that,

if such delinquency is not paid within six months from the date of the service of such notice, his lease or sale will be declared forfeited by the board of educational lands and funds. If after such notice the amounts due are not paid within six months from the date of the service of such notice thereof the said contract of lease or sale may be declared forfeited; and the lands therein described shall revert to the state the same as though such lease or sale had never been made; and the order making such forfeiture shall be spread upon the records of the board of educational lands and funds. * * * The forfeiture may be entered by said board after ninety days from the date of such published notice. * * * Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs at any time before such land is again sold or leased."

In that connection, defendant does not allege or claim that either plaintiffs or their predecessors did not pay all "delinquencies and costs at any time before" such land was "again sold or leased." As a matter of fact, defendant admits otherwise and, upon application, as provided by law and the contracts involved, defendant admittedly deeded the land to plaintiffs after all payments required to be made under the contracts of lease and sale had been completed.

In Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366, this court concluded that a proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause or of excepting something from its operation which would otherwise have been within it. In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails.

Under section 3831, Cons. St. 1891, it is the "contract of lease or sale" that is "declared forfeited" by and

"spread upon the records of the board" which the owner thereof "may redeem * * * by paying all delinquencies and costs at any time before such land is again sold or leased." The land itself reverts to defendant absolutely, "the same as though such lease or sale had never been made" only after failure of the owner to redeem the contracts by paying all delinquencies and costs within such prescribed time. When that is timely done, the declared forfeiture is of no force and effect and all of the owner's theretofore-existing contractual rights are restored to and preserved in him as if there had been no delinquencies thereunder. In other words, the right to redeem granted in a contract to lease or purchase school lands under the statutes here involved, which are a part of such contracts, is a vested right of the lessee or purchaser to restore himself to the same position he was in thereunder prior to default and declared forfeiture. We have not been cited, and upon diligent search we have not found, any authority which would permit any other conclusion.

In that connection, the term "redeem" has more than one meaning in law, which may vary under different conditions dependent upon the context in which it is used. It may imply the existence of a debt and the right to pay the obligation rather than a repurchase or sale. It has been defined as meaning to receive back by paying the obligation, or to recover or regain by the fulfillment of some obligation, as by the payment of a debt due. The term as used in the statute here involved may and should be so defined. See, 76 C. J. S., Redeem, p. 175; 53 C. J., Redeem, p. 663, and authorities cited. Also, contrary to defendant's contention, the term "redemption" may be employed in the sense of paying back or satisfying a party's indebtedness rather than with any thought of buying back or repurchasing, or it may mean the payment of an obligation according to its terms, and implies that there is something to be regained or recovered back again rather than a sale, purchase, or exchange.

See 76 C. J. S., Redemption, p. 177, and authorities cited.

As recently as Pfeifer v. Ableidinger, 166 Neb. 464, 89 N. W. 2d 568, this court, citing authorities, reaffirmed that: "A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the pleader's conclusions of law or fact.

"A general demurrer tests the substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded."

Therein this court also held: "Every contract is made with reference to, and subject to, existing laws, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government.

"The rights of a lessee of school land are determined by the law as it was at the time the lease was made and the lessee may not be deprived of any substantial right resulting from the lease in his favor by subsequent legislation.

"The state by entering into a contract abandons its attributes of sovereignty and binds itself, to the extent of its power to contract, substantially as an individual does who becomes a party to a contract." See, also, State ex rel. Jehorek v. McKelvie, 111 Neb. 224, 196 N. N. W. 110.

In Mulhall v. State, 140 Neb. 341, 299 N. W. 481, this court concluded that the Board of Educational Lands and Funds has no power in conveying land by deed to add restrictions not contained in the original sales contract.

In Reavis v. State, 140 Neb. 442, 300 N. W. 344, this court held that: "Where the state had given a contract to sell school-land, and agreed to give a deed in fee simple when the contract was paid in full, the fact that after

said contract of sale was given the Constitution of Nebraska was amended, making it illegal to deed away mineral rights on school-land, would not prevent the state from conveying said land under the terms of the original contract."

Also, in State ex rel. Jehorek v. McKelvie, *supra*, this court held that: "The acceptance and recording by a vendee of a deed from the governor of the state of Nebraska, conveying a portion of the state's common-school lands, and containing mineral reservations, which reservations were unauthorized and invalid, will not estop such vendee from afterwards demanding a proper deed of conveyance without such invalid reservations." By analogy, of course, such a vendee would also have the right to have his title quieted against such reservation.

Hile v. Troupe, 77 Neb. 199, 109 N. W. 218, dealt with the right, after declared forfeiture, to redeem a duly executed lease of school lands under circumstances comparable with those at bar. In that opinion, this court said: "The statute in force at the time the lease in suit was executed enacted a procedure for the declaration of forfeitures in cases of delinquencies in payments of rents, but with the following proviso: 'Provided, the owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs *at any time before such land is again sold or leased.*' Laws 1883, ch. 74, sec. 20. This proviso remained in force until 1903, when it was amended by substituting for the portion thereof printed in italics the words 'at any time before such land is advertised to be leased at public auction' (laws 1903, ch. 100, sec. 17), and the statute as theretofore existing was then repealed. But the matter with which the legislature was dealing was not the exercise of governmental functions merely, but one having reference to the rights and obligations of the state as a party to certain contracts, and it is a well-settled principle that a state is as powerless, under the

operation of section 10, article I of the constitution of the United States, to impair by law its own contractual obligations as it is to affect in like manner the contracts of natural persons. Davis v. Gray, 83 U. S. 203; Hall v. Wisconsin, 103 U. S. 5; People v. Stephens, 71 N. Y. 527. And it is a principle much older than the constitution of the United States 'that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embaces (sic) alike those which affect its validity, construction, discharge, and enforcement.' Von Hoffman v. City of Quincy, 71 U. S. 535, 550. This language is authoritative and binding, not only upon this court, but upon every branch and functionary of the state government. And it is said by the same high authority: 'Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, * * * impairs its obligations.' Green v. Biddle, 8 Wheat. (U. S.), *1, *84. It is clear therefore that the right of redemption created by the above quoted proviso in the statute in force when the lease in suit was made became incorporated with and a part of that instrument. The proviso had nothing to do, as the attorney general contends that it did, with mere procedure or with the remedy by which the state was and is entitled to declare and enforce a forfeiture and a resale or release of the land; but it is entirely distinct therefrom and expressly designed to preserve to the lessee the valuable right to atone for his delinquencies and to redeem his land from forfeiture at any time during the pendency of such proceedings and before their termination by an actual resale or release. That such a right is a contractual one, which is valuable and vested and protected by the above mentioned constitutional guaranty, the authorities leave

us no room to doubt. Bronson v. Kinzie, 1 How. (U. S.) *311; Howard v. Bugbee, 24 How. (U. S.) 461; Cargill v. Power, 1 Mich. 369; Moody v. Hoskins, 64 Miss. 468; Dorrington v. Myers, 11 Neb. 388; Von Hoffman v. City of Quincy, supra. The act of 1903 was therefore, in the respect mentioned, inoperative upon the lease in question." By analogy, such statement has like application to a contract to purchase school lands, which has been duly executed in conformity with a vested right or option contained in the lease at the time of its execution.

For reasons heretofore stated, the judgment of the trial court should be and hereby is affirmed. All costs are taxed to defendant.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE ESTATE OF EMMA NISSEN, DECEASED. MELVINA HILLIGAS, APPELLANT, V. FRANK M. FARR, ADMINISTRATOR OF THE ESTATE OF EMMA NISSEN, DECEASED, APPELLEE.
105 N. W. 2d 578

Filed October 28, 1960. No. 34799.

1. **Appeal and Error.** By the terms of Rule 7, paragraph e, of the Revised Rules of the Supreme Court, Part I, Practice in Supreme Court, a bill of exceptions may be amended by written agreement attached to the bill at any time before the case is submitted to the Supreme Court.
2. ———. By the terms of the same rule proposed amendments not agreed to by all of the parties shall be heard and decided by the district court, after notice, and the order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court.
3. ———. An amendment to a bill of exceptions will not be considered by the Supreme Court which has not been presented in compliance with Rule 7, paragraph e, of the Revised Rules of the Supreme Court, Part I, Practice in Supreme Court.
4. ———. In a case coming to the Supreme Court on appeal, error will not be presumed but it must affirmatively appear from the record.

5. ———. The rule that error will not be presumed but must appear from the record applies in the instance of an appeal from an order granting a new trial, or any other appealable order, where a ruling depends upon an examination of the evidence taken at the trial.
6. ———. The exaction of the rule that on appeal error will not be presumed but it must appear from the record is that the entire record of the evidence must be presented.
7. ———. In the absence of a proper bill of exceptions, all assignments of error which require for their determination a reference to such a bill must be overruled.

APPEAL from the district court for Hamilton County: JOHN D. ZEILINGER, JUDGE. *Affirmed.*

E. H. Powell, for appellant.

John E. Dougherty and *Charles L. Whitney,* for appellee.

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

YEAGER, J.

The estate of Emma Nissen, deceased, was probated in the county court of Hamilton County, Nebraska. A claim was filed against the estate by "Mr. and Mrs. Ralph Hilligas" for $1,791.50, "for services rendered by each (of) us for decedent, and other miscelaneous (sic) items, over the years, as per attached itemization marked 'Exhibit A.'" A trial was had in the county court which resulted in an adjudicated allowance in the amount of $145 only. Mrs. Hilligas, using her true name of Melvina Hilligas, appealed from the adjudication to the district court. Ralph Hilligas did not join in the appeal. On appeal Melvina Hilligas filed a petition in which she claimed a right of recovery in the amount of $1,407.50. Issues were joined in the district court between Melvina Hilligas and Frank M. Farr, administrator of the estate. A trial was had to a jury which resulted in a verdict and judgment in favor of Melvina Hilligas and against the administrator for $1,407.50.

A motion for new trial, or in the alternative for judgment notwithstanding the verdict, was duly filed. Judgment notwithstanding the verdict was denied but a new trial was ordered. Melvina Hilligas has appealed from the order sustaining the motion for new trial.

On the appeal here Melvina Hilligas is designated plaintiff and appellant. She will be referred to hereinafter as plaintiff. The administrator is designated defendant and appellee. He will be referred to as defendant.

As grounds for reversal the plaintiff sets forth two assignments of error. The first is: "The trial court erred in granting a defense motion for a new trial (T42)." The second is: "The court's ruling at 2:157 is correct, and the court erred in departing therefrom at E10:177,179 and in entering the order at T42."

It is of course true that the content of the motion for new trial must be ascertained. It is further true of course that if a ground or grounds related to competency, relevancy, or materiality of evidence received or the propriety of the rejection of evidence, such questions could not be passed upon in the absence of a record of the evidence unless for some reason the assignments of error may not as a matter of law be considered.

The motion for new trial in this case contains 47 specifications of grounds for new trial. A proper determination upon the subjects contained in no less than 27 of them cannot be made in the absence of opportunity to examine a record of the evidence relating to these subjects adduced at the tiral. There is before this court no such record.

There is a bill of exceptions, it is true, but it is only a partial one properly prepared and presented agreeable to Rule 7, paragraphs c and d, of the Revised Rules of the Supreme Court, Part I, Practice in Supreme Court, which rule is authorized by section 25-1140, R. S. Supp., 1959. This was prepared and presented pursuant to order and request of the plaintiff.

There is another volume denominated "Partial Bill of Exceptions No. 2" but in the light of a proper interpretation of Rule 7 of the rules of the Supreme Court and particularly paragraph e thereof this may not be regarded as a part of the bill of exceptions or as a partial bill of exceptions. If it is capable of characterization it must be regarded as an attempted amendment.

Paragraph e of Rule 7 of the rules of the Supreme Court provides for amendment and prescribes the method of accomplishment. It provides that where amendment is not agreed to by the parties the question of whether or not there shall be amendment shall be heard and decided, on notice, by the district court. It is further required that the order of the district court as to amendment shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. There has been no compliance with these requirements.

This volume was prepared pursuant to praecipe filed with the clerk of the district court by the defendant and not the plaintiff. The plaintiff agrees with the conclusion arrived at herein and asserts that it is no part of the bill of exceptions and may not be considered by this court.

The only bill of exceptions here for consideration therefore is the one prepared and presented by express direction of the plaintiff and agreed to in writing by one of the attorneys for the defendant. That direction was that the court reporter prepare and file a bill of exceptions containing the evidence only of the plaintiff when she was on the stand together with the exhibits introduced.

This partial bill of exceptions does not contain any evidence essential as proof of the claim asserted by plaintiff. No evidence appears therein establishing or tending to establish a right of recovery in favor of the plaintiff. The plaintiff does not contend otherwise.

It becomes clear therefore that the evidence on which the order was made is not before this court.

The sole substantial theory on which the plaintiff contends that the court erred in granting a new trial is that after the motion for new trial was submitted the court took it under advisement and, while the court had it under advisement and before ruling thereon, wrote and mailed a letter to the attorneys for the parties advising them as to views with relation to a part thereof and of the intended ruling thereon. The letter does not purport to be a ruling. It appears as exhibit 10 in the partial bill of exceptions. It points out that an appearance will be made in court and an order there entered conforming to the view expressed in the letter. The letter was dated November 6, 1959.

An order was duly rendered in court on January 22, 1960. By the order the motion for new trial was sustained. The order contains no statement of ground for sustaining the motion.

The letter got into the record in the district court on December 11, 1959, after the letter was written, when there was "additional argument on the motion for new trial." This was 1 month and 11 days before the order granting a new trial was rendered. It was offered by the plaintiff and received without objection.

A comment of the court precedes the admission of the letter. It perhaps has no legal force and effect, but it makes it clear that the letter was never intended as an adjudication. It is in pertinent part as follows: "The letter is not a Memorandum Opinion. It's not my thought or was not my thought when I wrote the letter that I would say in the order granting a new trial that I was granting the new trial for any particular reason. I doubt very much if the letter is material for the purpose of your showing, however, I believe I will receive it."

If it were assumed, as it is not herein, that exhibit 10 had any right to judicial recognition it could not be

said that it had the effect of avoiding the necessity of presenting the record of the evidence taken at the trial for review by this court on appeal.

The subject contained in the letter which plaintiff presents here is certain of the testimony of the plaintiff admitted at the trial which the defendant contended was incompetent. In the light of the partial bill of exceptions it becomes apparent that the question of whether or not this evidence was competent could not be determined by this court in the absence of other evidence which has not been presented for review.

In the light of what has been ascertained from the record and pointed out herein, it becomes necessary to proceed to consider certain questions which are primary, basic, and fundamental in the disposition of this appellate proceeding which have not been presented by the briefs in this case.

The first proposition in this area is that on appeal error will not be presumed but it must affirmatively appear from the record. See, Singer Mfg. Co. v. Doggett, 16 Neb. 609, 21 N. W. 468; Aetna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; Buck v. Zimmerman, 144 Neb. 719, 14 N. W. 2d 335; Clute v. Mach, 153 Neb. 772, 45 N. W. 2d 897; State ex rel. League of Municipalities v. Loup River Public Power Dist., 158 Neb. 160, 62 N. W. 2d 682; Combes v. Anderson, 164 Neb. 131, 81 N. W. 2d 899; Spidel Farm Supply, Inc. v. Line, 165 Neb. 664, 86 N. W. 2d 789; Hert v. City Beverage Co., 167 Neb. 557, 94 N. W. 2d 27. This is the general rule.

There is nothing in the decisions of this court the effect of which is to say that this general rule does not apply where the appeal is from any order involving the necessity for an examination of the evidence. Explicitly, in a case where a motion for new trial is sustained and the determination of the propriety of the order depends upon the examination of evidence the rule does apply. See, Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695,

35 N. W. 2d 772; Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579; Hert v. City Beverage Co., *supra.*

The all-embracing rule in a case where there is an appeal from an order granting a new trial, where no reason has been given therefor, is that the appellant is required to bring the record to the Supreme Court together with his assignments of error and submit the record for critical examination with a contention that there was no prejudicial error. See, Greenberg v. Fireman's Fund Ins. Co., *supra;* Bryant v. Greene, *supra;* Hert v. City Beverage Co., *supra.*

The exaction of the law that the record of the evidence must be presented when questions of fact are to be determined on appeal means that the entire record of the evidence shall be presented.

In Hazelet v. Holt County, 51 Neb. 724, 71 N. W. 719, it was said: "In the absence of a proper bill of exceptions, all assignments of error which require for their determination a reference to such a bill must be overruled." See, also, In re Estate of Abts, 122 Neb. 714, 241 N. W. 270; Plantz v. Peony Park, 129 Neb. 338, 261 N. W. 826; Wabel v. Ross, 153 Neb. 236, 44 N. W. 2d 312; National Fire Ins. Co. v. Evertson, 157 Neb. 540, 60 N. W. 2d 638; Palmer v. Capitol Life Ins. Co., 157 Neb. 760, 61 N. W. 2d 396; Pauley v. Scheer, 168 Neb. 343, 95 N. W. 2d 672; Peterson v. George, 168 Neb. 571, 96 N. W. 2d 627; Lange v. Kansas Hide & Wool Co., 168 Neb. 601, 97 N. W. 2d 246.

The conditions therefore which would prevent the necessity for a presentation of a record of the evidence would be where the motion was not dependent upon an examination of evidence, or a reason given by the court in the order sustaining the motion which would point to a valid conclusion that there was an absence of necessity for such an examination. Neither of the conditions appears in this case. As pointed out, a large number of the assignments of error in the motion for new trial are predicated upon matters the propriety of

which may be determined only upon what appears or does not appear in the evidence. Also no reason for the order sustaining the motion for new trial is stated therein.

In the light of these principles there is nothing before the Supreme Court upon which a conclusion may be reached that the district court erred in sustaining the motion for a new trial.

The order and judgment of the district court in sustaining the motion for new trial is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JOSEPH D. LAW, APPELLANT, V. RAY L. GILMORE, APPELLEE.
105 N. W. 2d 595

Filed November 4, 1960. No. 34748.

1. **Trial: Appeal and Error.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. ———: ———. 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. **Appeal and Error.** Errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party.
4. **New Trial: Appeal and Error.** When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial.
5. **Trial: Appeal and Error.** A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time.

APPEAL from the district court for Custer County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Miles N. Lee and *Tedd C. Huston,* for appellant.

A. Paul Johnson, for appellee.

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

SIMMONS, C. J.

This is an automobile accident case. Plaintiff sued for damages to his car. Defendant, denying liability, by cross-petition sued for damages to his car. The cause was tried to a jury. It was stipulated that the amount of the damage to plaintiff's car was $658.55, and the amount of damage to defendant's car was $507.76. The court submitted the issue of contributory and comparative negligence to the jury. The jury returned a verdict for the plaintiff for $458.55.

Judgment was rendered on the verdict. On defendant's motion for a new trial the judgment and verdict were set aside and a new trial was granted.

Plaintiff purportedly appeals under the rules stated in Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, and followed as recently as Bryant v. Greene, 166 Neb. 520, 89 N. W. 2d 579, applicable where, as here, the trial court gave no reasons for granting the new trial.

We confess some difficulty in determining from the briefs the prejudicial error which defendant contends exists in the record which justifies the decision of the trial court. It appears to resolve itself into three propositions: (1) The evidence was insufficient to submit the issue of defendant's negligence to the jury; (2) the evidence was insufficient to submit the issue of comparative negligence to the jury; and (3) evidence as to insurance was erroneously given prejudicial to the defendant.

The accident happened on a late December afternoon at the intersection of a state highway and a township road. The township road ran north and south. The state highway joined in a curved roadway running from west to north. The actual impact of the cars happened on the state highway just west of the point of the crotch of the "Y" formed by the intersection of the two roads. Plaintiff was going northeast on the curve. Defendant was going southwest at the entry of the curve. The point of impact occurred on the right half of the road or in plaintiff's lane of travel.

The evidence is in marked conflict on many matters. There is evidence, however, that would support a jury's finding that plaintiff was proceeding northeast around the curve on the left side lane, and that when he saw the defendant approaching he pulled to the right and was in his own lane of travel when the defendant ran into him.

There is evidence that fixes the defendant's speed at 65 or 70 miles per hour before the accident and the plaintiff's speed as from 35 miles per hour to a stop and a backing up started when the cars collided. There is also evidence that the defendant's car was 200 feet north of the point of impact when the plaintiff's car was 50 or 60 feet from it, and that plaintiff's car came to rest with its left rear wheel in defendant's lane of travel, coupled with evidence that plaintiff's car was pushed back into that position by the force of the impact.

Plaintiff's position here is that he is entitled to have the judgment against defendant sustained and that the trial court erred in setting it aside and granting a new trial. Defendant's position is that the court properly set aside the judgment against him and in favor of plaintiff.

There is a rule applicable here that where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on

the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Greenberg v. Fireman's Fund Ins. Co., *supra,* last followed in Gleason v. Poore, 167 Neb. 312, 92 N. W. 2d 705.

Defendant's principal argument here seems to be that the jury by reducing the stipulated amount of plaintiff's damage by approximately one-third thereby found, as a matter of law, that the plaintiff's negligence was "more than slight."

The trial court submitted to the jury the "amount of his recovery" if either party was entitled to recover from the other.

The court also submitted the issue of negligence and contributory negligence to the jury, and "* * * if you find that the plaintiff, Joseph D. Law, was guilty of slight negligence, and that the negligence of the defendant, Ray A. Gilmore, in comparison therewith was gross, then plaintiff would still be entitled to recover as to the allegations of his Petition, but in that event it will be your duty to deduct from said stipulated amount of damages such proportion thereof as you find the contributory negligence chargeable to the plaintiff bears to the entire negligence as shown by the evidence, and return a verdict for the balance only." And, likewise, "* * * if you find that the Cross-Petitioner, Ray A. Gilmore, was guilty of slight negligence, and that the negligence of the plaintiff, Joseph D. Law, in comparison therewith was gross, then the Cross-Petitioner would still be entitled to recover upon the allegations of his Cross-Petition, but in that event it will be your duty to deduct from said stipulated amount of damages such proportion thereof as you find the contributory negligence chargeable to said Cross-Petitioner bears to the entire negligence as shown by the evidence, and return a verdict for the balance only."

The giving of these instructions was not assigned as

error in the motion for a new trial. Error as to them is not claimed here by either party.

A similar situation existed in Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109, where we restated the rule that 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.

Clearly the instructions permitted the jury to do exactly what was done by it in this case.

Plaintiff in his direct examination testified that he thought the defendant telephoned the banker at Callaway about notifying the safety patrol; that the banker came and "the State Farm Insurance Agent" and "I could be wrong on that, about him being the State Farm agent * * *." This was a volunteer statement not in response to any question, no objection was made to it, nor was the trial court asked to instruct the jury about it or take other action. It is now assigned as error justifying the granting of the new trial.

Prejudice to defendant does not appear. The rule is that errors sufficient to cause the granting of a new trial must be errors prejudicial to the rights of the unsuccessful party. Greenberg v. Fireman's Fund Ins. Co., *supra*, last followed in Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672.

Plaintiff here relies on the rule of practice promulgated in Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726, 105 A. L. R. 1306.

The rule of practice adopted in the Fielding case does not hold that every reference to insurance in the trial of a cause is error, much less reversible error. See, also, Stephenson v. DeLuxe Parts Co., 133 Neb. 749, 277 N. W. 44; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349; Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130; Haight v. Nelson, 157 Neb. 341, 59 N. W. 2d 576, 42 A. L. R. 2d 1.

It is difficult to see error of the trial court when its attention was not called to the evidence now objected to, and where it was not asked to strike, admonish the jury, or otherwise rule in the matter.

Assuming error on the part of the trial court, the following rules are applicable here: When testimony is offered and admitted in evidence without objection being made thereto, error cannot be predicated thereon on appeal. This rule applies to the district court when reviewing its own proceedings on motion for a new trial. Vielehr v. Malone, 158 Neb. 436, 63 N. W. 2d 497.

A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315.

The other contentions of the parties have been reviewed. We find them to be without merit.

The judgment of the trial court is reversed and the cause remanded with directions to reinstate the judgment based on the jury's verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. JOHN A. KRIEGER ET AL., APPELLANTS, V. THE BOARD OF SUPERVISORS OF CLAY COUNTY, NEBRASKA, APPELLEE.

105 N. W. 2d 721

Filed November 4, 1960. No. 34816.

1. **Mandamus.** Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice.
2. ———. The proper practice in this state in a mandamus action is to issue the writ in the name of the state upon the relation of the party or parties claiming the relief sought.
3. ———. The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ

by motion supported by affidavit, whereupon the court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed.

4. ———. When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause.
5. ———. The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued and no other pleadings are permitted.
6. ———. If no answer is filed to an alternative writ then a peremptory writ must be allowed.
7. ———. Generally, when a hearing on an application is ordered and notice thereof given or an order to show cause has been issued and served and a return in either situation presents an issue or issues of fact, the court should not try such issue or issues at that stage of the proceedings but, in such case, issue a writ. However, such writ should be an alternative writ and issues should be made up thereon by the filing of an answer thereto and then tried on the issue or issues raised thereby.
8. ———. If no writ has been issued the case may be heard on the petition and response thereto when a hearing or order to show cause has been ordered under section 25-2160, R. R. S. 1943, and notice given thereof.
9. ———. The ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus.
10. ———. A writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce.
11. ———. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.

APPEAL from the district court for Clay County: NORRIS CHADDERDON, JUDGE. *Affirmed.*

John F. McCarthy, for appellants.

J. T. Massie, for appellee.

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

WENKE, J.

On August 4, 1958, John A. Krieger and Mary Krieger brought a mandamus action in the district court for Clay County in the name of the State of Nebraska upon the relation of themselves as relators. The purpose of the action is to require respondent, the Board of Supervisors of Clay County, to obey and carry out a judgment rendered by the district court for Clay County on June 14, 1949, in an action wherein relators were plaintiffs. This action was properly brought for, as stated in City of Crawford v. Darrow, 87 Neb. 494, 127 N. W. 891: "* * * the practice in this state has been to issue it (writ of mandamus) in the name of the state upon the relation of the party claiming the relief sought, * * *." See, also, State ex rel. Levy v. Spicer, 36 Neb. 469, 54 N. W. 849.

On September 15, 1959, the trial court ordered a hearing to be had on November 2, 1959, at 10 a.m., on relators' petition for mandamus and also ordered that notice thereof should be given to the respondent at least 10 days prior thereto. Such notice was personally served on every member of the Board of Supervisors of Clay County on October 1, 1959. Thereafter, by an agreement of the parties, which was approved by the trial court, the hearing set for November 2, 1959, was continued to November 5, 1959. On November 5, 1959, the relators asked leave to amend their petition. They were given 10 days in which to do so. They filed their amendment on November 16, 1959. Respondent was given 20 days in which to file an answer to the relators' petition, as amended. On December 4, 1959, respondent filed a motion seeking to require the relators to make their petition, in certain respects, more definite and certain. Further hearing was had before the district court on December 8, 1959. At that time respondent's

motion was overruled and it was given 7 days in which to file an answer to the relators' petition for mandamus. Relators' counsel excepted to this ruling, contending that under sections 25-2163 and 25-2164, R. R. S. 1943, they were entitled to a peremptory writ of mandamus because respondent had failed to answer. The court refused to grant the writ requested. Thereafter, on December 15, 1959, respondent filed an answer in the form of a general denial. Trial was had on January 6, 1960. After relators had rested respondent moved for a dismissal on the ground that relators had failed to prove the allegations of their petition. This motion the trial court sustained and thereupon dismissed relators' petition. Relators filed a motion for new trial and this appeal is from the overruling thereof.

Relators contend that the trial court abused its discretion in not issuing a peremptory writ of mandamus when respondent failed to answer, as required by statute. The answer to this contention, in view of the proceedings had, requires us to review our holdings on procedure in mandamus actions.

The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ by motion supported by affidavit, whereupon the court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed. See § 25-2160, R. R. S. 1943. When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause. See §§ 25-2158 and 25-2159, R. R. S. 1943. The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued and no other pleadings are permitted. See §§ 25-2162 and 25-2164, R. R. S. 1943. If no answer is filed to an alternative writ then a peremptory writ must be allowed.

§ 25-2163, R. R. S. 1943. Generally, when a hearing on an application is ordered and notice thereof given or an order to show cause has been issued and served and a return in either situation presents an issue or issues of fact, the court should not try such issue or issues at that stage of the proceedings but, in such case, issue a writ. However, such writ should be an alternative writ and issues should be made up thereon by the filing of an answer thereto and then tried on the issue or issues raised thereby. American Water-works Co. v. State ex rel. O'Connor, 31 Neb. 445, 48 N. W. 64; State ex rel. Gillilan v. Home Street Ry. Co., 43 Neb. 830, 62 N. W. 225. However, under our holdings, if no writ has been issued the case may be heard on the petition and response thereto when a hearing or order to show cause has been ordered under section 25-2160, R. R. S. 1943, and notice thereof given. State ex rel. Gillilan v. Home Street Ry. Co., *supra;* City of Crawford v. Darrow, *supra;* State ex rel. Kelley v. Ferguson, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. N. S. 266; Kurth v. City of Lincoln, 162 Neb. 643, 76 N. W. 2d 924. As stated in State ex rel. Moore v. Chicago, St. P., M. & O. R. R., 19 Neb. 476, 27 N. W. 434: "Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice. * * * Hence the ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus." See, also, § 25-2156, R. R. S. 1943.

In view of the foregoing we can see no abuse of discretion by the trial court when it heard the matter on its merits after it had been set down for hearing on relators' petition for a writ of mandamus and respondent had filed an answer raising issues of fact. The trial court could have properly issued an alternative writ of mandamus, and probably should have done so, but certainly not the peremptory writ of mandamus which relators demanded. However, we find no prejudicial

error, under the situation here disclosed, by reason of the trial court's failure to issue an alternative writ of mandamus. And, in this respect, we find no error in the trial court's extending the time in which respondents could file an answer. It was within the discretion of the trial court to do so and we find no abuse of such discretion. Relators' contentions in this respect are without merit.

On June 14, 1949, relators obtained the following judgment in the district court for Clay County against the Harvard township board of Clay County.

"IT IS THEREFORE ORDERED BY THE COURT that the defendant, (Harvard) Township Board, be and they are hereby directed to place a 48 inch half circle culvert in the Township road above described, which runs in an east-west direction on the north side of said Section 29, at a point approximately 160 feet west of the northwest corner of said NE¼ of said Section, and to fill the road ditches of said township road to the height of the surrounding land at a point approximately 150 feet East of said northwest corner of said NE¼ Section. *That upon said defendant complying with said order, said action shall stand dismissed with prejudice,* and the costs of this action are hereby assessed equally between plaintiffs, defendant, and intervenors." (Emphasis ours.)

The record discloses that shortly after this judgment was rendered the mandatory provisions thereof were fully complied with. Whether it was caused to be done by the Harvard township board or the Board of Supervisors of Clay County is not entirely clear although it was apparently caused to be done by the latter. John A. Krieger, one of the relators who owned the land involved in the original action, testified to the effect that dams or fills in the ditches on each side of the road were put in. John H. Schmer of Harvard, Nebraska, who was a member of the Board of Supervisors of Clay County in 1948, 1949, and 1950, testified to the effect

that he read the judgment rendered in favor of relators by the district court for Clay County on June 14, 1949, shortly after it was rendered and complied therewith by causing the culvert to be put in and caused dams or fills to be placed in the ditches on each side of the road, and that he put in the culvert and fills pursuant to and in accordance with the foregoing judgment.

The burden of proof was on relators to establish their right to mandamus. See 55 C. J. S., Mandamus, § 325b, p. 559.

"Mandamus is a civil remedy and is a legal as distinguished from an equitable proceeding, although issuance of the writ is largely controlled by equitable principles." State ex rel. School Dist. v. Board of Equalization, 166 Neb. 785, 90 N. W. 2d 421.

"A writ of mandamus is not a writ of right. Before a court is warranted in granting a peremptory writ it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce." State ex rel. School Dist. v. Board of Equalization, *supra.* See, also, State ex rel. Schoonover v. Crabill, 136 Neb. 819, 287 N. W. 669; Hess v. Taylor, 142 Neb. 184, 5 N. W. 2d 346; State ex rel. Evans v. Brown, 152 Neb. 612, 41 N. W. 2d 862.

We have often stated: "To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear." State ex rel. Long v. Barstler, 122 Neb. 167, 240 N. W. 273. See, also, State ex rel. Schoonover v. Crabill, *supra;* State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239; State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26; State ex rel. Bates v. Morgan, 154 Neb. 234, 47 N. W. 2d 512; Kurth v. City of Lincoln, *supra;* State ex rel. School Dist. v. Board of Equalization, *supra.*

When the provisions of the judgment rendered by the

district court for Clay County on June 14, 1949, had been fully complied with, as the record shows they were shortly after the judgment was rendered, the judgment, by its own terms, was no longer in force and effect for it had been satisfied. Therefore, the duty imposed by that judgment on the Harvard township board did not exist, as a matter of law, as against the Board of Supervisors of Clay County, at the time the writ of mandamus was applied for.

Sometime after June 14, 1949, Harold F. Smith and Forrest Pense made application for a change in procedure under the order of June 14, 1949, and on September 1, 1951, such change was authorized. On appeal to this court the order of September 1, 1951, was declared to be void and without force and effect because the judge who rendered it had neither jurisdiction nor power to do so. See Krieger v. Schroeder, 165 Neb. 657, 87 N. W. 2d 367. However, holding the order of September 1, 1951, to be without force and effect did not change the rights of the parties to the order of June 14, 1949, whatever they might be.

Sometime after June 14, 1949, the Board of Supervisors of Clay County took over the maintenance of the township road herein involved as part of a mail route. After they did so they graded it but apparently left the culvert intact and, after doing so, replaced the dams in the ditches on each side of the road. However, it appears that since that was done something has caused part of the dam in the north ditch to disappear. It is this dam or fill that the relators want replaced. If the relators are being irreparably damaged by reason of this condition injunctive relief is open to them or they may sue for damages or possibly both. That being true mandamus is not available to them. See § 25-2157, R. R. S. 1943.

What the Clay County Board of Supervisors should now do in regard to maintaining this road depends on the circumstances surrounding the situation at the pres-

ent time. In this respect we might mention that on August 9, 1956, the Board of Supervisors of Clay County was substituted as defendant for the Harvard township board in the original action, No. 7201, filed by the relators in the district court for Clay County and served with summons therein.[4] However, the record does not show that any further action has been had therein as far as the Board of Supervisors of Clay County is concerned. We think the rights of the parties, as they now exist, can be determined in that action as a matter of fact and, by reason thereof, the trial court was correct in denying the relief they herein sought. Costs herein are taxed to the relators.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

FLORENCE L. HUNGERFORD, ADMINISTRATRIX OF THE ESTATE OF CLEO HUNGERFORD, DECEASED, APPELLANT, V. ROBERT A. KNUDSEN, APPELLEE.
105 N. W. 2d 568

Filed November 4, 1960. No. 34821.

1. Trial: Appeal and Error. Where a motion for a directed verdict was made at the close of plaintiff's evidence and sustained by the trial court, the ruling of the trial court thereon cannot be reviewed by this court in the absence of a motion for a new trial assigning such error and a ruling thereon secured in the trial court.
2. ———: ———. Where it is sought to review the judgment of the district court in a law action, no required motion for a new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense which support the judgment, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had.

APPEAL from the district court for Dakota County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Leamer & Graham, for appellant.

Mark J. Ryan, for appellee.

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

CARTER, J.

Cleo Hungerford commenced this action against the defendant to recover damages for injuries received while riding as a guest in an automobile owned and operated by the defendant. Issues were joined and a trial had. At the close of the plaintiff's evidence the trial court directed a verdict for the defendant. The plaintiff has appealed. The record shows that Cleo Hungerford died on October 11, 1959, and the action was revived in the name of Florence Hungerford, administratrix of the estate of Cleo Hungerford, deceased.

The plaintiff failed to file a motion for a new trial. It is the contention of the defendant that the filing of a motion for a new trial is essential to a review of the errors assigned on appeal in the instant case.

The mode and manner of appeal is statutory, and a litigant who complies with the requirements of the applicable statute is entitled to a review of his case to the extent of the scope provided by law. Larson v. Wegner, 120 Neb. 449, 233 N. W. 253; Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120.

The Legislature in 1947 amended the statute governing appeals to this court. Laws 1947, c. 85, § 1, p. 262. At the time the foregoing sections of the statute became effective it was a part of the procedure of this state that if a motion for a directed verdict was made during the trial of the cause, the ruling of the court thereon could not be reviewed by this court unless it was, by the party aggrieved by it, assigned as error in a motion for a new trial, and a ruling thereon secured in the trial court. Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533. Except to the extent that the procedure has been changed by the legislative act in 1947, the foregoing rule is in force in this state.

Section 25-1315.02, R. R. S. 1943, as amended by the 1947 act, provides that whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Thereafter, and within the statutory time therein stated, the party who has moved for the directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict. Section 25-1315.03, R. R. S. 1943, as amended by the 1947 act, provides that an order entering judgment, as provided by section 25-1315.02, R. R. S. 1943, or granting or denying a new trial, is an appealable order. In other words, a motion for a new trial is not always essential to review on appeal under the procedure specified by the 1947 amendment. This was determined in Krepcik v. Interstate Transit Lines, *supra,* and the reasons therefore are explicitly stated therein. We adhere to the reasoning of that case.

In the instant case the motion for a directed verdict was made at the close of plaintiff's case. Since the 1947 amendment applies only in cases where a motion for a directed verdict is made at the close of all the evidence and is denied or not granted for any reason, the 1947 amendment is not applicable to the situation before us. Consequently, the rule applicable where a motion for a directed verdict is made at the close of plaintiff's evidence is that the ruling of the trial court thereon can not be reviewed by this court unless it was, by the party aggrieved by it, assigned as error in a motion for a new trial and a ruling thereon secured in the trial court.

When it is sought to review the judgment of the district court in a law action, no required motion for a

new trial having been filed, this court will examine the record to ascertain if the pleadings state a cause of action or defense which support the judgment, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had. Shipley v. McNeel, 149 Neb. 790, 32 N. W. 2d 639; In re Application of Rozgall, 147 Neb. 260, 23 N. W. 2d 85. Since the answer of the defendant states a defense to the action, the judgment of the district court must be affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

MOLLIE KRAMER, APPELLANT AND CROSS-APPELLEE, V. PETER KRAMER, JR., APPELLEE AND CROSS-APPELLANT.
105 N. W. 2d 741

Filed November 4, 1960. No. 34828.

1. **Divorce.** Where the evidence in a divorce suit sustains a finding of cruelty on the part of the husband toward the wife, and is corroborated as required by law, the action of the district court in granting a divorce to the wife is proper and ordinarily will not be interfered with by this court on appeal.
2. ———. In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired and the contributions each has made thereto, and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just.

APPEAL from the district court for Scotts Bluff County: RICHARD N. VAN STEENBERG, JUDGE. *Affirmed.*

Lyman & Winner, for appellant.

Wright & Simmons, for appellee.

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

CARTER, J.

Plaintiff, Mollie Kramer, brought suit for divorce against the defendant, Peter Kramer, Jr., on the ground of cruelty. Defendant denied generally and cross-petitioned for a divorce on the ground of cruelty. The trial court granted a divorce to the plaintiff and awarded alimony to her. The plaintiff contends the alimony granted is inadequate under the evidence. The defendant asserts that the divorce should have been granted to him and that the amount of the alimony granted is excessive.

Plaintiff and defendant were married on February 1, 1927. Five children were born to the marriage, all of whom have reached their majority. The plaintiff was 52 and the defendant 59 years of age at the time this suit was commenced. There is evidence in the record, adequately corroborated, of cruelty on the part of the defendant toward the plaintiff. The decree of divorce is sustained by the evidence which we do not deem necessary to recite since the major issue raised by the appeal and cross-appeal is the correctness of the award of alimony.

The evidence shows that the parties worked hard for several years after their marriage and accumulated very little property until the early 1940's. The parties became the owners of three 80-acre tracts of land in Scotts Bluff County which are particularly described in the pleadings. The first 80-acre tract was acquired in 1948 at a cost of $22,000. It is referred to in the record as the Gering farm. Defendant gave its value as $35,000 to $38,000. A real estate agent fixed its value at $28,000. It is subject to a mortgage lien of $2,676.01.

The other two 80-acre tracts were purchased in 1953 and 1957 for $22,000 and $17,500 respectively, and were subject to mortgage liens in the amounts of $4,950 and $8,100. The defendant fixed the value of the two 80-acre tracts at $40,000. The real estate agent fixed their value at $46,000. These two 80-acre tracts adjoin and are referred to as the Scottsbluff farm. The value of the trucks, tractors, and farm machinery was appraised at $10,057, including a 1955 Buick automobile valued at $700. The value of feed on hand was appraised at $453.44. The value of cattle on feed was appraised at $13,935. The value of crops raised and not sold was fixed at $2,505, exclusive of the bean crop. Household goods were estimated to have a $300 to $500 value. There is evidence that the parties had commercial fertilizer valued at $979.40. They also possessed checks worth $88.34, $1,359.68, $358.34, and two for $82 each. They also had two tractor tires and a tube valued at $264 and 9 shares of co-op stock the value of which was not shown. The defendant testified that he had an indebtedness of $5,000 to a local bank, $750 to an implement company, and $935.85 for income taxes due and unpaid. From this it is evident that the value of all the property of the parties varied from $86,500 to $92,500, approximately, depending on the evidence accepted as credible.

It is the contention of the plaintiff that she is entitled to receive 50 per cent of all the property as alimony since it was all accumulated by the joint efforts of the parties and the title to the real estate was held by them in joint tenancy.

The trial court awarded the 80-acre Gering farm to the plaintiff subject to the mortgage lien thereon, and the Scottsbluff farm to the defendant subject to the mortgage liens thereon. The plaintiff was awarded the household furniture, the family car, and $10,000 payable $1,000 forthwith and $1,500 annually until paid. The costs were taxed to the defendant, including an

attorney's fee of $1,000. All other property was awarded the defendant subject to any indebtedness against it. The value of the property awarded the plaintiff is $36,323.99. In arriving at this figure the household goods are valued at the $300 minimum testified to, and the Gering farm is valued at $28,000 rather than the $35,000 to $38,000 value testified to by the defendant. The $1,000 allowed as an attorney's fee is not included in the value of plaintiff's award.

The rule applicable in fixing the amount of alimony to be allowed in cases of this kind is stated in Malone v. Malone, 163 Neb. 517, 80 N. W. 2d 294, as follows: "In determining the question of alimony or division of property as between the parties the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage; their earning ability; the duration of and the conduct of each during the marriage; their station in life, including the social standing, comforts, and luxuries of life which the wife would probably have enjoyed; the circumstances and necessities of each; their health and physical condition; and their financial circumstances as shown by the property they owned at the time of the divorce, its value at that time, its income-producing capacity, if any, whether accumulated or acquired before or after the marriage, the manner in which it was acquired, and the contributions each has made thereto and, from all the relevant facts and circumstances relating thereto, determine the rights of the parties and make an award that is equitable and just."

We point out that this rule provides no mathematical formula by which an alimony award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case. In the instant case the defendant was given more than one-half of the property but he is charged with the payment of most of the indebtedness and with the payment of $10,000 to the

plaintiff. On the other hand, the property awarded the plaintiff is free from indebtedness except the mortgage lien on the Gering farm in the amount of $2,676.01. Defendant is also charged with the payment of the costs, including attorney's fee of $1,000. We are of the opinion that the decree of the trial court entered on February 25, 1960, is fair and equitable under the evidence in the record before us.

The decree as entered on February 25, 1960, is affirmed. This means that plaintiff is entitled to the income from the Gering farm after that date. On the other hand, the amount of temporary alimony payments made after such date shall be credited as payments on the $10,000 award to the plaintiff.

AFFIRMED.

ARTHUR C. LAUGHREY, APPELLEE, V. VIOLA H. LAUGHREY, APPELLANT.
105 N. W. 2d 576

Filed November 4, 1960. No. 34841.

1. Divorce. A decree of divorce may not be granted on the uncorroborated declarations, confessions, or admissions of the parties, and in all cases corroborative evidence of the facts alleged to constitute a ground for divorce is required.
2. ———. The corroboration relied upon in a suit for a divorce must in itself be competent evidence of the acts and conduct asserted as a ground for divorce.

APPEAL from the district court for Madison County: LYLE E, JACKSON, JUDGE. *Reversed and remanded with directions.*

Bernard Ptak, for appellant.

Hutton & Hutton, for appellee.

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

CARTER, J.

Plaintiff, Arthur C. Laughrey, brought suit for divorce against the defendant, Viola H. Laughrey, on the ground of cruelty. Defendant denied the allegations of the petition and cross-petitioned for a divorce from bed and board. The trial court granted a divorce to the plaintiff and dismissed defendant's cross-petition. The defendant has appealed.

Plaintiff and defendant were married on July 13, 1956. At the time of the trial on March 4, 1960, plaintiff was 74 and defendant 71 years of age. Plaintiff testified that the marital difficulties of the parties commenced about a year after the marriage. He stated that the defendant refused to prepare meals and that he had to prepare his own. He stated that she insisted on keeping the temperature of the home at 70 degrees and this was too cold for him. He stated that because of the chilliness of the home when she was present, he lived in the utility room which was much warmer. Plaintiff stated also that defendant kept the volume on the television set so high it interfered with his sleep. He stated that this caused him great mental anguish amounting to extreme cruelty toward him.

The only evidence of corroboration was provided by Gilbert Lieswald. He testified that he had known the plaintiff about 8 years and had visited at plaintiff's home on four occasions. On three of the occasions defendant was not home and he found the home to be warm and comfortable. On the occasion when defendant was home he testified that the house was "kind of chilly" and that plaintiff was reading a paper in the utility room where it was warm and comfortable. This is all of the corroborative evidence that appears in the record.

A decree of divorce may not be granted in this state solely on the declarations, confessions, or admissions of the parties, and in all cases other satisfactory evidence of the facts alleged in the petition is required. § 42-335,

R. R. S. 1943. The corroboration must in itself be competent evidence of the acts and conduct asserted as a ground for divorce. Schwarting v. Schwarting, 158 Neb. 99, 62 N. W. 2d 315. The corroborative evidence in the instant case does not support the allegations of cruelty. There is no evidence that the chilly house on the one occasion testified to caused plaintiff any anguish or concern whatever. It is not corroborative of the charge of cruelty.

It is evident that the parties did not get along well after the first year of their marriage. But mere incompatibility, standing alone, is not a ground for divorce in this state. Smith v. Smith, 160 Neb. 120, 69 N. W. 2d 321. Extreme cruelty consists of acts or omissions of such a character as to destroy the peace of mind or impair the bodily health of the injured party, or to be such as to destroy the ends and objects of matrimony. Peterson v. Peterson, 153 Neb. 727, 46 N. W. 2d 126. There is no corroborative evidence to sustain such a conclusion in this case. The following language from Brown v. Brown, 130 Neb. 487, 265 N. W. 556, is particularly applicable: "It is not for this court to attempt to do what is best for the parties. The relief which should be granted is that provided by the statute upon the establishment of misconduct on the part of the defendant amounting to extreme cruelty. 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. While it is apparent that the results of this marriage have at times been most unhappy, that is no sufficient cause named in the statutes for granting a decree of divorce."

The evidence is insufficient to sustain the granting of a divorce to the plaintiff. The decree of the district court is reversed and the cause is remanded with directions to the district court to dismiss the case and to tax the costs in that court to the plaintiff, including

the allowance of attorney's fees there made. The costs of this appeal are taxed to the plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

JAMES KNAGGS, APPELLEE, V. CITY OF LEXINGTON, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.
105 N. W. 2d 727

Filed November 4, 1960. No. 34859.

1. **Workmen's Compensation: Appeal and Error.** On appeal to this court in a workmen's compensation case the cause is considered de novo upon the record before us.
2. ———: ———. However, where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others.
3. **Workmen's Compensation.** A claimant must prove, in order to recover under the Nebraska Workmen's Compensation Act, 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 other words, there must be a causal connection between an accident suffered by the claimant and the cause of his disability.
5. ———. In the determination of the question of causation, the disability or death for which compensation is claimed may just as legitimately be attributed to the accidental injury where undeveloped and latent physical conditions are set in motion and accelerated so as to produce such final result as where the same result follows directly from visible violence done to the physical structure of the body.
6. ———. The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of the workmen's compensation act.
7. ———. Where an employee, while engaged in the work of his employment, aggravates or accelerates the condition of diseased blood vessels, thereby causing death or disability, it may constitute an injury of a character such as to come within the meaning of the workmen's compensation act.

8. ———. An accident, within the meaning of the statute, shall 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 injury.
9. ———. Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by our statute.
10. ———. Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident that becomes such a part of the proximate cause of such disability as to be compensable under the provisions of the workmen's compensation act.
11. ———. In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation act, applies to the law and not to the evidence offered to support a claim by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking.
12. ———. For workmen's compensation purposes "total disability" does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

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

Stewart & Stewart, for appellant.

Smith Brothers, for appellee.

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

WENKE, J.

This is an appeal from the district court for Dawson County. It involves a claim arising under the Nebraska Workmen's Compensation Act which was originally filed by James Knaggs in the Nebraska Workmen's Com-

pensation Court. The district court, on appeal by the City of Lexington, found that James Knaggs, claimant, was totally and permanently disabled by reason of a heart attack caused by an accident arising out of and in the course of his employment with the City of Lexington and, because thereof, ordered the city to pay claimant the sum of $33.84 per week for 300 weeks and thereafter the sum of $22.84 per week for the remainder of his life. It also ordered the city to pay certain medical, hospital, drug, and nursing bills, together with other expenses had by claimant in connection with his condition following the accident, all of which amounted to the sum of $1,967.02.

The City of Lexington filed a motion for new trial. This motion the trial court overruled except as to the items of hospital and medical expenses. As to these it granted a new trial for the purpose of redetermining the amount thereof. From this order the city took an appeal to this court. On appeal to this court in a workmen's compensation case the cause is considered de novo upon the record before us. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Gotfrey v. Sakurada, 169 Neb. 879, 101 N. W. 2d 470. However, "* * * where the evidence is conflicting and cannot be reconciled, this court will consider the fact that the district court that tried the cause de novo and observed the demeanor of witnesses gave credence to the testimony of some rather than to the contradictory testimony of others." Dietz v. State, 157 Neb. 324, 59 N. W. 2d 587.

Appellant states the question involved in this appeal as: "Did the appellee suffer an injury to his person which was the proximate result of an accident within the meaning of the Nebraska Workmen's Compensation Act?" In this respect appellee has the burden of proof. See, Anderson v. Cowger, *supra;* Chiles v. Cudahy Packing Co., 158 Neb. 713, 64 N. W. 2d 459; Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394. He must prove, in order to recover, "* * * that an acci-

dent occurred arising out of and in the course of employment which accident produced injury that resulted in disability or death." Anderson v. Cowger, *supra.* See, also, Jones v. Yankee Hill Brick Manuf. Co., *supra;* Gotfrey v. Sakurada, *supra.* And, as we have often said in this respect, a compensation award cannot be based on possibilities or probabilities. See, Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Chiles v. Cudahy Packing Co., *supra;* Anderson v. Cowger, *supra;* Gotfrey v. Sakurada, *supra.*

There must be a causal connection between an accident suffered by the claimant and the cause of his disability. Anderson v. Cowger, *supra;* Pixa v. Grainger Bros. Co., *supra;* McCauley v. Harris, 164 Neb. 216, 82 N. W. 2d 30. In Schirmer v. Cedar County Farmers Telephone Co., 139 Neb. 182, 296 N. W. 875, we discussed the latter, as it relates to the situation here presented, in the following language: " 'In the determination of the question of causation, the disability or death for which compensation is claimed may just as legitimately be attributed to the accidental injury where undeveloped and latent physical conditions are set in motion and accelerated so as to produce such final result as where the same result follows directly from visible violence done to the physical structure of the body.' 71 C. J. 605. 'The acceleration, aggravation, or lighting up of a preexisting disease by an injury may constitute disability of a character such as to come within the meaning of workmen's compensation acts.' 71 C. J. 608. 'Where an employee, while engaged in the work of his employment, aggravates or accelerates the condition of diseased blood vessels, thereby causing death or disability, it may constitute an injury of a character such as to come within the meaning of workmen's compensation acts.' 71 C. J. 610. 'The acceleration or aggravation of an employee's heart condition thereby causing death or other disability may constitute physical harm of such a character as to come within the mean-

ing of workmen's compensation acts.' 71 C. J. 611."

"An accident, within the meaning of the statute, shall 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 injury. § 48-151, R. R. S. 1943; Ruderman v. Foreman Bros., *supra* (157 Neb. 605, 60 N. W. 2d 658); Muff v. Brainard, 150 Neb. 650, 35 N. W. 2d 597. Symptoms of pain and anguish, such as weakness, pallor, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by our statute. Beam v. Goodyear Tire & Rubber Co., *supra* (152 Neb. 663, 42 N. W. 2d 293); Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492." Anderson v. Cowger, *supra.* See, also, Pittenger v. Safeway Stores, Inc., 166 Neb. 858, 91 N. W. 2d 31; Jones v. Yankee Hill Brick Manuf. Co., *supra;* Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522.

"Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident that becomes such a part of the proximate cause of such disability as to be compensable under the provisions of the workmen's compensation act." Gilkeson v. Northern Gas Engineering Co., 127 Neb. 124, 254 N. W. 714. See, also, Rose v. City of Fairmont, 140 Neb. 550, 300 N. W. 574; Brown v. City of Omaha, 141 Neb. 587, 4 N. W. 2d 564, Anderson v. Cowger, *supra;* Jones v. Yankee Hill Brick Manuf. Co. *supra;* Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379; Eschenbrenner v. Employers Mutual Casualty Co., 165 Neb. 32, 84 N. W. 2d 169.

"In considering the sufficiency of the proof it should be remembered the rule of liberal construction, as it relates to the workmen's compensation law, applies to the law and not to the evidence offered to support a claim

by virtue of the law. The rule does not dispense with the necessity that claimant prove his right to compensation; that is, it does not permit a court to award compensation when the required proof is lacking." Anderson v. Cowger, *supra.* See, also, Gotfrey v. Sakurada, *supra;* Chiles v. Cudahy Packing Co., *supra;* Hamilton v. Heubner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1.

"For workmen's compensation purposes 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or a work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do." Anderson v. Cowger, *supra.*

In the light of these principles we set forth the facts adduced. There is little dispute in the evidence except that of the doctors as their testimony relates to the cause of appellee's acute coronary occlusion, which condition resulted in his being totally and permanently disabled insofar as his ability to perform hard manual labor is concerned.

Appellee was employed by appellant in 1951 to work in its community hospital, known as Lexington Community Hospital, as a general custodial and utility employee. His duties consisted of maintaining the entire hospital property, both inside and outside. His work included the care of the oxygen equipment in the hospital, which required him to move oxygen tanks weighing from 300 to 400 pounds; the lifting of patients in and out of bed; the taking of supplies to every floor of the hospital; the care of the boiler room; the painting and carpenter work; the scooping of snow; the mowing of the lawn; the trimming of trees; and the doing of everything that would come up in the hospital involving hard or heavy manual labor. He worked at his job 6 days a week, sometimes on Sundays, and occasionally at night.

On Saturday, February 1, 1958, appellee went to work at 8 a.m. He was then about 49½ to 50 years of

age, 5 feet 8 inches in height, weighed about 170 pounds and in apparent good health. He testified he was feeling real good when he went to work. He performed the usual routine duties of his job that morning when, about 10:30 while he was in the dining room on a coffee break, he was called by Mrs. Olmsted, a cook in the hospital, to fix a clogged disposal unit. Fixing a clogged disposal unit was one of the duties of his job as this condition apparently occurred quite frequently. Appellee got a large plunger for the purpose of fixing the clogged disposal unit. He then stepped on a chair and up onto the apron of the sink in which the disposal unit was located. Appellee placed his feet on the metal edge of the sink and began using the plunger while another employee of the hospital sought to flush it with water by means of an automatic flusher. After plunging it a few times appellee's feet slipped out from under him when, as he pushed the plunger down, it threw him and he fell backwards. When he fell either the lower part of his back or his buttocks hit the metal portion of the edge of the sink very hard. After falling appellee sat on the edge of the sink a short time, putting his feet on the chair which he had used to get up onto the sink. He testified the fall resulted in his having a peculiar, shook-up, trembling feeling; and that he didn't feel right. After sitting for a short time appellee got back up on the sink and finished the job, advising Mrs. Olmsted of that fact after he had done so. The job of fixing the clogged disposal unit took some 5 or 6 minutes.

Appellee then went into the laundry room, which is next to the room in which the disposal unit was located, to paint a strip of floor some 4 feet wide along the east side thereof. Located in this area, and against the east wall were two electrical units, one a refrigerator and the other a deep freeze. Appellee had previously moved the refrigerator, which weighed some 500 pounds, but had never had occasion to move the deep freeze which

had been installed in the laundry room some 2 or 3 months before the accident. The deep freeze was about 12 to 15 feet long, 3 to 4 feet deep, and 3½ to 4 feet high. It weighed about 1,500 pounds and, when placed in the laundry room, it was placed there by 3 men who used rollers for the purpose of moving it into the laundry room of the hospital from a truck that brought it to the hospital. Appellee had to move these two pieces out from the east wall of the laundry room some 4 feet in order to paint the floor along the east wall thereof. He had, the day before, moved the deep freeze out from the wall with a claw bar far enough so he could get behind it.

After appellee put away the plunger, the laundry room being used by him as his workshop, he proceeded to move the deep freeze, which was full of groceries. He did so by pushing it with his feet, getting behind it with his back to the wall. He pushed it out by pushing it first at one end and then at the other until finally he got it out from the wall the desired distance of about 4 feet. Appellee testified it took every bit of effort he could give to move the deep freeze and that he pushed it as hard as he could. Appellee then moved the refrigerator, which was full of groceries, out far enough to paint a 4-foot strip. He did so by pushing and pulling it. Moving the deep freeze and refrigerator took about 20 to 25 minutes. During all of the time appellee was doing this work he continued to have this peculiar, shook-up, trembling feeling that came over him after the fall he had taken while fixing the clogged disposal unit.

After he moved out the two pieces of equipment appellee got a pan of paint and a roller and started to paint a 4-foot strip along the east side of the laundry room. As he started using the roller for this purpose the pain he had got worse. He hurried with the painting to get through but the pain kept increasing. Finally, after 20 to 25 minutes, he finished the painting job but

he was not able to put away the tools he was using. He just put them to one side. When he finished the painting, pain was all over his body and he had a trembling feeling. He walked down to the laboratory in the hospital, which was on the same floor but some 200 feet from the laundry room. The pain kept getting worse and he couldn't sit down. A doctor was called. The doctor put him in a wheel chair and took him to a room where he was given a shot.

Appellee described his condition, before he was given the shot, as though he was going to pieces from the pain which was all over his body. Witnesses, who saw him in the wheel chair, testified appellee looked pale and appeared in extreme and acute pain; and that he had his hands clenched and was moaning and groaning. Appellee was kept in the hospital because of this condition until March 30, 1958, and there is no question but that, in view of our holding as hereinbefore set forth, he is now totally and permanently disabled because thereof. Appellee was only trained for and had always engaged in the performance of hard and heavy manual labor as a means of earning a livelihood. The evidence adduced shows, because of his present physical condition due to the coronary occlusion he suffered, that he can no longer engage in the performance thereof.

Appellee testified he had no knowledge of ever having experienced a heart attack prior to February 1, 1958, nor had he ever suffered any arm or chest pains. Dr. E. A. Watson of Lexington, who testified appellee was a patient of his, said he never observed appellee having any symptoms of heart disease nor had he ever made any complaints to him which could relate thereto, such as pain in the arms, shoulders, chest, or being short of breath.

Dr. E. A. Watson attended appellee during the course of his illness resulting from the acute coronary infarct or occlusion he suffered on February 1, 1958. He testified on direct examination that: "I think that the

trauma associated with the fall, the temporary shock pattern which developed following the fall, the extreme exertion or moving the heavy equipment shortly thereafter at the hospital, all played a very prominent picture in causing the picture of coronary thrombosis or coronary infarct to develop at that time." He was then asked on cross-examination: "Now Doctor, I think your testimony has been that you believe his heart attack came on as a result of the combination of this trauma to his buttocks and the extreme exertion on moving the equipment - - is that your conclusion?" To this question he responded: "It is." He was further asked on cross-examination: "And so when you say that in your opinion, the combination of the falling on the buttocks and the extreme exertion, that's your opinion, that's your guess at it, isn't it, Doctor? You can't say definitely, unless there was an operation or unless you could examine the organs?" To this he responded: "If the combination, as you have described it, hadn't happened, Mr. Knaggs wouldn't have had a coronary on the 1st of February, 1958." He then was asked on redirect: "And as I understand your testimony, why, you are of the opinion that this man's heart attack arose from a combination of the physical and emotional shock and the fall and the heavy exertion, is that correct?" To this he responded: "That's correct."

Dr. Arthur M. Greene of Omaha, who specializes in internal medicine, examined appellee at his office in Omaha on August 4, 1959. He took a complete history of the appellee at that time, made a physical examination, took an electrocardiogram and chest X-rays, and did certain laboratory work. The laboratory work consisted of determining the sedimentation rate, infarction volume, hemoglobin, white blood count, differential blood count, and urinalysis. From these he found evidence of heart disease but no evidence of infections or other diseases leading to heart disease, that is, his

examination revealed an acute, severe antero-septal myocardial infarction. Dr. Greene stated: "The cause of the hardening of the arteries is arteriosclerosis; the heart attack occurs when the vessel is suddenly blocked, either by hemorrhage into an arteriosclerotic plaque or by a sudden blood clot into in (an) artery or by rupture of an artery in the coronary system of the heart." Dr. Greene discussed the causes leading up to appellee's condition and thereafter went on to state that: "My opinion is that this gentleman, although previously having had coronary sclerosis, suffered an acute heart attack because of unusual stress and strain of the morning's activities." On cross-examination he was asked: "Doctor, you talked about the unusual stress and strain from his morning's activities. Which particular activties were you thinking of?" To this question he responded: "I was thinking mainly of a sudden fall and a jolt, landing on his buttocks, and then using all of his strength to move a heavy refrigerator (deep freeze)."

It is true that three other well-qualified doctors were of the opposite opinion. In this situation we consider as applicable the rule hereinbefore stated when evidence is conflicting and cannot be reconciled. In this respect we mention the circumstance of appellee moving the fully-loaded deep freeze as not being exertion of a character as would ordinarily be incident to his employment. The evidence shows it required extreme overexertion. We have come to the conclusion, as did the district court, that appellee suffered a compensable injury due to an accident arising out of and in the course of his employment. Admittedly appellee was, on February 1, 1958, drawing wages of $50.77 per week and there is no question raised about the weekly payments allowed appellee being correct in view thereof.

Appellant and appellee have both cited Nebraska cases contending they exemplify factual situations comparable to the one before us and that the holdings therein should, in effect, be controlling here. Each case arising

under the Nebraska Workmen's Compensation Act must stand on its own facts and the laws of this state relating thereto, together with our opinions construing such laws. And, as to the cases cited from other jurisdictions, we said in Eschenbrenner v. Employers Mutual Casualty Co., *supra:* "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." And, we might add, the opinions of various states also differ widely in construing identical provisions.

The trial court, as hereinbefore stated, granted appellant a new trial for determining the proper amount to be allowed for medical and hospital expenses incurred because of the injury suffered by appellee. It appears that although appellee was hospitalized from February 1 to March 30, 1958, because of the acute coronary occlusion which he suffered on February 1, 1958, he was also treated for duodenal ulcers and probably gall bladder condition while confined therein. In fact, appellee consented to remit $60 from the amount allowed for medical and hospital services, together with half of the total of $54 allowed as expenses for two trips to Omaha, because they related to his being treated for these diseases. The record fully supports the trial court's order in this respect and is affirmed. Costs of this appeal are taxed to appellant.

In view of what we have said the judgment of the trial court is in all respects affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

CARTER, J., dissenting.

I cannot agree that causal connection between the accident and the coronary occlusion was established. Three physicians called by the defendant testified to a complete absence of causal connection. They testified that a coronary occlusion is a result of arterial disease of long duration. At a certain stage of its progress a coronary

occlusion is inevitable and is unaffected by trauma unless the injury is directly in the area of the diseased portion of the anatomy. The decision in this case, however, rests on the evidence of two doctors called by the plaintiff.

Dr. Arthur M. Greene testified that a coronary occlusion could result from an injury to the area of the heart or from extreme exertion. It was his opinion that the plaintiff in falling on his buttocks and the exertion of pushing the deep freeze provided a pattern that precipitated the coronary attack. He knew of no instance where such a fall precipitated a coronary attack. He could not say when the heart attack occurred nor could he point to any event of the morning that caused plaintiff's attack. He stated that it was conceivable that a coronary attack might result from the jar of the fall but that he did not know if it could. On this point he admitted that he was in the realm of possibility only.

Dr. E. A. Watson testified that he could not say that any one thing caused the coronary attack and that it was the exertion resulting from everything that happened that induced the attack. He stated that the only sure way of determining the cause of a coronary attack was by autopsy after death. In discussing the relation of overexertion to the coronary attack he said that it was theorizing on his part but that he felt that the whole sequence of events was a pattern and if the pattern hadn't occurred, plaintiff would not have suffered a coronary attack on the day he did. He testified that he could point to no single event that induced the coronary attack.

There is no evidence in this record that the fall on the buttocks alone produced, activated, or accelerated the coronary attack. There is evidence in the record that it did not and could not have produced, activated, or accelerated the attack. In my opinion the evidence is clearly insufficient to establish by a preponderance of the evidence that the fall caused, activated, or accel-

erated the coronary attack. I submit that it takes more than proximity in time to establish causal connection between an accident such as we have here and a coronary attack.

This court on several occasions has held that the burden of establishing that an accident contributed directly to the death of an employee or to the activation or acceleration of a disease is not met by mere guess, surmise, conjecture, speculation, or possibility. Nelson v. Frenchman-Cambridge Irr. Dist., 168 Neb. 37, 95 N. W. 2d 201; Ruderman v. Forman Bros., 157 Neb. 605, 60 N. W. 2d 658; Pixa v. Grainger Bros. Co., 143 Neb. 922, 12 N. W. 2d 74; Rose v. City of Fairmont, 140 Neb. 550, 300 N. W. 574.

CLARENCE R. OTTEMAN, APPELLEE, V. THE INTERSTATE FIRE AND CASUALTY COMPANY, INC., A CORPORATION, APPELLANT.
105 N. W. 2d 583

Filed November 4, 1960. No. 34925.

1. **Trial.** A final order within the meaning of section 25-1902, R. R. S. 1943, is one which determines the action and prevents a judgment; one which affects a substantial right in a special proceeding; or one which is made on a summary application in an action after judgment.
2. **Trial: Appeal and Error.** An exception to the general rule that only final orders are appealable appears in section 25-1315.03, R. R. S. 1943, wherein it is provided that an order entering judgment as provided in section 25-1315.02, R. R. S. 1943, or granting or denying a new trial, is an appealable order.
3. **Judgments.** The summary judgment process as defined by statute is a special proceeding.
4. **Trial.** An order is final only when no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory.
5. ———. An order sustaining a motion for new trial is in its essence interlocutory.
6. **Trial: Appeal and Error.** The interlocutory character of an order sustaining a motion for new trial is not destroyed by the fact that by the terms of section 25-1315.03, R. R. S. 1943, an appeal may be taken therefrom.

7. **Trial.** A trial is the examination before a competent tribunal, according to law, of facts or law put in issue in a cause, for the purpose of determining such issue.
8. **Trial: Judgments.** The process prescribed by the summary judgment act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial.
9. **New Trial.** A new trial does not involve an original examination of issues, but only re-examination.
10. **Courts: Judgments.** A court of general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made.

APPEAL from the district court for Dodge County: RUSSELL A. ROBINSON, JUDGE. *On motion of appellee to dismiss appeal. Motion to dismiss appeal sustained.*

William G. Line, for appellant.

Spear, Lamme & Simmons, for appellee.

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

YEAGER, J.

This is an action at law wherein Clarence R. Otteman is plaintiff and appellee and The Interstate Fire and Casualty Company, Inc., a corporation, is defendant and appellant. The action was commenced in the district court for Dodge County, Nebraska. In the action a petition was filed and in due course an answer was filed as was also a reply. For reasons which will become apparent necessity does not arise to set forth the character of the pleaded cause of action or the defense thereto.

After the issues were made up each party submitted to the other interrogatories. Answers were in due course made. Thereafter the defendant made request for admissions. There was a due response by the plaintiff to this request.

Following these steps the defendant filed a motion for a summary judgment. The motion for summary

judgment was sustained on July 7, 1960, and by judgment of the district court the petition of plaintiff was dismissed.

On July 14, 1960, the plaintiff filed a motion denominated motion for new trial. This motion was sustained on September 10, 1960. From the order sustaining the motion the defendant appealed. The plaintiff filed in this court a motion to dismiss the appeal. The ground of the motion is that the order vacating the summary judgment and granting a trial is not an order or judgment from which an appeal may be taken. This is the only question before this court at this time.

The motion to dismiss the appeal has been presented on memorandum briefs. From these briefs it appears, although there is nothing therein directly so stating, that the rendition of the summary judgment and the vacation thereof occurred within the same term of court. For the purposes of this opinion it will be assumed that this was true.

In the light of this assumption it becomes necessary to determine first whether or not the order vacating the judgment was a final order within the meaning of section 25-1902, R. R. S. 1943. If it was not then necessity will arise to determine whether or not it was appealable under section 25-1315.03, R. R. S. 1943.

A final order within the meaning of section 25-1902, R. R. S. 1943, is one which determines the action and prevents a judgment; one which affects a substantial right in a special proceeding; or one which is made on a summary application in an action after judgment.

Section 25-1315.03, R. R. S. 1943, contains an exception to the general rule applicable under section 25-1902, R. R. S. 1943, that appeals may be taken only from final orders. This section provides in part the following: "An order entering judgment, as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order." For the purposes of this case

the concern is with the question of the right to appeal from an order granting a new trial.

If this was a final order within the meaning of section 25-1902, R. R. S. 1943, it follows of course that the order was appealable.

It is clear that the order was not one made on a summary application after judgment. It is also clear that it did not directly or in effect determine the action and prevent a judgment. It affirmatively left the action open for trial and judgment.

There can be little doubt that the summary judgment process as defined by statute is a special proceeding. That was so pointed out in Healy v. Metropolitan Utilities Dist., 158 Neb. 151, 62 N. W. 2d 543. In that case it was said: "A motion for a summary judgment is not a substitute for a motion to dismiss, a demurrer, or a judgment on the pleadings. It is a new procedure which may be used in certain cases where other procedural steps are not effective."

The process involved avoids the weighing of evidence and requires the determination to be based upon the sole question of whether or not there is any genuine issue of fact. Section 25-1332, R. R. S. 1943, defines it as follows: "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Based on reason however it may not well be said that what was done here affected a substantial right. What was done here preserved the right to a trial under orderly legal processes, a right which had been denied by the summary judgment. No substantial right basic in the subject matter of the action as presented by the pleadings was in anywise affected by the vacation of the summary judgment.

This court has held that an order is final only when

no further action is required to dispose of the cause pending, but when the cause is retained for further action the order is interlocutory. Merle & Heaney Mfg. Co. v. Wallace, 48 Neb. 886, 67 N. W. 883; Continental Trust Co. v. Peterson, 76 Neb. 411, 107 N. W. 786, on rehearing, 76 Neb. 417, 110 N. W. 316; Wunrath v. Peoples Furniture & Carpet Co., 98 Neb. 342, 152 N. W. 736; Barry v. Wolf, 148 Neb. 27, 26 N. W. 2d 303; Miller v. Schlereth, 151 Neb. 33, 36 N. W. 2d 497; Koehn v. Union Fire Ins. Co., 151 Neb. 859, 39 N. W. 2d 808; Harkness v. Central Nebraska Public Power & Irr. Dist., 154 Neb. 463, 48 N. W. 2d 385.

From an examination of section 25-1902, R. R. S. 1943, and these cases the conclusion is inescapable that by the section the previously declared interlocutory character of an order sustaining a motion for new trial has not been disturbed. It has remained the same.

The order of concern here was interlocutory and not final and was not appealable under the procedure applicable under section 25-1902, R. R. S. 1943.

At the 1955 session the Legislature enacted what is now section 25-1315.03, R. R. S. 1943. It was amendatory of a provision enacted in 1947. For present purposes it may be said that the portion of the provision of concern here actually came into being in 1947 and has since that time been in force and effect. This provision was in nowise declaratory of an intent to change the character of an order sustaining a motion for new trial as defined by this court from an interlocutory to a final order, although it did make such an order appealable. Such an order retained its character as an interlocutory order. All that the statute did was to grant the right of appeal from such an interlocutory order.

It follows that unless the proceedings which lead to a summary judgment and the rendition of such a judgment must be regarded as a trial the order vacating

the judgment and in terms granting a new trial did not afford a right of appeal.

A trial, as generally defined, is: "The examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue." Black's Law Dictionary (3d Ed.), p. 1754. See, also, Marsch v. Southern New England R. R. Corp., 235 Mass. 304, 126 N. E. 519.

This court has not said in specific terms that the summary judgment does not amount to a trial. It has declared however that it does not amount to a formal trial. In Healy v. Metropolitan Utilities Dist., *supra*, the court in addressing itself to this subject said: "But the purpose of the rule does not include the depriving of a litigant of a formal trial where there is a genuine issue of fact to be determined."

Section 25-1333, R. R. S. 1943, contains language from which it appears that the Legislature in the enactment of the summary judgment act attempted to and at least inferentially did distinguish the summary judgment process from a trial. This section is as follows:

"If on motion under sections 25-1330 to 25-1336 judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

It is observable that the section twice by inference

indicates that the portion of the action which may be disposed of by summary action is not done so by a trial and twice declares specifically that the portion which may not be so disposed of must be submitted at a trial.

In the light of this the conclusion reached is that an exercise of the process prescribed by the summary judgment act is not a trial within the meaning of that term and a judgment in favor of a movant is not one rendered as the result of a trial.

A new trial does not involve an original examination of issues of fact, but only re-examination. This is declared by section 25-1142, R. R. S. 1943, in the following language: "A 'new trial' is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. * * *"

There having never been a trial an order vacating a judgment and allowing for the first time a trial on the issues in the action cannot be regarded as the granting of a new trial.

Up to this point the rights of the parties have been considered on the basis of whether or not the order in question was one granting a new trial. It all related to the language of the motion and of the order employing that terminology. As was said there was not in that sense an order granting a new trial. There is however another basis on which it must be said the order was not appealable.

The plaintiff substantially contends that although the motion was denominated "MOTION FOR NEW TRIAL" it was by its declaration one requesting the court to, within the term, vacate the summary judgment. The motion is by its primary terms for an order vacating the judgment. The order primarily vacates the judgment. The order was rendered within the term.

The court had inherent power to vacate its judgment within the term. In County of Scotts Bluff v. Bristol, 159 Neb. 634, 68 N. W. 2d 197, it was said: "A court of

general jurisdiction has inherent power to vacate an adjudication made by it in a civil case at any time during the term of court in which it was made." The defendant does not dispute this. In truth, this case is cited and the principle stated with approval by the defendant in its memorandum briefs. The fact that a misnomer may have been applied to certain relief which was granted to plaintiff if, as was true here, the relief sought and granted was sufficiently described and defined in the motion and the order granting the relief could be of no controlling consequence. Mere nomenclature or semantics will not be allowed to supersede a clear and substantial declaration of intent and purpose. Attention has not been called to any statute or any decisions which would permit an appeal from an order entered pursuant to this rule, except in the instance of an order granting in a true sense a new trial, or an order upon a motion to set aside a judgment notwithstanding the verdict, the effect of which would be to grant a new trial. As pointed out in this instance a new trial was not granted.

The order vacating and setting aside the summary judgment in favor of the defendant and against the plaintiff was not an appealable order and in this light the motion to dismiss the appeal of the defendant from that order should be and is sustained.

MOTION TO DISMISS APPEAL SUSTAINED.

GEORGE WILLIAM BLACKSTONE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
105 N. W. 2d 744

Filed November 10, 1960. No. 34779.

Assault and Battery. In a prosecution for assault which involves specific intent, the intent must be proved as charged.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Reversed.*

Thomas P. Lott, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for defendant in error.

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

YEAGER, J.

This is a criminal action which was prosecuted in the name of the State of Nebraska by the county attorney of Douglas County against George William Blackstone who was charged by information with the offense of assault with intent to commit robbery. On this charge he was convicted by the verdict of a jury and sentenced by the court to serve a term of 7 years in the Nebraska State Penitentiary. He has filed in this court a petition in error wherein he declares that he was erroneously convicted and sentenced, and by which he seeks a reversal of the conviction and sentence. He is plaintiff in error here but for convenience will be referred to as the defendant. The State is defendant in error but will be referred to as the State.

By the information on which the defendant was tried it is charged that on or about June 27, 1959, the defendant in the county of Douglas and State of Nebraska committed an assault upon Betty Mae Higley with the intent to commit a robbery. It was on this charge that the defendant was convicted and sentenced.

The brief of defendant contains three assignments of error on which he predicates a claim that he is entitled to a reversal. Only one of them requires consideration. By this one it is asserted that the court erred in submitting the charge to the jury. The basic contention is that the State failed to prove the charge and that on that account a motion for directed verdict made at the close of the State's evidence and again at the close of all the evidence should have been sustained.

There are of course two essential elements of the

crime charged against the defendant. The two are the assault and the intent with which it was committed.

The evidence taken at the trial was sufficient to sustain a verdict that a violent and vicious assault was committed upon Betty Mae Higley, who will be referred to hereinafter as the prosecutrix, and that it was committed by the defendant. One witness, and the only one outside the prosecutrix who observed the incident, identified positively the defendant as the person who committed the assault. The prosecutrix, as the result of observation made during the assault and her view of the defendant afterwards, gave it as her opinion that the defendant committed the assault.

If therefore the verdict and sentence must be set aside it must be on account of the failure of the proof of intent to commit a robbery of the prosecutrix.

Intent necessary to constitute the offense with which the defendant is charged is specific intent to commit a robbery. Before it may be said that the conviction may be sustained it must be found that this specific intent has been proved.

In Vallas v. State, 137 Neb. 250, 288 N. W. 818, this court said: "The authorities are agreed on the general proposition that, in a prosecution for assault with intent to kill, the specific intent to take life is the gist of the offense. The intent must be proved as charged."

That was a case involving intent to kill rather than intent to rob as here. The rule however is the same in all situations where specific intent is an element of a crime. See, 22 C. J. S., Criminal Law, § 32, p. 91; Botsch v. State, 43 Neb. 501, 61 N. W. 730; Swartz v. State, 121 Neb. 696, 238 N. W. 312; Garofola v. State, 121 Neb. 850, 238 N. W. 755.

A review of the evidence on the question of whether or not intent was proved discloses that on the date mentioned the prosecutrix and one Evelyn Rochford were with their husbands in attendance at the races being held at Ak-Sar-Ben Field and that while there

the two women entered a restroom provided for women. Inside the facility were at least two individual compartments. These have been referred to as toilets. After the two went in, the prosecutrix entered one of the compartments. Evelyn Rochford remained outside at least a part of the time in the vicinity of or in front of a mirror. The prosecutrix had with her a purse. She said that as she came out of a door a man struck and continued to strike her violently. From the record it may not be determined whether the door from which the prosecutrix was emerging was the door to the compartment or a door to the restroom. It appears inferentially to have been the door to the compartment. Evelyn Rochford turned and saw the man striking the prosecutrix. At the trial, as pointed out, this witness identified the defendant as the assailant. The two women screamed, Evelyn Rochford ran for help, and the assailant fled. Soon thereafter and some considerable distance away the defendant was apprehended. There is evidence that when apprehended he had fresh blood on one of his hands.

The substance of the theory of the State as to intent is that the intent of the defendant was to take from the prosecutrix her purse. On the record nothing else could have been the subject of the alleged intent.

The prosecutrix testified that at the time of the assault she had the purse in her hand. After the assault it was found on the floor in one of the compartments. Whether it was in the one which had been occupied by the prosecutrix or another one does not clearly appear. The prosecutrix did not testify that her assailant attempted to take the purse from her or that by any act he indicated that he intended to take it. She did not testify that he made any remark which directly or in essence indicated an intention to take the purse. In truth, no inquiry was made of her on the trial the effect of which was to seek to elicit information on the subject of the intent of the assailant. Evelyn Rochford,

the only other witness to the incident, did not testify to anything from which it could be said that there was an intent to take the purse. She testified that she did not know that the purse had been missing until the prosecutrix told her it had been returned.

There is other evidence relative to the purse but none that amounted to competent evidence bearing upon the intent of the assailant. Fay Hiykel, a detective sergeant of the Omaha police force, who came onto the scene after the assault testified: "I then ran to the women's lavatory, and they said a woman had been assaulted and some one grabbed her purse."

Ceola Turner, a restroom attendant, testified that she saw the assailant running away from the scene. She testified that "they" said the prosecutrix missed her pocketbook, and one of the ladies said it was in the toilet. The witness said she went and got it and gave it to one of the ladies. She further testified that the prosecutrix stated that her purse had been taken.

The statements of the witnesses Hiykel and Turner cannot be regarded as proof of an intent to commit a robbery. On their face they are not and do not purport to be direct statements of fact or of circumstances based upon knowledge in proof of an intent to commit a robbery by the assailant. There is no other evidence in the record bearing on this question.

This record leaves the element of intent necessary to sustain a conviction without any evidentiary support. This renders the conviction and sentence erroneous. The judgment of the district court is reversed.

REVERSED.

SIMMONS, C. J., participating on briefs.

EDWARD D. KENNEDY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
105 N. W. 2d 710

Filed November 10, 1960. No. 34806.

1. **Criminal Law.** The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or crime. It is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed.
2. ———. The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties.
3. ———. It is proper to set out the aggravation of a criminal offense justifying the heavier penalties contemplated by the habitual criminal law either in the count charging the crime or in a separate count in the information.
4. ———. When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute.
5. **Continuances.** An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby.
6. ———. In determining whether or not the trial court has abused its discretion in refusing to grant a continuance it is proper to look to the entire record in the case.
7. **Continuances: Appeal and Error.** The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial.
8. **Criminal Law.** The refusal of the district court to suspend for an indefinite time the trial of a criminal case to enable the defendant to procure the attendance of a witness is not, in the absence of a showing of diligence, an abuse of judicial discretion.
9. **Burglary.** The material elements of the crime of possession, custody, or control of instruments or tools under section 28-534, R. R. S. 1943, with intent to break and enter may be proved by direct or circumstantial evidence.
10. ———. In a prosecution for possession of burglar's tools and implements, the ownership thereof is ordinarily immaterial.
11. ———. In such a case, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have con-

structive possession or one may have actual possession and the other, constructive possession.

12. ———. The possession of burglarious implements or tools with a guilty intent may be joint as well as several, and where the guilty intent of several is manifested by their joint act, it becomes a joint offense.

13. ———. The words "possession, custody or control" as used in section 28-534, R. R. S. 1943, express an alternative of terms, definitions, or explanations of the same thing in different words.

14. **Weapons.** As a general rule, absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant and a weapon is so concealed when it is hidden from ordinary observation and is readily accessible on his person or in a motor vehicle operated by defendant.

15. **Criminal Law.** The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable hypothesis except that of his guilt.

16. **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 cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

17. ———: ———. In a criminal case, this court will not interfere with a verdict of guilty based upon the 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.

18. ———: ———. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

19. **Criminal Law.** Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.

20. ———. An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

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

CHAPPELL, J.

This is a criminal case prosecuted in the district court for Douglas County upon an information originally filed February 9, 1959. Count I therein charged that on or about January 12, 1959, defendant, Edward D. Kennedy, was found in Douglas County having in his possession, custody, or control certain described instruments or tools with intent to break and enter into a building containing property of value. Such information charged in count II that on or about the same date in Douglas County said defendant unlawfully carried two described 38-caliber loaded revolvers concealed on or about his person. Thereafter, on September 16, 1959, such information was amended but only by adding count III, which factually charged that defendant was an habitual criminal, having twice theretofore on separate designated dates pleaded guilty in Douglas County to the offense of burglary and been duly sentenced therefor.

Defendant at all times here involved was represented by counsel, and after a plea of not guilty trial was had to a jury upon counts I and II. Defendant's motions to direct a verdict made at conclusion of the State's evidence and renewed at conclusion of all the evidence were overruled and the issues were submitted to the jury. Thereafter, the jury returned separate verdicts finding defendant guilty upon each of said counts. After hearing thereon, defendant's motion for new trial was overruled and a hearing was duly held by the court upon

count III, whereupon defendant was found to be an habitual criminal and was sentenced to serve 15 years in the Nebraska State Penitentiary and to pay all costs of prosecution upon each of counts I and II of the information. However, such sentences were ordered to run concurrently.

Thereafter, defendant prosecuted error to this court, assigning and arguing, as far as important here, that the trial court: (1) Erred in refusing to sustain defendant's two oral motions for continuance, one of which was made at commencement of the trial, and one of which was made thereafter at the conclusion of defendant's evidence and before he rested; (2) erred in not sustaining defendant's motions for directed verdict; (3) erred in not admonishing the jury to disregard certain alleged inflammatory statements made by counsel for the State in closing argument, which allegedly reflected on failure of defendant to take the stand in his own defense and explain the presence of the tools and guns in his car; (4) erred in refusing to sustain defendant's motion for new trial; and (5) erred in finding that defendant was an habitual criminal and sentencing him as such. We do not sustain the assignments.

At opening of the trial, defendant's counsel orally moved for "a continuance on the ground that we did not receive the amended information within time to prepare a proper defense for the trial." In that connection, counts I and II of the amended information were at all times identical with the original which had been on file since February 9, 1959. The information, as amended, simply included count III, which factually charged that defendant was an habitual criminal.

In Jones v. State, 147 Neb. 219, 22 N. W. 2d 710, this court held that: "The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or crime. It is a direction of attention to facts which under the statute and the crime charged in the

information are determinative of the penalty to be imposed.

"The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties.

"It is proper to set out the aggravation of a criminal offense justifying the heavier penalties contemplated by the habitual criminal law either in the count charging the crime or in a separate count in the information."

Section 29-2221, R. R. S. 1943, provides, in part, that: "(1) Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than ten nor more than twenty years; Provided, that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern.

"(2) Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charge and shall not in any manner be disclosed to the jury. If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the

accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state, or by the United States, the court shall sentence such person so convicted as an habitual criminal."

In Poppe v. State, 155 Neb. 527, 52 N. W. 2d 422, this court, dealing with a charge that accused was an habitual criminal, held that: "When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute."

Thus, whether or not defendant was an habitual criminal was not an issue upon defendant's trial of the felonies charged in counts I and II, but was one required to be heard by the trial court alone after the trial was held and defendant was found guilty. Verdicts of guilty on counts I and II were returned October 15, 1959, and hearing by the court alone on count III after notice was not held until December 21, 1959. Thus, defendant had ample time to so present his defense, if any, to count III.

On the other hand, one of defendant's counsel argues that he entered the case as counsel for defendant on October 5, 1959, and was forced to trial on October 13, 1959. However, the record discloses that one of defendant's two counsel who served throughout the trial first appeared in court as counsel for defendant on September 23, 1959, 3 weeks before the jury trial commenced. The original information was filed February 9, 1959, and on August 28, 1959, defendant's then counsel of record was permitted upon application to withdraw as counsel for defendant. On that same day, defendant being an indigent, the public defender of Douglas County was appointed to represent defendant, with the case set for trial September 21, 1959. On September 16, 1959, the amended information was filed, which simply added count III to the original information. De-

fendant was arraigned September 17, 1959. Thereat, with the public defender present and representing him, defendant pleaded not guilty and motion of the public defender for continuance was denied, with trial set for September 21, 1959. However, on motion and for cause shown, the order of September 17, 1959, denying continuance was vacated and the trial was continued until September 28, 1959. On September 23, 1959, defendant, having discharged the public defender as his counsel, appeared in open court with one of his counsel who represented him then and at the trial, and a continuance was granted until September 30, 1959. Trial was not had even on that date because of intervening motions unimportant here, and the cause came on for trial October 13, 1959, whereat before any evidence was adduced one of defendant's counsel made the oral motion for continuance heretofore set forth.

As recently as Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649, we reaffirmed that: "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed unless it appears that the rights of the defendant were prejudiced thereby."

Also, as held in Cox v. State, 159 Neb. 811, 68 N. W. 2d 497, 66 A. L. R. 2d 293: "In determining whether or not the trial court has abused its discretion in refusing to grant a continuance it is proper to look to the entire record in the case." See, also, § 25-1148, R. R. S. 1943.

This record shows that defendant was at all times well aware of the charges against him; and that several months had elapsed since the filing of the information, during all of which time he was represented by and had the services of at least four lawyers, and at least one of those who represented him at the trial appeared as counsel of record 3 weeks before the trial. The record contains no showing by affidavit or otherwise that the granting of a further continuance was required to fairly try the simple issues here involved. We conclude that

the trial court did not abuse its discretion in denying the continuance first requested.

Defendant's second motion for continuance was orally made at conclusion of defendant's evidence just prior to the time he rested. Such motion was purportedly made in order to verify information that there was a material and important witness believed to be incarcerated in Colorado. However, defendant's counsel did not know "whether he has been in jail there or whereabouts there, * * *." The trial court then inquired of defendant's counsel if he was prepared in support of his motion to state the name of the witness and in substance what his testimony might be in support of the motion for continuance. In reply, counsel did not disclose the name of the witness but was evasive and did not say who or where the witness was or what his testimony would be except to state in substance that he believed it was direct testimony showing knowledge of the prior location and ownership of the burglary tools and weapons. With regard to defendant's aforesaid request for continuance, we find in this record no proper showing of the name or whereabouts of such a witness or the materiality of his testimony if such a witness existed or could be found. The whole request and proposal was entirely speculative and conjectural without any proper showing of diligence or materiality. We conclude that the trial court did not abuse its discretion in overruling defendant's second motion for continuance.

In that connection, at the hearing upon defendant's motion for new trial, after a continuance thereof had been granted, the deposition of an unemployed and thrice-convicted felon, who had no permanent address and was then in the Denver County jail on another alleged offense, as was one Bevins hereinafter mentioned, was offered by defendant and received in evidence, purportedly to support his motion for new trial. One of defendant's counsel also testified under oath

that the evidence contained in the deposition was not "actually in the realm of newly discovered evidence; * * *." Evidently, the purpose of offering the deposition was to support defendant's contention that his aforesaid requests for continuance, wherein no showings were made and which were properly overruled, should now in effect be retrospectively granted by the awarding of a new trial. The substance of the deposition was that the witness owned the tools and guns found in defendant's car where he had purportedly thrown them during the early evening of January 12, 1959, in order to avoid being caught in possession thereof and arrested therefor. We find that his testimony was not only immaterial, as heretofore pointed out, but it was also so equivocal, indefinite, fantastic, and incredible that it would reasonably support no other conclusion except that it was false.

In Phillips v. State, 154 Neb. 790, 49 N. W. 2d 698, we reaffirmed that: "In a prosecution for possession of burglar's tools and implements, the ownership thereof is ordinarily immaterial."

Also, in Hubbard v. State, 65 Neb. 805, 91 N. W. 869, this court held that: "The denial of a motion for a continuance in order to secure evidence is not reversible error where it appears that the testimony of the absent witness would be either false or immaterial.

"The refusal of the district court to suspend for an indefinite time the trial of a criminal case to enable the defendant to procure the attendance of a witness is not, in the absence of a showing of diligence, an abuse of judicial discretion." We conclude that the trial court did not err in refusing to give defendant a new trial upon the grounds aforesaid, as contended by him.

We turn then to defendant's contention that the trial court erred in refusing to sustain his motions to direct a verdict of not guilty for insufficiency of the evidence to support a conviction.

Section 28-534, R. R. S. 1943, provides in part: "Who-

ever shall be found having upon him or her, or having in his or her possession, custody or control, any picklock, crow, key, bit or other instrument or tool with intent feloniously to break and enter into any * * * building containing valuable property, shall be deemed guilty of a felony, and punished by confinement in the penitentiary not less than one year nor more than five years."

Also, section 28-1001, R. R. S. 1943, provides in part: "Whoever shall carry a weapon or weapons concealed on or about his person such as a revolver * * * shall upon conviction be fined in any sum not exceeding one thousand dollars or imprisoned in the state penitentiary not exceeding two years; * * *." Thereafter follows a proviso which has no application here.

In Phillips v. State, *supra,* this court concluded that the material elements of the crime of possession, custody, or control of instruments or tools under section 28-534, R. R. S. 1943, with intent to break and enter may be proved by direct or circumstantial evidence.

Therein we also held that: "The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect accused with the crime charged are of such conclusive nature as to exclude every reasonable 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 cannot be accounted for upon any rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed.

"In a criminal case, this court will not interfere with a verdict of guilty based upon the 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.

"In such a case, the possession may be actual or constructive, and unless expressly provided by statute, possession upon one's person is not necessary. Two persons may have constructive possession or one may have actual possession and the other, constructive possession.

"The possession of burglarious implements or tools with a guilty intent may be joint as well as several, and where the guilty intent of several is manifested by their joint act, it becomes a joint offense.

"The words 'possession, custody or control' as used in section 28-534, R. R. S. 1943, express an alternative of terms, definitions, or explanations of the same thing in different words."

In that opinion we said: "In that connection, section 28-1001, R. R. S. 1943, containing exceptions having no application here, makes it a felony to carry a revolver concealed on or about his person. In Bright v. State, 125 Neb. 817, 252 N. W. 386, a conviction was affirmed where the evidence disclosed that defendant was carrying a revolver concealed but readily accessible either in a motor vehicle operated by him or on his person while operating the same. The weight of authority sustains such position. See, 56 Am. Jur., Weapons and Firearms, § 10, p. 996; Annotation, 50 A. L. R. 1534; Annotation, 88 A. L. R. 807."

The Annotations, 50 A. L. R. 1534, and 88 A. L. R. 807, cite and discuss many authorities dealing with situations comparable with that at bar. They are authority for the conclusion that the manifest object under statutes comparable with section 28-1001, R. R. S. 1943, was to prevent the carrying of concealed weapons and stamp out practices that have been and are fruitful of bloodshed, misery, and death. Thus, the courts generally hold, including our own, that absolute invisibility to other persons is not indispensable to concealment of a weapon on or about the person of a defendant, and that a weapon is so concealed when it is hidden from ordinary observation and is readily accessible on his

person or in a motor vehicle operated by defendant.

In the light of the foregoing rules, we have examined the record which shows that the State adduced the following undisputed evidence: On the night of January 12, 1959, two officers of the Omaha police department were serving as cruiser patrolmen on Radial Highway near Saddle Creek Road and Cuming Street in Omaha. About 9:15 p. m., they saw a 1957 Chevrolet four-door car make a left turn from east to north through a red light signal on Forty-third Avenue and Radial Highway while driving about 25 miles an hour. The officers followed that car and flashed their spotlight through its rear window. As the cruiser car followed the Chevrolet it accelerated its speed, turned east on Izard Street, went through a stop sign at Forty-second Avenue, speeded up to about 60 to 70 or 80 miles an hour, then made a left turn to go south on Fortieth Street to Webster Street, where it attempted to turn east at Fortieth and Webster Streets and the Chevrolet went out of control, struck the curb, and the right door flew open but was closed again. The pursuing police car's red light and siren were on at all times after making the turn at Izard Street, but the Chevrolet continued to accelerate its speed and did not slow down or stop. The streets were patched with ice, and were wet, slushy, and slippery. After rounding the corner of Fortieth and Webster Streets, the Chevrolet started "fish-tailing" and continued to do so for about a block, when it spun around and slid backwards up over the curb into a school fence then came back out a few feet toward the street. However, the officers stopped the cruiser car up against the front bumper of the Chevrolet to prevent further escape and then got out of the cruiser car. During the chase the officers saw three shadows or silhouettes of men through the back window of the Chevrolet as their spotlight was trained upon it. Another police officer in another car also saw the Chevrolet at the time it turned through a red light and

recognized defendant as the driver and one Bevins as another occupant in the front seat. He did not see any other occupant and when the Chevrolet stopped only two men got out. Defendant got out from the driver's side and Bevins got out from the right front seat. The officers recognized both such men from previous history in criminal cases, so, although they offered no resistance, one officer covered them with his sidearms while another handcuffed them. Later, when the Chevrolet was being towed from the curb into the street in order to take it to the police station, screams were heard from under the Chevrolet and another man, wet, cold, and injured somewhat was found hiding beneath the car by clinging to its undercarriage.

When defendant and Bevins got out of the Chevrolet the arresting officer opened a back door of the car and found, visible for the first time, a satchel of tools; an overcoat; and two snub-nosed, fully-loaded, 38-caliber revolvers on the back seat. The satchel was open and some tools protruded therefrom. The two revolvers were lying beside the satchel and on the overcoat in about the center of the back seat, as if thrown there in flight but where they were readily accessible to the occupants of the Chevrolet and invisible until the back doors of the car were open. Another officer arrived at the scene and took pictures of the back seat of the car through an open door. One such picture, showing the tools, coat, and guns so lying on the back seat, was offered and received in evidence.

The satchel contained two steel pinch bars; a steel-handled ax; a coping saw; a 10-pound sledge hammer with the handle sawed off shorter, as is usually done by burglars; a pair of vise-grip pliers; a pair of ordinary pliers; two cold chisels; a center punch; and another punch. A length of six- or eight-strand rope, knotted every 12 or 18 inches, which rope was of the length and type generally used by burglars to get into buildings or to descend from a roof, skylight, or window thereof,

was also found lying on the ground near the right open door of defendant's car.

At the time of defendant's arrest he was asked by an officer: " 'Is that your car?' And he said, 'yes, it is.' I said, 'Are you sure it is not your mother's?' He said, 'No, it is my car, and it is registered to me.' I said, 'What about the tools in the back seat.' He said, 'What tools.' And then I asked him where he was living, and he says 'Out on Dodge Street in the Clay Court.' "

A captain of police in Omaha, then serving in a supervisory position over burglary investigations in the detective bureau, who had 24 years of police experience and had many times investigated burglaries and viewed and examined tools used in burglaries, testified as a witness for the State. He testified that the rope, tools, and weapons found in defendant's car were a most complete set of burglar tools, although, as usual, some of them could be used for legitimate purposes. He also explained and demonstrated how each item found in defendant's car could be used in a burglary. On cross-examination of such witness by defendant's counsel, in answer to a question whether the tools found in defendant's car had been used in a burglary, the captain answered that such tools had been sent to the Federal Bureau of Investigation in Washington where they had been compared with other evidence that had been sent in from this district, and that he had thereafter received from such bureau a report which had been sent to the Omaha police department wherein it was pointed out that two of such tools were positively and conclusively identified as having been used in a burglary of the Scofield Seed Company in Council Bluffs, Iowa, on January 3, 1959. Such report of the bureau was produced in open court for the scrutiny of defendant's counsel and its authenticity and accuracy were not questioned, but the report was not offered and received in evidence.

Defendant did not testify, but he offered the testimony

of two lay witnesses that they owned tools similar to some of those found in defendant's car, and that they had useful legitimate purposes, which, as heretofore shown, the State had admitted.

This court has repeatedly held that: "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty." Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672. See, also, Salyers v. State, 159 Neb. 235, 66 N. W. 2d 576; Hertz v. State, 160 Neb. 640, 71 N. W. 2d 113. We conclude that the evidence adduced herein was amply sufficient to support a verdict of guilty on counts I and II, and that the trial court did not err in failing to sustain defendant's motions for directed verdict.

Defendant assigned that the trial court erred prejudicially in failing to admonish the jury to disregard misconduct of counsel for the State during argument wherein he related: "He asked him who owned the car, and there isn't any question, Mr. Kennedy said I own the car. He asked again does your mother own the car. No, I own it. Is this car registered in your name? It is my car. Where do you live? In a Motel on West Dodge. What kind of tools does a man use if he is in a Motel on West Dodge? Should he have just any tools." In the first place, we point out that defendant never asked the court to admonish the jury to disregard any statements of the prosecutor and never sought a mistrial because thereof. Counsel for defendant did object to the statement aforesaid simply because "there is no showing in evidence as to occupation" of defendant, and the objection was overruled. It is a fact that there was no evidence adduced with regard to defendant's occupation which would justify his carrying the tools which were found in his car. Thus, every fact related

by the prosecutor in the quoted statement was based on evidence and legitimate inferences drawn therefrom. Also, contrary to defendant's contention, the statement did not reflect in any manner upon defendant's failure to take the stand. In that connection, instruction No. 18 given by the trial court, cautioned the jury that the law did not require defendant to take the stand; that the fact that defendant did not take the stand and testify was not to be considered by the jury in any manner; and that the jurors were not at liberty to draw any inference against him by reason of his failure to take the stand or to speculate in any manner because of his failure to testify.

In Jackson v. State, 133 Neb. 786, 277 N. W. 92, this court held that: "Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct." See, also, Cramer v. State, 145 Neb. 88, 15 N. W. 2d 323, wherein we held: "An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct." Defendant's assignment with regard to misconduct of counsel for the State has no merit.

Defendant's last assignment of error deals with his claimed invalidity of the first of two prior convictions of defendant for burglary, whereat, as shown by court records and other evidence in this record, defendant had pleaded guilty and was sentenced for such felonies. The State relied upon both such prior convictions at the hearing by the court on count III of the information which charged that defendant was an habitual criminal. Defendant's contention was and is that his first conviction was void because defendant was less than 16 years of age when he was sentenced, therefore he was erroneously sentenced to serve 2 years in the Nebraska State Reformatory. In the first place, we conclude that

defendant failed to establish by any competent evidence that he was less than 16 years of age when he was so convicted and sentenced. The record of his first conviction upon a plea of guilty and his sentence as well, which imports validity, disclosed by judicial recitation that defendant was not less than 16 years of age at the time of his conviction and sentence. This court recently reaffirmed and concluded in Haswell v. State, 167 Neb. 169, 92 N. W. 2d 161, that an unauthorized or erroneous sentence does not void a lawful conviction. In any event the age of an accused when he has been twice convicted, sentenced, and committed to prison on a felony charge has no bearing on the question of whether or not he was an habitual criminal within the statutory meaning thereof.

For reasons heretofore stated, we conclude that in all respects the judgment and sentence of the trial court should be and hereby are affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

SCHOOL DISTRICT NO. 145 OF LANCASTER COUNTY, NEBRASKA, ALSO KNOWN AS THE SCHOOL DISTRICT OF THE VILLAGE OF WAVERLY, LANCASTER COUNTY, NEBRASKA, APPELLANT, V. MAURICE ROBERTSON, APPELLEE.
105 N. W. 2d 735

Filed November 10, 1960. No. 34811.

1. **Pleading: Trial.** In order that a recovery may be had in an action the pleadings and the proof must agree.
2. ———: ———. A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing another. The allegations and proof must agree.
3. **Contracts: Pleading.** The rule that a party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause applies to suits on contracts.

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

Perry, Perry & Nuernberger, for appellant.

Francis M. Casey, for appellee.

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

YEAGER, J.

This is an action at law by School District No. 145 of Lancaster County, Nebraska, also known as the School District of the Village of Waverly, Lancaster County, Nebraska, plaintiff and appellant, against Maurice Robertson, defendant and appellee, to recover $1,473.62 with interest at 6 percent per annum on $1,312 from the date of the commencement of the action. The trial started as one to a jury but during its course a jury was waived and it proceeded as from the beginning as a trial to the court. At the conclusion of the trial a judgment was rendered in favor of the plaintiff for $137.50 only, with interest at 6 percent per annum from May 25, 1956, to April 16, 1959, and the costs of the action to April 16, 1959, with the balance of the costs taxed to the plaintiff. A motion for new trial was filed by plaintiff. This motion was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

The pleadings on which the case was presented were an amended petition and an amended answer.

By the petition the plaintiff substantially pleaded that it was a duly organized school district and body corporate having the powers of a corporation for public purposes under the laws of the state and that it operated a school in Waverly, Nebraska, known as the Waverly Consolidated School.

It was further pleaded that the defendant was a nonresident of the plaintiff district and that he resided in another district with four minor children of school age which district provided and maintained an approved public school for all grades including high school in

which the children could have secured instruction, but for personal reasons he chose to send his children to the school of the plaintiff district for the period involved in this action. The defendant by his answer and by testimony admits that the allegations in this portion of the petition are true.

The plaintiff further pleaded that in about the month of January 1951, it entered into an oral contract with the defendant whereby it was agreed that the minor children of the defendant should attend the school conducted by the plaintiff under which agreement the defendant was to pay tuition at the rate established by the plaintiff for nonresident pupils, which agreement was acknowledged at numerous times thereafter; that under this agreement children of the defendant attended the school of plaintiff for the years 1951 to 1956; and that there was due on the contract $1,312 with interest from June 1, 1956, making a total of $1,473.62, and interest on $1,312 from the date of the commencement of the action. The amount of $1,312 was for an alleged balance due for tuition for the school years 1954-1955 and 1955-1956.

By the amended answer defendant denied the oral agreement alleged by the plaintiff. He alleged that it was agreed that the children of the defendant should attend the school of the plaintiff for which he was required to pay only one-half of the established or scheduled rate of tuition. He alleged that on this basis he was indebted to the plaintiff in the amount of $137.50. By the answer he tendered payment of this amount. No reply to the answer was filed.

There is a complete absence of testimony from witnesses called by the plaintiff to establish the existence of the oral contract alleged to have been entered into in 1951. Likewise there is a complete absence of testimony as to any happening thereafter the effect of which could be construed as the renewal of an agreement entered into in 1951 or of an oral contract entered into

at any later date. The deposition of the defendant was taken before the trial. A part of this deposition was read in evidence at the trial by the plaintiff on the theory that it contained admissions against interest. The remainder of the deposition was read into the record by the defendant. In that there was no evidence which might be regarded as proof of the oral agreement alleged in the petition or any reaffirmation thereof.

The most that can be said of this evidence of the plaintiff is that it discloses that the children of the defendant attended the school as it is alleged they did; that demand was made upon the defendant for payment of tuition each year; that he paid the amounts demanded through the school year 1953-1954; but that for the school years 1954-1955 and 1955-1956, although demand was made, he paid only $1,037 and failed and refused to pay any amount in excess thereof.

At the conclusion of the evidence of the plaintiff the defendant moved in the alternative that the court dismiss the case or direct a verdict in favor of the defendant on the ground, among others that do not require mention here, that the action is by the petition based upon a specific oral contract entered into in January 1951, but that the record of the evidence is completely silent as to any such contract entered into at that time or at any other time. This motion was overruled.

It is interpolated here that no other theory was presented to the court by amendment to the petition or offer of amendment, or otherwise.

Thereafter the defendant put on his evidence. He testified as a witness in his own behalf. There is nothing in his testimony or in any other evidence adduced by him the effect of which was to prove the agreement alleged by the plaintiff or a reaffirmation thereof.

Unless something occurred the effect of which was to avoid its application, the rule which is applicable and controlling and entitled the defendant to have judgment in his favor on the entire pleaded cause of action

except as to the $137.50 with interest, which he tendered, is stated in Traver v. Shaefle, 33 Neb. 531, 50 N. W. 683, as follows: "The rule of law is inflexible that the allegations and the proof, allegata et probata, must agree." See, also, Bauer v. Wood, 144 Neb. 14, 12 N. W. 2d 118; Cunningham v. Brewer, 144 Neb. 211, 13 N. W. 2d 113; Barnhart v. Henderson, 147 Neb. 689, 24 N. W. 2d 854; National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489; Benson v. Walker, 157 Neb. 436, 59 N. W. 2d 739; Shepardson v. Chicago, B. & Q. R. R. Co., 160 Neb. 127, 69 N. W. 2d 376.

In interpretation and application of this rule it was said in Foote v. Chittenden, 106 Neb. 704, 184 N. W. 167: "A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause. The allegations and proof must agree." This was quoted with approval in Cunningham v. Brewer, *supra.*

The rule has application generally, and specifically it has application to suits on contracts. The rule is approved in Benson v. Walker, *supra,* which was, as is apparent from a reading of the opinion, a suit on a contract.

The plaintiff insists in effect by its brief that the answer of the defendant had the effect of avoiding the application. It insists that the answer contains what amounts to an admission of the existence of the alleged contract upon which the action is based. Nothing contained in the answer is capable of such a construction.

The existence of the contract alleged by the plaintiff was denied by the answer. An entirely different contract was affirmatively pleaded by the defendant. It was in no sense an admission of the cause of action pleaded by the plaintiff. It was not one which would permit of a recovery of anything more than $137.50 with interest. This question has received a sufficient answer in the declaration quoted herein that one will not be permitted to plead one cause of action and upon trial

rely on proof establishing a different cause. This is necessarily true if the reliance is upon proof, as is true in this case, the effect of which is to defeat the pleaded cause of action. There is no ground in this case to justify a departure from the rule that in a case the allegations and the proof must agree.

The district court found that the plaintiff had failed to establish by a preponderance of the evidence that the contract alleged in the petition was ever made and rendered its judgment accordingly. It gave the plaintiff judgment for $137.50 with interest at 6 percent per annum from May 25, 1956, to April 16, 1959, and the costs of the action which accrued to April 16, 1959, and taxed the subsequently accrued costs to the plaintiff. The defendant has not cross-appealed. The judgment of the district court was correct and it should be and is affirmed.

AFFIRMED.

MARY E. BUIE, APPELLANT, V. JUDSON H. BEAMSLEY, DOING BUSINESS AS ROYAL TV RENTAL & SERVICE CO., APPELLEE.
105 N. W. 2d 738

Filed November 10, 1960. No. 34825.

1. **Trial.** 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.
2. **Negligence: Trial.** When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury.

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

Crossman, Barton & Norris, for appellant.

Cassem, Tierney, Adams & Henatsch, for appellee.

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

MESSMORE, J.

This is an action at law brought by Mary E. Buie in the district court for Douglas County as plaintiff, against Judson H. Beamsley, doing business as the Royal TV Rental & Service Company, defendant, to recover damages for personal injuries sustained by her when she was in the act of crossing a street and was struck by a truck owned and operated by the defendant. The trial court sustained the defendant's motion for directed verdict at the close of plaintiff's case, and dismissed the plaintiff's action. The plaintiff filed a motion for new trial which was overruled. From the order overruling the plaintiff's motion for new trial, the plaintiff appealed.

The plaintiff's petition alleged that on September 22, 1958, at about 3:30 p.m., the plaintiff was walking across Farnam Street from south to north on the west side of Thirty-eighth Street in Omaha, and was at all times within the crosswalk provided for pedestrians; that the defendant was driving his 1958 International panel truck westbound on Farnam Street in the northernmost driving lane; and that when the plaintiff was three-fourths of the way across Farnam Street she was struck on her right hip by the right front fender of the defendant's truck and as a result thereof was injured. Plaintiff's petition further alleged that the defendant was guilty of negligence in the following respects: (1) In failing to yield the right-of-way to the plaintiff as a pedestrian in violation of section 55-4.1 (a) of the Omaha traffic code; (2) in failing to keep a proper lookout for the plaintiff; (3) in operating his truck at such a speed that he was unable to stop before striking the plaintiff; and (4) in failing to divert the course of his truck so as to avoid hitting the plaintiff.

The defendant's answer alleged that on the date as

set forth in the plaintiff's petition he was driving his truck, as described therein, west on Farnam Street in the northernmost driving lane in a careful and prudent manner when the plaintiff suddenly, without warning, ran directly into the path of the defendant's truck and was struck thereby. The defendant's answer denied that he was guilty of any negligence, and further alleged that the sole and proximate cause of the accident was the negligence of the plaintiff which was more than slight in the following particulars: (1) In running from a place of safety into a place of danger directly into the path of the defendant's truck; (2) in running in front of the defendant's truck at a time when she knew or should have known that the defendant could not possibly stop in time to avoid striking her; (3) in failing to keep a proper lookout for oncoming traffic; (4) in entering the intersection at a time when she knew or should have known that she could not safely cross; and (5) in failing to exercise reasonable precautions while crossing said intersection. The answer denied each and every allegation contained in the plaintiff's petition not expressly admitted.

The plaintiff's reply to the defendant's answer was a general denial.

The plaintiff assigns as error that the trial court erred in sustaining the defendant's motion for a directed verdict at the close of the plaintiff's case and in dismissing the plaintiff's cause of action; and that the trial court erred in overruling the plaintiff's motion for a new trial.

The record discloses that the plaintiff was employed by the Child Saving Institute as a nurse's aid, and at the time of trial she was 54 years of age. On September 22, 1958, at about 3:45 p.m., she, as a pedestrian, was involved in an accident when she was struck by the defendant's truck. She was going to Thirty-eighth and Farnam Streets. It was a fair day, the sun was shining in the west, and there was no moisture on the pavement. The temperature was somewhere around 70 de-

grees. The plaintiff testified that Thirty-eighth Street runs north and south and Farnam Street is a one-way street running east and west with three westbound driving lanes, and a parking lane on each side of the street; that she proceeded east on the south side of Farnam Street to the southwest corner of Thirty-eighth and Farnam Streets where she stopped; that she waited on the southwest corner until several cars had passed by; that there was a lull in traffic and she stepped off the curb and proceeded north across Farnam Street; that at that time the closest cars were about a block east; and that she could see to the east as far as the Blackstone Hotel, which she judged to be about a block to the east. When she stepped off the curb she was in the crosswalk, which was unmarked. As she started across the street she was walking normally. She looked to the east for a second time when she reached the middle driving lane and saw cars about a block east of her. She was still in the crosswalk. She further testified that she saw a truck in the north driving lane about half a block to the east of her. She kept on walking and did not stop when she reached the middle driving lane, nor at any time while crossing the street. She again looked to the east, a third time, when she reached the north driving lane. At that time the truck was at the "west corner of the west end of" the Hinky Dinky store which is on the northeast corner of the intersection a few feet east of the exact corner of the intersection which is occupied by a parking lot serving the store. She further testified that the truck was moving at that time. She started to run, and after running about four steps she was struck by the truck while she was still in the crosswalk and about three steps from completing crossing the street. She was facing north when she was struck by the right front fender of the truck on her right hip. Just before she was struck, she heard the wheels of the truck skidding on the pave-

ment and making a screeching noise for about a second or two. She did not hear the sound of a horn.

On cross-examination the plaintiff testified that she was unable to judge the speed of the truck, but that it was coming pretty fast. She was aware that there was a truck coming in the north lane when she was in the middle of the street, and when she heard the brakes being applied on the truck she ran three or four steps. She did not see the truck, but heard it when she started to run. She further testified that she could have stopped at any time before she reached the north driving lane; that she was walking at a normal gait; and that there was no other traffic in close proximity to her.

The following are applicable to the instant case.

"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.

"When different minds may reasonably draw different conclusions from the same facts as to whether or not they establish negligence or contributory negligence, such issues should be submitted to the jury." Hammond v. Morris, 147 Neb. 600, 24 N. W. 2d 633.

Section 39-751, R. R. S. 1943, provides in part: "The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices."

We conclude that under the facts as shown by the record in this case, the questions of the negligence of the defendant while driving his truck at the time of the accident, and the contributory negligence of the plaintiff, if any, are questions of fact to be determined by a jury.

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

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

DELBERT TALBOTT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT, V. CITY OF LYONS, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLEES, IOWA ELECTRIC LIGHT AND POWER COMPANY, INTERVENER-APPELLANT.

105 N. W. 2d 918

Filed November 10, 1960. No. 34830.

1. **Pleading: Trial.** There can be no recovery if there is a material variance between the allegations and the proof. The allegata and probata must agree.
2. **Municipal Corporations: Estoppel.** Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class.
3. ———: ———. The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done.
4. **Estoppel.** The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel.

5. **Elections.** Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate an election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not desire to vote.
6. **Municipal Corporations: Bonds.** A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal.
7. ———: ———. A municipal corporation may, and, when so required by constitution, statute, or charter, must, prior to the issuance of bonds, make provision for the payment of such bonds and interest thereon, a common requirement being that the municipality shall at or before the issuance of the bonds, make provision for the collection of an annual tax sufficient to pay the interest on the bonds, and to create a sinking fund for the payment of the principal.

APPEAL from the district court for Burt County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Raun & Samuelson and *Cassem, Tierney, Adams & Henatsch*, for appellants.

John A. Young and *Perry, Perry & Nuernberger*, for appellees.

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

WENKE, J.

Charles Walton, as a resident, taxpayer, and legally qualified voter of the city of Lyons, brought this action in the district court for Burt County on behalf of himself, and all others similarly situated, against the city of Lyons, its mayor, councilmen, clerk and treasurer, and the Kirkpatrick-Pettis Company, a corporation. The purpose of the action is to permanently enjoin the defendants, and each of them, from taking any action for the purpose of carrying out the provisions of ordinance No. 272 of the city of Lyons. This ordinance was passed and approved by the city council and mayor on June 24, 1959, and then caused to be legally pub-

lished in a local newspaper. It was enacted for the purpose of issuing "negotiable bonds of the City of Lyons, Nebraska in the principal amount of fifty-four thousand six hundred seventy-five dollars ($54,675.00) in pursuance of the provisions of Chapter 19, article 7, Reissue Revised Statutes of Nebraska, 1943, as amended, for the purpose of raising funds to tender to Iowa Electric Light and Power Company the amount of the award of the condemnation court for the gas system owned by Iowa Electric Light and Power Company, prescribing the form of said bonds and providing for the levy of taxes to pay the same and the tender of $54,675.00 to Iowa Electric Light and Power Company." The ordinance discloses that the bonds have been sold to defendant Kirkpatrick-Pettis Company, an investment brokerage firm located in Omaha, Nebraska, and that the treasurer of the city was therein directed to deliver the bonds to it upon payment of the purchase price.

After the action was started, but before trial, Charles Walton withdrew therefrom and Delbert Talbott, who was then a resident and taxpayer of the city of Lyons, was, by order of court, substituted as plaintiff. Iowa Electric Light and Power Company, a corporation, owner of the gas distribution system in the city of Lyons, was, by order of court, permitted to intervene and did file a petition of intervention. Plaintiff and intervener both contend, as a basis for the injunctive relief sought, that the defendants, and each of them, are estopped from carrying out the provisions of ordinance No. 272 because of representations and promises, both oral and written, made by the mayor and city councilmen, both directly and indirectly, to the voters of the city of Lyons immediately prior to an election held on April 3, 1956, whereat the electors voted to have the city acquire the intervener's gas distribution system. These representations, it is claimed, were to the effect that only revenue bonds would be used to purchase intervener's gas distribution system if the

electorate voted favorably for the acquisition thereof.

Upon trial the court found generally for the defendants and against the plaintiff and the intervener; found that the prayer of both for a permanent injunction should be denied; dissolved a temporary restraining order it had caused to be issued; and then rendered a judgment accordingly, dismissing the plaintiff's petition and also that of the intervener. Plaintiff and intervener filed a motion for new trial and this appeal was taken from the overruling thereof. We shall herein refer to the parties as they appeared in the court below.

The principal question raised by this appeal is one of fact, that is, do the facts established estop the city from proceeding under ordinance No. 272 and should it be enjoined from doing so? However, before proceeding with that issue, there are two contentions made by defendants which require our attention. Defendants contend there is such a material variance between the allegations and proof that plaintiff and the intervener cannot sustain their position, citing our holding in Callaway v. Farmers Union Cooperative Assn., 119 Neb. 1, 226 N. W. 802, to support this contention. Therein we held: "There can be no recovery if there is a material variance between the allegations and the proof. The allegata and probata must agree." Plaintiff alleged: "Prior to the said election of April 3, 1956, the Mayor and City Councilmen of Lyons represented orally and by written literature that Revenue Bonds would be used by the City of Lyons for the purchase of said gas system if the electorate voted favorably for acquisition thereof; that many of the businessmen in the City of Lyons distributed preelection literature, prior to April 3, 1956, which represented that revenue bonds would be used to acquire said system, which representations were acquiesced in, and ratified by, the Mayor and City Council then in office on and immediately prior to April 3, 1956." Allegations contained in the petition of intervention are to the same effect. There is no evidence to the effect that

the mayor or councilmen represented to the voters of the city that if, at the April 3, 1956, election, they voted to acquire the gas distribution system that it would be purchased by issuing revenue bonds. However, plaintiff and intervener also alleged that the mayor and councilmen represented to the voters of the city of Lyons that only the earnings from the revenue of the gas distribution system would be used to purchase it. In view of the provisions of section 25-846, R. R. S. 1943, we shall consider the evidence adduced to see if it is sufficient to grant the relief that plaintiff and intervener here seek.

Defendants further contend that intervener, under our holding in May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, has no right at this time to question the source of funds which the city may use to purchase its gas distribution system in the city of Lyons. Therein we held, by quoting from Central Power Co. v. Nebraska City, 112 F. 2d 471, as follows: " 'The laws of Nebraska make adequate provision for the raising of money by cities to pay for property acquired under condemnation and since the Company must receive its payment before the City can take possession, the Company may not in this proceeding question how the City is to obtain the money with which it will pay.' " But intervener owns tangible personal property located in the city of Lyons, and taxable by it for city purposes, which is not a part of its distribution system located therein. Under this factual situation we think this contention to be without merit.

We fully discussed the doctrine of equitable estoppel as it applies to municipal corporations in the exercise of governmental functions in May v. City of Kearney, *supra*. See, also, City of Kearney v. Consumers Public Power Dist., 146 Neb. 29, 18 N. W. 2d 437; Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. In May v. City of Kearney, *supra*, we held: "Ordinarily the doctrine of equitable estoppel cannot be invoked

against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another." Therein we went on to hold, by quoting from People v. Thomas, 361 Ill. 448, 198 N. E. 363, that: "'The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, * * *.'" Therein we also said: "To preserve self government public officials in charge of, or in obtaining control of, such large public financial and economic operations must be held to strict accountability for promises and pledges made to the electorate who under the law and by their votes confer these powers upon them, in order that the electorate may cast an intelligent ballot and protect their personal and property rights." However, we went on to say: "'* * * while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances.'"

Plaintiff and intervener seem to think the factual situation here presented brings it within our holding as it relates to the facts presented in May v. City of Kearney, *supra*. Therein the voters of the city of Kearney authorized the city to acquire, by condemnation, the electric light and power plant and distribution system serving the inhabitants of that city owned by Consumers Public Power District. Prior to the vote authorizing the city to do so the mayor and councilmen advised the voters, through various means, that the only question to be decided by the election was what a

court would say was a fair price for the property sought to be acquired; that if the price set by the court seemed fair and reasonable to the mayor and city council that the proposition of issuing revenue bonds to pay for it would then be submitted to the voters; that only revenue bonds would be used to pay for the purchase price; and that general obligation bonds payable by the city from the levy and collection of taxes would not be used. After an election was held to issue revenue bonds, which the voters defeated, the city attempted to issue general obligation bonds. We enjoined it from doing so. No such factual situation is here presented.

The intervener's 25-year franchise to sell gas in the city of Lyons, allegedly a city of the second class located in Burt County, expired some time prior to April 3, 1956. About that time someone suggested to the mayor and council that the city ought to acquire the gas distribution system and operate it. To determine if that would be feasible the city, in the fall of 1955, employed the engineering firm of Fulton and Cramer to study the matter and report its findings to the city. This was done and a report was made and submitted. It set forth the estimated value of the distribution plant to be $38,000, and estimated an annual profit therefrom, under city operation, of $15,503. In view of the fact that the mayor and councilmen caused these estimates to be published and used them as a basis for saying that if the city would purchase the gas distribution system, it would, in their opinion, pay for itself, we call attention to what we said in Nickel v. School Board of Axtell, *supra*, by quoting from 19 Am. Jur., Estoppel, § 54, p. 660, that: " 'The positive assertion of a fact, and not the mere expression of an opinion, is necessary to constitute an estoppel. Likewise, a statement which is honestly made and which is intended or understood to be a mere estimate will not support an estoppel.' " See, also, Inslee v. City of Bridgeport, 153 Neb. 559, 45 N. W. 2d 590; May v. City of Kearney, *supra*.

The matter of the city acquiring the gas distribution system of the intervener was thereafter submitted to the voters of the city at a general election on April 3, 1956. See § 19-701, R. S. Supp., 1955. It carried by a vote of 241 to 235. The value of the distribution system was thereafter fixed, by proper authorities, at $54,675. The city attempted to tender this amount by issuing its general obligation bonds, pursuant to ordinance No. 272. See § 19-704, R. R. S. 1943. It did not submit the question of issuing revenue bonds for this purpose to a vote of the electorate, as section 17-905, R. R. S. 1943, authorized it to do. It is plaintiff's and intervener's contention that because of representations made by the mayor and councilmen to the voters of the city, immediately prior to the election of April 3, 1956, that the city was required to submit to the voters of the city the question of issuing revenue bonds for the payment of the price fixed for the purpose of the distribution system and was, by reason of such representations made by its mayor and councilmen, estopped from issuing general obligation bonds under section 17-905, R. R. S. 1943.

After the mayor and councilmen had discussed the question of whether or not the city should acquire and operate the gas distribution system in the city, different members of the council, as well as the mayor and other businessmen of the city, made an investigation of the experience other cities had had in connection with operating the gas distribution systems in their respective cities. Some of these cities had acquired their gas distribution systems by the issuance of revenue bonds while others had used general obligation bonds for that purpose. Among the cities visited were Hastings, Pender, Ponca, and Alma. The experience of these cities and the report of the engineers were highly favorable to a successful operation thereof and convinced the mayor and councilmen that the gas distribution system,

if acquired, could be operated profitably and would pay for itself.

A public meeting was called and held in the city about March 15, 1956, to discuss the issue. At this meeting representatives of both sides, that is the mayor and city council as against the intervener, were present and explained to those present their views on the issue. A member of the firm of Fulton and Cramer was present. He first explained the report his firm had submitted to the city and thereafter answered any questions asked. Quite opposite views were expressed by representatives of the two sides, especially as to the earnings that could be expected. It was explained to those present that if the city were authorized to acquire the distribution system by a vote of the people that it could then issue general obligation bonds to pay for its purchase but that revenue bonds could also be used for that purpose but not unless another election was held and the voters favored doing so.

From the exhibits introduced it becomes apparent that the voters of the city were divided on the question of purchasing the gas distribution system. Forty-four businessmen, which included all the councilmen and mayor, published a full page ad in the local paper setting forth the factual situation as they found it to exist in other cities that had purchased their gas distribution system, setting forth the contents of the engineers' report, setting forth other factual data about the city of Lyons and its successful operation of other utilities, and setting forth a comparative gas rate schedule for comparable cities in size as to whether they owned or did not own their gas distribution system. It also contained a discussion of these facts. There is no evidence to show that these facts were not fairly and truthfully presented. The intervener put a full page ad in the local paper on March 29, 1956, explaining why it felt the city should not take over the distribution system and 68 individuals had their names on a handbill

put out for the same purpose. There was also a handbill put out by the mayor and councilmen the night before the election. We find nothing wrong with what was stated therein. It was an answer to contentions made by those opposed to the acquisition of the gas distribution system in what developed into a hotly contested election.

There is no evidence to the effect that the mayor or any member of the city council ever told anyone that only revenue bonds would be used by the city to purchase the distribution system. It is true they told everyone they believed that if the city purchased it that it would not cost the taxpayers a penny for it could be paid for out of profits arising from the operation thereof within a short number of years. There is ample evidence in the record to support such a view. It is true that some of the witnesses testified that they supposed, in view of what they were told that it wouldn't cost the city a penny, that only revenue bonds would be issued to pay for it. However, such a supposition is not sufficient to create an estoppel. The fact is that none of them said they relied thereon in casting their vote. It is apparent they did not. As we said in Nickel v. School Board of Axtell, *supra*: "It can also be said there is no evidence in the record that the electorate, or any part thereof, relied on this statement in voting at the election held on May 6, 1952. It is only contended it is reasonable to assume they may have. Such conjecture or surmise is not sufficient, in any event, to bring into play the equitable doctrine of estoppel." And in Inslee v. City of Bridgeport, *supra*, we said by quoting from 1 Dillon on Municipal Corporations (5th Ed.), § 213, p. 430: " 'Inducements in the way of statements and representations made to influence a voter, although false and fraudulent, will not invalidate the election if it does not appear that by force and fraud the voter was compelled to vote in a way he did not desire to vote.' "

It is true that in May v. City of Kearney, *supra*, we

said: "That the electorate taxpayers relied upon the promises and pledges made by the mayor and city council in the case at bar may be and is inferred from the circumstances appearing in the evidence and need not be proved by direct evidence." However, that holding has no application to the facts herein presented.

We have considered the record before us and from all the evidence adduced have come to the conclusion that the voters on both sides were fully informed as to the question being presented to them at the election held on April 3, 1956, and that neither side was misled by what was said or done. It is true that the vote was close but such is our system of government where the majority controls.

It is plaintiff's and intervener's thought that sections 19-1302 and 19-1303, R. R. S. 1943, have application to the "sinking fund" provision of ordinance No. 272 and, by reason thereof, such fund is neither authorized by the statute nor has it been by a vote of the electorate of the city of Lyons.

Section 5 of the ordinance provides as follows: "The Mayor and Council shall cause to be levied and collected annually a tax by valuation on all the taxable property within the City sufficient in rate and amount to pay the interest on the said bonds as the interest becomes due and to create a sinking fund to pay the principal of said bonds when such principal becomes due."

These sections of the statute have no application to a situation, such as here, where the electorate voted, on April 3, 1956, to acquire the gas distribution system of intervener, which vote authorized the city to issue general obligation bonds for the purchase thereof. When such bonds are issued the city has authority to cause to be levied and assessed upon the assessed value of all the taxable property within the corporate limits of the city, except intangible property, such sums as may be authorized by law for the payment of outstanding bonds. See §§ 17-507 and 17-702, R. R. S. 1943.

"A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal." Union P. R. R. Co. v. Buffalo County, 9 Neb. 449, 4 N. W. 53. See, also, 15 McQuillin, Municipal Corporations (3d Ed.), § 43.133, p. 697. That a sinking fund for the payment of bonds was anticipated by the Legislature is evidenced by section 77-2341, R. R. S. 1943. We think the following is applicable to the situation here presented: "A municipal corporation may, and, when so required by constitution, statute, or charter, must, prior to the issuance of bonds, make provision for the payment of such bonds and interest thereon, a common requirement being that the municipality shall, at or before the issuance of the bonds, make provision for the collection of an annual tax sufficient to pay the interest on the bonds, and to create a sinking fund for the payment of the principal." 64 C. J. S., Municipal Corporations, § 1918, p. 512.

In view of what we have said and held herein, we find the action of the trial court dismissing both plaintiff's and intervener's petitions to be correct and affirm its judgment doing so.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

PATRICK WAMSLEY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
106 N. W. 2d 22

Filed November 18, 1960. No. 34764.

1. **Criminal Law: Trial.** Where competent evidence is adduced to support every element of the offense charged in a criminal prosecution, it is ordinarily for the jury to determine if the offense has been established by evidence beyond a reasonable doubt.

2. **Continuances: Appeal and Error.** The granting of recesses and continuances during a trial to permit a witness to compose himself after manifestations of emotion and hysteria while testifying is within the discretion of the trial court, and this court will not interfere with the trial court's ruling thereon unless an abuse of discretion is shown.
3. **Rape: Trial.** It is the duty of a trial court in a rape case, after denying a motion for a mistrial on the ground that defendant was prejudiced by manifestations of emotion and hysteria by the prosecutrix, to admonish the jury to disregard such manifestations and that it is to determine the verdict solely from the evidence.
4. ———: ———. Where, in a prosecution for rape, the father of prosecutrix interrupts the trial during the cross-examination of prosecutrix by arising from the audience and saying "that's enough," and proceeds to the witness stand and escorts the prosecutrix therefrom, it is the duty of the court to remove any prejudice to the defendant arising therefrom, to reprimand the father for his conduct, to take necessary steps to prevent its recurrence, and to admonish the jury to disregard the incident in its consideration of the evidence.
5. **Criminal Law: Trial.** It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief in the guilt of the defendant unless the belief is expressed as a deduction from the evidence.
6. **Rape: Appeal and Error.** Where incidents occur during the trial of a rape case which tend to create sympathy for the prosecutrix and hostility toward the defendant, it is the duty of the court, on request, to instruct the jury to disregard such incidents and to arrive at the verdict solely upon the evidence. A failure to give such an instruction under such circumstance ordinarily constitutes prejudicial error.
7. **Criminal Law: Appeal and Error.** The rule is that where, in a criminal case, any one of several errors assigned would not in itself be sufficient to warrant a reversal, nevertheless, if all of them in the aggregate justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of the court to award a new trial.
8. **Constitutional Law: Criminal Law.** A defendant in a criminal prosecution has a constitutional right to a public trial by an impartial jury, and when it appears to this court that a defendant has not been accorded a fair trial its duty is to grant a new trial.

ERROR to the district court for Lincoln County: JOHN H. KUNS, JUDGE. *Reversed and remanded.*

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

Clarence S. Beck, Attorney General, and *Bernard L. Packett*, for defendant in error.

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

CARTER, J.

This is a prosecution for statutory rape against the defendant, Patrick Wamsley. The jury returned a verdict of guilty and the defendant was sentenced by the trial court to serve a term of 12 years in the State Penitentiary. The defendant seeks a review in this court by petition in error.

The information charged that the defendant, a male person over the age of 18 years, did on April 3, 1959, unlawfully and feloniously assault Melba Baker, a female child of the age of 15 years and not previously unchaste, and did unlawfully and feloniously carnally know and abuse the said Melba Baker. The charge was made pursuant to section 28-408, R. R. S. 1943.

The prosecutrix was born on August 11, 1943. Consequently she was 15 years and 7 months old on April 3, 1959, the date of the alleged offense. The evidence is undisputed that prosecutrix had sexual intercourse with defendant and four other boys on the night of April 3, 1959. All were more than 18 and less than 21 years of age. The four boys will be referred to as Sullivan, Faulkner, T. Herrod, and G. Herrod.

The evidence shows that a few days prior to April 3, 1959, Sullivan and Faulkner saw prosecutrix walking along a street in North Platte. They drove their automobile to the curb and asked her if she wanted to go for a ride and she declined to go with them. She did not know the boys and they did not know her. On a following Saturday the same two boys again saw prosecutrix

walking along a street and they again accosted her and asked her to go for a ride and get a bottle of pop. She told them that she had to go home and could not go with them. She told them who she was and Faulkner told her who he was. Faulkner asked for a date sometime and she said: "All right, if you want to call." She gave Faulkner her home address and telephone number. A few days later Faulkner called her to go for a coke and she stated she could not go because her mother was sick. Faulkner called again on April 3, 1959, and asked her to go to the show with him. After obtaining her mother's consent she accepted his invitation and agreed that he would call for her at 7:30 that evening.

The prosecutrix left with Faulkner in his car at the appointed hour. They went to a filling station where Sullivan, T. Herrod, and a brother of the latter not involved in this litigation entered the car. The brother of T. Herrod was taken home and the remainder of the group went to get a root beer. Thereafter they decided to buy some beer and drove back to the Herrod home to get G. Herrod to make the purchase for them. They saw defendant's car driving away from the Herrod home and they honked their car horn to get his attention. Defendant stopped and Faulkner's car was driven along side. Defendant and G. Herrod were in the car. The latter agreed to buy the beer and agreed to bring it to the sand pit south of the city. Defendant got into the Faulkner car and the group drove to the sand pit to await the arrival of G. Herrod with the beer. Within a few minutes G. Herrod arrived with four six-packs of beer which were placed in the Faulkner car. All except prosecutrix began drinking beer. Faulkner began to "neck" and "paw" the girl in the presence of the others. Admittedly Faulkner was having no success and an arrangement was made for the others to leave the defendant and prosecutrix alone in the car. Prosecutrix testified to defendant's efforts to have sex-

ual intercourse with her. She told him she wanted to go home. He persisted and she drew a small pocket knife which she held at his throat. Defendant admits that he grabbed her by the hair and took the knife from her. Defendant proceeded to have sexual intercourse with prosecutrix, which he avers was with her full cooperation and consent which she denies. Defendant left the car and Sullivan, Faulkner, G. Herrod, and T. Herrod in turn entered the car and had sexual intercourse with the prosecutrix. Sullivan then returned to the car and had sexual intercourse with her a second time. A third car containing two boys came and left very shortly before the end of the episode. Prosecutrix heard them come and made no outcry. All of the boys testified that prosecutrix was willing and cooperative, and offered no resistance. Prosecutrix does not deny that she did not physically resist after the knife incident with the defendant.

Defendant left the scene shortly after his sexual act with prosecutrix. G. Herrod also left, probably in the third car which had arrived near the end of the episode. Sullivan, Faulkner, T. Herrod, and prosecutrix drove around for a while and then went to obtain food and coffee. Thereafter the prosecutrix was taken home at about 12 midnight.

When prosecutrix arrived home her parents had retired for the night. She did not awaken them. She arose at 2 a.m., and went with her father to assist him in doing janitorial work at two local restaurants. She made no complaint to her father. Upon returning home at about 6:30 a.m., she awakened her mother and informed her of the previous night's events. She was taken to a doctor, and the sheriff was informed. Prosecutrix testified that her clothes were torn and that she observed blood on her underclothing and in the bed where she had slept. The five boys involved testified as to the clothing they were wearing at the time and that there was no blood on them. Prosecutrix testified

positively that she had never had sexual intercourse with any man previous to that time. The doctor who examined the girl testified that from the findings of the examination it was his opinion that the prosecutrix was chaste prior to the event on April 3, 1959. The defendant called a qualified physician who gave it as his opinion under the assumed facts which were supported by the evidence that prosecutrix was not previously chaste.

All of the elements of the crime charged were admitted by the defendant except the previous chastity of the prosecutrix. The time and place of the act, the identity and ages of the parties, and the perpetration of the acts of sexual intercourse are admitted by the defendant and the four boys with him. The only controverted issue was whether or not the prosecutrix was chaste prior to the time of the offense charged. The evidence on this issue was in conflict and presented a jury question, which the jury resolved in favor of the State.

The defendant assigns 25 errors, which he asserts deprive him of a fair and impartial trial. We shall give each of them the attention it deserves, considering the nature of the case and the contents of the record before us.

The defendant contends that the evidence is insufficient to prove the previous chastity of the prosecutrix beyond a reasonable doubt and that the trial court erred in not directing a verdict for the defendant and in not sustaining his motion for a new trial on that ground. We point out that the prosecutrix testified that she had never previously engaged in sexual intercourse. It is true that the credibility of the prosecutrix on this vital point was impeached by her sworn testimony at the preliminary hearing in the county court, which impeaching evidence will be more particularly discussed in connection with another point. Her evidence, however, was corroborated by the evidence of the examining physician. While there was substantial evidence to support the contention of the defendant that

prosecutrix was not previously chaste, it presented a question of fact to be determined by the jury. We find no merit in defendant's contention on this point.

The defendant contends that the trial court erred in refusing to declare a mistrial requested by the defendant following several hysterical and emotional outbursts, demonstrations, and breakdowns by prosecutrix on the witness stand. It is contended that such conduct and the recesses and continuances granted by the trial court as a result thereof had the effect of producing the utmost sympathy for the prosecutrix in the minds of the jurors and to arouse the jury to extreme passion and prejudice against the defendant. The record shows that several recesses of the court were taken for the purpose of permitting the prosecutrix to compose herself, and on one occasion the court was recessed from approximately 11 a.m. to 1:30 p.m. for such purpose, and at 1:30 p.m. court was recessed until 9:30 the next morning for the same reason.

The evidence shows that the prosecutrix did on several occasions during her cross-examination become emotional and hysterical, and that the trial court granted several recesses of the court as heretofore stated to enable her to compose herself in order that she could continue as a witness. There is nothing in the record as to what she said during these hysterical outbursts. There is evidence that after she retired from the courtroom such outbursts, at least on one occasion, were heard throughout the floor of the courthouse on which the courtroom is located. The record is not clear that this was within hearing of the jury. Counsel for the defendant objected to the continuance from 11 a.m. to 1:30 p.m. and from 1:30 p.m. to 9:30 the following morning and moved for a mistrial on the ground that the defendant was prejudiced from having a fair trial by the frequent outbursts of emotion and hysteria and the resulting recesses of the court. The motion for a mistrial was renewed when court resumed the following morn-

ing. The trial court overruled the motion for a mistrial. No admonition was directed to the jury to disregard the manifestations of emotion and hysteria, nor was the jury directed by the instructions to do so, although such an instruction was requested by the defendant. The question before this court does not appear to have been passed on in a case having any similarity to the present one.

In cases such as the one before us, manifestations of emotion and hysteria are not unnatural or unusual. No contention is here made that such manifestations were feigned and not spontaneous on the part of the prosecutrix. Whether or not such manifestations are prejudicial to the fundamental right of a defendant to a fair and impartial trial has been before other courts, with results that are not in all respects consistent. These cases are collected in an annotation appearing in 46 A. L. R. 2d 949.

We think the proper rule is that, where there are outbursts of emotion or hysteria in the course of the trial, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and insure a fair and impartial trial for the defendant. It necessarily follows that in the absence of an abuse of discretion an appellate court will not interfere with the rulings of the trial court thereon, such court having a much better knowledge of what occurred and the extent of the passion and prejudice that resulted therefrom than this court might glean from the printed record. We find no error in the action of the trial court in granting the recesses and continuances about which the defendant complains. It is true that the trial court failed to admonish the jury to disregard the manifestations of emotion and hysteria on the part of the prosecutrix, a matter which we shall consider in connection with another point raised in the case.

As a part of his motion for a mistrial the defendant

by his counsel stated that about 9:30 a.m. on the third day of the trial the father of the prosecutrix, during her cross-examination, arose from the audience and said "That's enough," and proceeded directly to the witness stand and assisted the prosecutrix therefrom. The State does not question the correctness of this statement. The trial court took no action. There is nothing in this record to indicate that the trial court reprimanded the father of the prosecutrix for his conduct, took any steps to prevent its recurrence, or admonished the jury to disregard the incident. While no objection was made at the very time the incident occurred, it was raised in the motion for a mistrial approximately 1½ hours later. The defendant offered an instruction dealing with the subject, which was refused.

The responsibility for conducting a trial in an orderly and proper manner for the purpose of insuring a fair and impartial trial for one charged with crime rests with the trial court, and it is vested with a wide discretion in so doing. In the absence of a clear showing that the trial court failed to control the situation and permitted the trial to get so out of hand as to necessarily have aroused passion and prejudice against the accused, the rulings of the court will not ordinarily be disturbed. But where a person injects himself into the trial as did the father of the prosecutrix, the duty of the court arises to act seasonably to control the situation by reprimanding the offender, by taking steps to prevent its recurrence, and by admonishing the jury to disregard the matter in order to dispel any passion or prejudice arising from it. In this instance none of these things were done. The trial court failed in its responsibility to assert the powers of the court in dealing with this intrusion upon the judicial process and in permitting the prejudice to the defendant arising therefrom to remain unalleviated. Wever v. State, 121 Neb. 816, 238 N. W. 736. Whether or not the matter was timely raised, it is proper to be considered along with other

errors appearing in the record, together with the general conduct of the trial, in determining if the accused had a fair and impartial trial, when assigned as error in the motion for a new trial timely filed.

The record shows that several recesses of the court were taken to permit the prosecutrix to compose herself as hereinbefore stated. A motion for a mistrial was made at the close of the evidence on the basis that the many manifestations of emotion and hysteria had the effect of arousing great sympathy for the prosecutrix and passion and prejudice against the defendant to such an extent that a fair and impartial trial could not be had. We do not here determine that a mistrial should have been granted. It was the duty of the court, however, to admonish the jury to disregard all incidents of the trial that tended to create sympathy for prosecutrix and prejudice to the defendant, and to further admonish the jury that it was the duty of the jury to try the case solely on the evidence properly before it and the instructions of the court, both by oral admonitions at seasonable times and by written instructions when properly requested. An instruction was requested in this case admonishing the jury to disregard the manifestations of emotion and hysteria by the prosecutrix, and that the jury should disregard sympathy for the prosecutrix and any prejudice toward the defendant, and try the case solely on the evidence.

The primary issue in the case is whether or not the prosecutrix was chaste. There is evidence by a physician that in his opinion she was not. The five boys involved testified to facts which clearly indicate that prosecutrix was not previously chaste. The prosecutrix testified positively that she had never previously had intercourse with a man. Her credibility was impeached by her own sworn testimony given at the preliminary hearing. The impeaching evidence not only went to her credibility generally but to the truth of her statement that she was previously chaste. The

nature of this impeaching evidence is such that we do not choose to repeat it here. It will be sufficient for us to say that it is not the evidence that could reasonably be expected from a poor innocent little girl, as the attorneys for the State proclaimed her to be in their arguments to the jury. It could reasonably be inferred from this sworn testimony given at the preliminary hearing that prosecutrix was not previously chaste. While the issue of chastity was for the jury, we point out that the manifestations of emotion and hysteria by the prosecutrix and the interruption of the trial and the escorting of prosecutrix from the witness stand by her father tended to create an atmosphere of sympathy for the prosecutrix and of passion and prejudice to the defendant which the trial court made no effort to minimize.

In addition to the foregoing the county attorney in his opening argument to the jury made the following statement: "And he (defense counsel) asked her point blank about her chastity, and she come back at him that she had never had intercourse before, and as I stand here, I heartily believe that with all my heart and soul, the way that she screamed, 'It isn't the truth,' because a little girl is not going to take the abuses and go up and take the stand in this case if she wasn't chaste," etc. The expression of the personal opinion of the prosecutor in a criminal prosecution, not based on the evidence, in arguing the case to the jury has frequently been condemned. Reed v. State, 66 Neb. 184, 92 N. W. 321; Olsen v. State, 113 Neb. 69, 201 N. W. 969; Balis v. State, 137 Neb. 835, 291 N. W. 477; Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666; Wilson v. State, 170 Neb. 494, 103 N. W. 2d 258.

With the close issue of fact in this case as to the previous chastity of the prosecutrix, the personal opinion of the county attorney could well have supplied the jury with the motivating factor that tipped the scales in favor of the State. Objection was made at the close of the county attorney's opening argument. The objec-

tion was overruled without an admonition to the jury to disregard it, the least that the trial court could have done to alleviate the prejudicial effect of the statement.

The nature of the instant case is such that sympathy for the prosecutrix and prejudice to the defendant could easily be engendered in the minds of jurors. In such a case every precaution should be taken to insure a fair and impartial trial, however guilty the defendant appears to be. It is the duty of the trial court by every means at his command to see to it that a fair and impartial trial is had and that the verdict rendered is based on a dispassionate consideration of the evidence. In the instant case the defendant moved for a mistrial at the close of all the evidence on the ground that the incidents herein discussed precluded such a trial. This was asserted in his motion for a new trial as a basis for a new trial. Whether the motion for a mistrial was a prerequisite to its assertion in the motion for a new trial, we do not here determine. We do find that the trial court erred in not awarding the defendant a new trial.

It is clear from an examination of the whole record that the manifestations of emotion and hysteria on the part of the prosecutrix, and the improper conduct of the county attorney in expressing his personal opinions in his argument to the jury, had the cumulative effect of charging the atmosphere of the trial with great sympathy for the prosecutrix and with extreme hostility toward the defendant. It seems clear to us that the recited events occurring at the trial had the effect, in the aggregate, of creating such an atmosphere of hostility toward the defendant that it tended to make impossible a dispassionate consideration of the evidence by the jury. The great sympathy for the prosecutrix created by the cited incidents and the resulting hostility toward the defendant could have been alleviated by rebukes to those who violated established rules of conduct, by admonishing the jury orally or by written instruction to disregard such incidents occurring at the trial, by

reprimanding the county attorney for expressing his personal opinions not inferred from the evidence, and by admonishing the jury to disregard such irregularities and return a dispassionate verdict based solely on the evidence before it. People v. Brown, 81 Cal. App. 226, 253 P. 735.

It is true that one or more of the recited incidents might not, standing alone, constitute prejudicial error requiring a new trial, but their cumulative effect was to deprive the defendant of his constitutional right to a public trial by an impartial jury.

There is a paucity of cases in this jurisdiction dealing with accumulative error as a ground for a new trial where one or more of such errors, standing alone, may not constitute reversible error. But such question has arisen in other jurisdictions to which we shall refer.

In 24 C. J. S., Criminal Law, § 1887, p. 840, it is said: "The doctrine of harmless error does not apply where accused has been deprived of a substantial right, and it will not be extended to such an extent as to deprive accused of a fair trial, or a trial on the merits. One who is accused of crime is entitled to an impartial trial, and where the record shows prejudicial irregularities, a conviction will be reversed." See, also, People v. Aragon, 154 Cal. App. 2d 646, 316 P. 2d 370.

In State v. Gossett, 117 S. C. 76, 108 S. E. 290, 16 A. L. R. 1299, the court said: "The law has been broken and demands prompt punishment of the offender; the law guarantees to the accused a fair trial; the public interest is as much involved in the sanctity of this guaranty as in the swift retribution which should follow crime. A fair trial means a trial before an impartial Judge, an honest jury, and in an atmosphere of judicial calm. It requires a wise, fearless, and impartial mind to harmonize these elements of the public interest, lest in its haste to deal a blow the law may perpetrate a judicial wrong." In McMahan v. State, 96 Okl. Cr. 176, 251 P. 2d 204, the court said: "A fair trial is a legal trial, or

one conducted in all material things in substantial conformity to law." We agree with these general definitions of a fair trial. It implies a trial with sympathy for one party or hostility toward the other being kept at a minimum at all stages of the trial in order that a fair and impartial verdict may be returned under the evidence.

In Stagemeyer v. State, 133 Neb. 9, 273 N. W. 824, we approved the following statement of the law: " 'An error which prevents proper consideration by the jury of the only question relied upon by the defendant is substantial, not technical, and we have no right to disregard it though we may approve of the verdict.' " See, also, People v. Rongetti, 338 Ill. 56, 170 N. E. 14.

In State v. Collins, 246 Iowa 989, 69 N. W. 2d 31, the court said: "But it is fair to say that in a criminal case where the error pertains to a matter calculated to arouse prejudice against defendant, we should be cautious in holding it to be nonprejudicial. 'Whether the error in a given case shall be regarded as harmless on appeal may often depend on the circumstances of the particular case rather than on any definite rules of law.' 24 C. J. S., Criminal Law, section 1887, page 841. And 'errors which might otherwise be regarded as harmless and unimportant may not be so considered in close cases.' "

In State v. Dolliver, 150 Minn. 155, 184 N. W. 848, the court stated: "And the rule is that, where any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet, if all of them taken together justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of this court to reverse." See, also, United States v. Donnelly, 179 F. 2d 227; Ellis v. State, 86 Fla. 155, 97 So. 285.

In State v. Toloff, 123 Wash. 92, 211 P. 745, the court stated the rule as follows: "Many of these assignments of error might not, in themselves, if standing alone, be sufficiently prejudicial to entitle the appellant to a new

trial, but the sum total of them was exceedingly prejudicial, especially in view of the fact that the testimony tending to establish his guilt, although it presented a small basis for the jury to determine that he was guilty, was of such a feeble and unpersuasive character that we are of the opinion that it must leave, in the minds of a jury, a reasonable doubt, unless the jury was influenced by matters other than those appearing in the evidence."

In State v. Gevrez, 61 Ariz. 296, 148 P. 2d 829, the court said: "We cannot, however, find fault with the mother of the deceased, but we do say the laxness of the court in permitting her to remain so near the jury, and her deportment while there, were very prejudicial to the rights of appellant and should not have been allowed. * * * We hold that the defendant herein did not have a fair and impartial trial."

In State v. Long, 127 Mont. 523, 268 P. 2d 390, the court said: "Whatever the status of a defendant in a criminal case may be and whatever be the nature of the crime with which he is charged, each and all are entitled to the same fair trial guaranteed by our Constitution. The Constitution makes no distinction between defendants but treats all alike, as must this court, whose duty it is to see that defendants in criminal cases brought before us are accorded a fair trial."

We are of the opinion, as the result of our examination of this record shows, that defendant has not had a fair and impartial trial according to law and the established rules of criminal procedure to which every person, whether guilty or innocent, is entitled. The judgment of the district court is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. RALPH E. KERSEY ET AL., APPELLANTS.

106 N. W. 2d 31

Filed November 18, 1960. No. 34791.

1. **Trial: Judgments.** When a proceeding under the Uniform Declaratory Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.
2. **Trial.** Where the record in a civil case shows that a law action was tried to the court without a jury and the record discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, this court will presume that a jury was waived.
3. **Appeal and Error.** The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
4. ———. In such a case, it is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
5. ———. In considering sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence.
6. **Insurance.** Where the word "permission" or "consent" appears in the omnibus clause of an insurance policy without definition, it is construed to include implied permission, and this implication may be a product of the present or past conduct of the insured.
7. ———. When an insurance policy provides that the insurer will pay reasonable expenses incurred within 1 year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing, and funeral expenses for each person who sustains bodily injury, caused by an accident, provided the automobile is being used by the named insured or his spouse if a resident of the household or with the permission of either, and the minor daughter of insured uses the automobile without the implied consent of the insured and an accident occurs resulting in injury to the occupants and the death of one

of them; Held, that no liability attaches to the insurer under the provisions of the policy.

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

Munro, Parker & Munro and *Dryden & Jensen,* for appellants.

John E. Dougherty and *Healey, Wilson & Barlow,* for appellee.

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

MESSMORE, J.

This is an action brought in the district court for Buffalo County by the State Farm Mutual Automobile Insurance Company, a corporation, as plaintiff, against Ralph E. Kersey, Merreta Kersey, Dale O. Beavers, administrator of the estate of Gregory Beavers, deceased, Mrs. Ralph E. Kersey, first and real name unknown (the record shows that Mrs. Ralph E. Kersey is also known as Jessie Kersey), Joyce Kersey, and James Kersey, minors, defendants. Merreta Kersey, James Kersey, and Joyce Kersey, minors, were represented by a guardian ad litem. The purpose of the action was to obtain a declaratory judgment determining the liability of plaintiff, if any, under the provisions of an insurance policy issued by it to Ralph E. Kersey covering his 1952 Oldsmobile sedan, because of an automobile accident which occurred while Merreta Kersey, a minor daughter of insured Ralph E. Kersey, was driving his automobile, resulting in injuries to Merreta, James, and Joyce Kersey who were riding in the automobile, and causing the death of Gregory Beavers, a minor, who was also riding in said automobile.

This case was tried to the court without a jury. The trial court rendered judgment in favor of the plaintiff and against all of the defendants; that each of the defendants be declared to have no rights, titles, or inter-

est in and to the policy of insurance issued by the plaintiff to the defendant Ralph E. Kersey; that the plaintiff be relieved of the burden and expense of defending Merreta Kersey in an action brought in the district court for Buffalo County wherein Dale O. Beavers, as administrator of the estate of Gregory Beavers, deceased, was plaintiff and Merreta Kersey was defendant; that Dale O. Beavers, as such administrator, be declared to have no rights, titles, or interest in and to the said policy of insurance or its medical coverage provisions as a result of the accident occurring on August 31, 1956; that Ralph E. Kersey or any of the minor defendants be declared to have no rights, titles, or interest under the medical provisions of said policy; and that the plaintiff be relieved therefrom.

The defendants filed an application for special findings of fact. The trial court found that the application should be granted and that the same constituted a part of the journal entry filed in this cause. The trial court found that the defendant Merreta Kersey drove the automobile owned by the defendant Ralph E. Kersey alone on July 4, 1956, in Overton, Nebraska, with the permission of defendant Ralph E. Kersey; that the defendant Merreta Kersey drove the automobile of the defendant Ralph E. Kersey alone, with the permission of Ralph E. Kersey, in Smithfield, Missouri, during the summer of 1955; that the defendant Ralph E. Kersey permitted the defendant Merreta Kersey to drive the automobile on country roads and in the village of Elm Creek, Nebraska, a number of times during the year preceding the accident of August 31, 1956, when the defendant Ralph E. Kersey was with her and gave her driving lessons at said times; that the defendant Merreta Kersey drove the automobile owned by the defendant Ralph E. Kersey back and forth on the family driveway both with and without the express permission of the defendant Ralph E. Kersey, approximately 12 to 15 times prior to the accident; that the defendant Ralph E. Kersey had knowl-

edge that Merreta Kersey was driving the car on the driveway and never objected; that the defendant Ralph E. Kersey did not notify his daughter Merreta Kersey that she was not to drive the car on a country road at the time the accident took place or at any other time; and that the defendant Ralph E. Kersey used his automobile in his business and almost always drove the automobile when he left home.

The trial court further found that neither parent of Merreta Kersey gave permission, directly or by implication, to Merreta Kersey to drive the automobile on August 31, 1956; and that the evidence in the case neither expressly or impliedly gave or granted Merreta Kersey permission to drive said automobile other than in the company of her father.

The defendant Dale O. Beavers, administrator of the estate of Gregory Beavers, deceased, filed a motion for new trial. The defendants F. M. Parker, guardian ad litem for Merreta Kersey, Joyce Kersey, and James Kersey, minors, Ralph E. Kersey, and Jessie Kersey, filed a motion for new trial. The trial court overruled all of the defendants' motions for new trial, and defendants perfected appeal to this court.

It was stipulated by the parties that the plaintiff is a corporation authorized to do business in this state; that Ralph E. Kersey is a resident of Elm Creek, Nebraska, and the father and natural guardian of Merreta, Joyce, and James Kersey, minor children, and that Mrs. Ralph E. Kersey, also known as Jessie Kersey, is the wife of Ralph E. Kersey; that Dale O. Beavers is the administrator of the estate of Gregory Beavers, deceased, pending in the county court of Buffalo County; that the plaintiff, in Nebraska, entered into a policy of insurance with Ralph E. Kersey covering a 1952 Oldsmobile sedan automobile owned by him; that on August 31, 1956, while said automobile was being driven by Merreta Kersey it overturned on a country road north of Elm Creek; that at the time of the accident Joyce

Kersey, James Kersey, and Gregory Beavers were riding in said automobile; that it is the contention of Ralph E. Kersey and Merreta Kersey that at the time of the accident Merreta Kersey was driving the automobile with the permission of Ralph E. Kersey and her mother; that as a result of the automobile accident Merreta Kersey, Joyce Kersey, and James Kersey incurred injuries resulting in medical expense in a stated sum; and that the defendant Ralph E. Kersey claims an interest in the policy of insurance under its medical payment coverage for the amount of medical expenses.

It was also stipulated that Gregory Beavers sustained injuries by virtue of the accident which resulted in his instantaneous death and the funeral expense of $500 was paid by Dale O. Beavers personally; and that Merreta Kersey contends that the plaintiff is obligated to defend actions arising out of said accident brought against her.

The plaintiff's amended petition denied that Ralph E. Kersey and Dale O. Beavers had an interest in the insurance policy under its medical payment coverage, or that Dale O. Beavers had an interest in the insurance policy by reason of any obligation of the insurance company to indemnify Merreta Kersey in the event a judgment was rendered against her for damages resulting from the death of Gregory Beavers; further denied that it had an obligation to defend actions arising from the death of Gregory Beavers out of the accident; and further denied that Merreta Kersey was driving the automobile with the permission of Ralph E. Kersey and his wife at the time of the accident.

The answer of the defendants Ralph E. Kersey and his wife, insofar as need be considered, alleged that the Oldsmobile was operated by Merreta Kersey at the time of the accident as a family car of Ralph E. Kersey and kept and maintained for the use of the family, including Merreta Kersey; that Merreta Kersey was driving said automobile with the implied consent and permission of Ralph E. Kersey; that the plaintiff accepted

the defense of the claim of Dale O. Beavers and assured Ralph E. Kersey that the plaintiff would defend any claim against him as the insured by the administrator of the estate of Gregory Beavers, deceased, and would extend coverage under the policy to the named insured; and that in reliance upon the plaintiff's agreement to defend and extend such coverage, Ralph E. Kersey did not investigate the accident. The answer further alleged that the agents of the plaintiff informed Ralph E. Kersey and his wife that it was liable for medical payments and funeral expenses coverage.

The answer of the defendants Merreta Kersey, Joyce Kersey, and James Kersey, through their guardian ad litem, denied generally the allegations of the plaintiff's amended petition; denied that the plaintiff was without an adequate remedy at law; alleged that the automobile operated by Merreta Kersey at the time of the accident was the family car of the defendant Ralph E. Kersey and kept and maintained for the use of said family, including Merreta Kersey; and alleged that Merreta Kersey was driving and operating said automobile at the time of the accident with the implied consent and permission of the defendant Ralph E. Kersey.

The answer of the defendant Dale O. Beavers denied that the plaintiff was without an adequate remedy at law; and denied all of the allegations contained in the plaintiff's amended petition not admitted.

For convenience we will refer to the State Farm Mutual Automobile Insurance Company, a corporation, as the plaintiff; to the defendants as their names appear in the record; and to the 1952 Oldsmobile automobile as the Oldsmobile.

The defendants' assignments of error pertinent to this appeal are as follows: The trial court erred in finding that Merreta Kersey did not have implied permission to drive said automobile at the time of the accident; and erred in finding that the defendants should be

excluded from any and all interest of the medical payments coverage in the plaintiff's insurance policy.

There are certain established rules of law pertinent to the instant case, as follows.

When a proceeding under the Uniform Declaratory Judgments Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. § 25-21,157, R. R. S. 1943. See, also, Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 48 N. W. 2d 623.

Where the record in a civil case shows that a law action was tried to the court without a jury and the record discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, this court will presume that a jury was waived. Davis v. Snyder, 45 Neb. 415, 63 N. W. 789.

"The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. * * * In such a case, it is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong." Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797.

"In considering sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence." Dunbier v. Stanton, *supra*. See, also, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568.

The record shows that on March 19, 1957, Ralph E. Kersey, as plaintiff, brought an action in the district court for Buffalo County against the State Farm Mutual Automobile Insurance Company, a corporation, defendant, to recover medical expenses under the provisions of a policy of insurance issued to the plaintiff by the defendant.

On February 19, 1957, Dale O. Beavers, administrator of the estate of Gregory Beavers, deceased, brought an action against Merreta Kersey and Ralph E. Kersey in the district court for Buffalo County for damages resulting from negligence on the part of Merreta Kersey in operating the automobile owned by Ralph E. Kersey resulting in the death of Gregory Beavers, a minor.

It was stipulated by the parties that on August 31, 1956, at the time and place of the accident, Merreta Kersey, daughter of Ralph E. Kersey and Jessie Kersey, was driving the 1952 Oldsmobile, and the following persons were riding in said automobile: James Kersey, Joyce Kersey, and Gregory Beavers.

The record discloses that Ralph E. Kersey is the pastor of the First Christian Church in Elm Creek, and that he lives in Elm Creek, Nebraska. He and his wife, Jessie, have five children, a son Robert Kersey who was home on furlough at the time of the accident, a daughter Erma who lives at Blair, Merreta Kersey who was born March 28, 1941, and Joyce and James Kersey, twins, born December 19, 1948. Reverend Kersey owned a 1952 Oldsmobile sedan and a policy of insurance issued by the plaintiff.

On August 31, 1956, Reverend Kersey went to Lexington to see a doctor. He and his wife left home about 1:30 or 2 p.m., and were driven to Lexington in the automobile of their son Robert. When he left home, Reverend Kersey left his Oldsmobile in the driveway, and inadvertently left the keys in the ignition switch. Normally he did not leave the keys in the car. While Reverend and Mrs. Kersey were at Lexington, Merreta

took the Oldsmobile and went for a drive in the country, taking the twins and Gregory Beavers, a playmate of the twins and the minor son of Dale O. Beavers. On a country road north of Elm Creek the Oldsmobile overturned, seriously injuring the three Kersey children and killing Gregory Beavers. Reverend and Mrs. Kersey heard of the accident when they returned to Elm Creek.

Reverend Kersey testified that prior to August 31, 1956, he had given Merreta lessons in driving the Oldsmobile. He permitted her to drive on country roads, which he referred to as "back roads," when he was with her on visits to members of his congregation. She drove in his presence 10, 12, or maybe 18 times. Reverend Kersey further testified that on July 4, 1956, when he, his wife, Merreta, and the twins were vising in Overton, Merreta asked to drive the Oldsmobile to visit a girl friend a few blocks from where they were visiting. She was granted permission to do so. On another occasion in 1955, while the Kerseys were visiting relatives in Smithfield, Missouri, Merreta was granted permission to drive the car across the village and back.

Reverend Kersey further testified that after hearing about the accident he and Mrs. Kersey went to the hospital where they found Merreta to be seriously injured and unconscious, and the twins were also seriously injured. On the morning after the accident a representative of the plaintiff insurance company contacted Reverend Kersey, as did also Rex Gray, an agent of the plaintiff from whom Reverend Kersey purchased the insurance policy. Reverend Kersey testified that the representative, Frank J. Roubicek, said he was an adjuster for the insurance company. There was a conversation with Gray and the adjuster at that time. Gray said they were sorry that the accident happened, but that there was nothing to worry about so far as the finances were concerned because Reverend Kersey was covered by insurance, and the medical bills would be taken care of.

Reverend Kersey further testified that the adjuster also took part in this conversation. The adjuster then said that they would like to make a report and had to have it in writing. Then Reverend Kersey, Mr. Gray, and the adjuster went out on the veranda on the north side of the hospital and sat down. A statement was taken, which was signed by Reverend Kersey. Reverend Kersey testified that he believed the adjuster called him on the telephone later while he and Mrs. Kersey were eating, and asked if they could have a few minutes of their time. Reverend Kersey told the adjuster that they were greatly disturbed over the accident, and the adjuster said: "Well, we just want to help you with this so you can get your insurance," and then said that they were coming out to the hospital. They went to the hospital with attorney Tye, by permission of Reverend Kersey. At the time they arrived, Reverend Kersey told them that the children were gravely ill and that he and Mrs. Kersey were very tired and wanted to be with the children. Mr. Tye expressed his sympathy with reference to the accident, and stated that he had come to take statements with regard thereto, so that Reverend Kersey could obtain his insurance. A place was found where it was suitable to take the statements of Reverend Kersey and his wife who was present.

Reverend Kersey testified further with reference to his general health, stating that he had had a spinal operation in July 1946 and had been compelled to wear a brace since that time, and that he could not properly relax or sleep; that he was extremely tired and nervous at the time Mr. Tye asked the questions, but that in his profession he encountered death, accidents, and sickness, and through the years he had learned to control his nervousness and could sympathize without showing emotion; and that his wife had been ill with what was known as a "heart block."

Reverend Kersey further testified that approximately

3 weeks after the accident he was notified by the plaintiff insurance company that it was not going to make payment under the provisions of the insurance policy; that plaintiff never notified him that it was not going to defend him in the action now pending, brought by Dale O. Beavers, administrator of the estate of Gregory Beavers; and that he had made no investigation of the accident to protect himself because the plaintiff said it would defend the action.

Merreta Kersey testified that she remembered driving the Oldsmobile on August 31, 1956; that she was at home that day with the twins; that the Oldsmobile was on the driveway; and that she had not asked her parents that day about driving it. She further testified that she took the Oldsmobile and the three children who were seated in the back seat of the car and went for a little ride in the country; that her father had been teaching her to drive the Oldsmobile for over a year; and that the accident occurred on a country road. She testified to driving the Oldsmobile in Overton and in Smithfield, Missouri, in the driveway at home, and on country roads a number of times.

Frank J. Roubicek, a claims service representative of the plaintiff, testified that he became acquainted with Reverend and Mrs. Kersey the morning of September 1, 1956, which was occasioned by a report of the accident of August 31, 1956, he received from Rex Gray, an agent of the plaintiff at Kearney; that he met Reverend Kersey in the hall at the hospital and talked to him briefly; that they then went outside the hospital and found some chairs; and that at that time he informed Reverend Kersey that he was an authorized representative of the plaintiff, and explained to him the purpose of his mission which was to accumulate facts with reference to this particular accident. He asked Reverend Kersey what he knew about the accident, and Reverend Kersey volunteered such information as he had about the accident. He also stated that he had not given

permission to Merreta to drive the car. At that time this witness took a statement in writing from Reverend Kersey. Reverend Kersey read the statement and signed it, using his own pen. This witness further testified that Reverend Kersey was quite composed, as opposed to being distraught, and his conversation was coherent.

Rex Gray testified that when they contacted Reverend Kersey at the hospital he was as near normal as a person could be, and had no difficulty in talking or visiting with them, or in answering questions. During the conversation had with Reverend Kersey in which the written statement was made, Roubicek presented Reverend Kersey a non-waiver agreement with the explanation that it was to enable the plaintiff to continue the investigation, and both Reverend and Mrs. Kersey signed this instrument.

Later the same day, shortly after noon, Mr. Tye asked questions which were answered by Reverend and Mrs. Kersey and recorded by a court reporter. This reporter testified that at the time he recorded the statements, Reverend Kersey answered the questions readily, calmly, and quietly. He further testified that after the statement was taken the court reporter again saw Reverend Kersey in the hospital and remarked to him that he must have very strong faith in his religion to take the tragedy that had happened as well as he did, and Reverend Kersey replied that he had very great faith.

Mr. Tye testified about going to the hospital to take the statements of Reverend and Mrs. Kersey; that he talked to them a few minutes prior to taking the statements and did not notice anything unusual about them or in their way of answering his questions; and that they made no complaints about making the statements.

Mr. Roubicek and Mr. Gray testified that after leaving the hospital they went to Elm Creek and had a conversation with Dale O. Beavers, the father of the boy who was killed. Mr. Beavers testified that in the conversation Mr. Roubicek stated that all expenses would

be paid, including flowers and burial clothes. Mr. Roubicek testified that he told Mr. Beavers the kind of expenses the company paid if the loss was within the coverage, and that he was there to complete the investigation. Mr. Gray testified that Mr. Roubicek made the statement that he was investigating and attempting to determine if the policy was in force.

After a full report was made to the plaintiff, Roubicek, together with Gray, went to the Kersey home about 2 weeks after the accident and advised them that no coverage would be extended. Later the Kerseys employed a law firm, and an attorney of that firm had conversations with Roubicek with reference to the reason for the denial of coverage. The plaintiff wrote a letter setting forth its position in this matter. There was further correspondence with reference to this matter that need not be set out.

On March 23, 1957, an attorney, at the request of Mr. Tye, took a statement which was recorded by a court reporter, in which Reverend Kersey referred to two occasions when he had permitted Merreta to drive the car alone, and in which he recalled that when he gave the statement at the hospital he did not include these facts. These two occasions have heretofore been mentioned.

The statement taken by Roubicek at the hospital, signed by Reverend Kersey, in substance was to the effect that a year or so prior to the accident Reverend Kersey had let Merreta drive the Oldsmobile while he was in it, in order that she might learn to operate it; that prior to August 31, 1956, Merreta had never driven the Oldsmobile without her father being in the car; that when he left to go to Lexington, the car was in the driveway and the keys were in it; that Merreta did not have his permission to drive the Oldsmobile that afternoon; that she had never driven the car alone; that his wife never gave permission to Merreta to drive the

Oldsmobile; and that he had read the page and the statements made therein were true.

In the statement made on Saturday, September 1, 1956, wherein Reverend Kersey was interrogated by attorney Tye, he stated that when he left Elm Creek he inadvertently forgot to take the keys out of the Oldsmobile; that Merreta would occasionally drive with him beside her on a country road and maybe a block or two in the village of Elm Creek and had been doing that for about a year; that he had not permitted her to drive the car unassisted; that he had never let her take the wheel on the highway or even on a country road; that she was never permitted to use the car alone in any way; that it had not been her habit or custom, or the custom of the family to let her use the Oldsmobile; that frequently she would ask to drive the Oldsmobile but that he always answered "no"; that on the day of the accident she did not say anything about driving the automobile, and he had no idea that she would; that she did not have a driver's license or a learner's permit; and that she was about 15½ years of age. The foregoing is the substance of the statement of Reverend Kersey. Mrs. Kersey's testimony was to the same effect with reference to Merreta driving the Oldsmobile.

The policy of insurance involved in this case provides in part: "Coverage C - Medical Payments. To pay reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, dental, ambulance, hospital, professional nursing and funeral services, and prosthetic devices, to or for each person who sustains bodily injury, caused by accident, while in or upon, entering into or alighting from, or through being struck by the automobile, provided the automobile is being used by the named insured or his spouse if a resident of the same household, *or with the permission of either.*" (Emphasis supplied.)

Subsection (3) of section 60-407, R. S. Supp., 1955, provides in part: "Minors who have not attained the

age set forth in subsection (1) of this section but are over the age of fourteen years, except within metropolitan, primary, and first-class cities, may be issued, by the county treasurer, a limited permit to drive a motor vehicle to and from the school building where he attends school, by the nearest highway or street from his place of residence, if such child lives a distance of one and one half miles or more from such school. Such limited permit shall be used for the sole purpose of transporting such minor to attend school; * * *."

Subsection (5) of section 60-407, R. S. Supp., 1955, provides in part: "Any person who shall have attained the age of fifteen and one half years or more may obtain a learner's permit from an examiner which shall be valid for a period of six months and he may operate a motor vehicle over the highways of this state if he is accompanied at all times by a licensed operator who is at least twenty-one years of age and who is actually occupying the seat beside the driver."

There was no compliance with the above section of the statutes as it relates to Merreta Kersey.

"The permission required to bring an additional insured within the protection of an omnibus clause may, as a general proposition, be express or implied, and the omnibus clause may expressly provide, or be required by statute to provide, that the permission of the named insured may be express or implied. Where the word 'permission' or 'consent' appears in the omnibus clause without definition, it is construed to include implied permission, and this implication may be a product of the present or past conduct of the insured. Implied permission is not confined alone to affirmative action, and is usually shown by usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used." 5A Am. Jur., Automobile Insurance, § 94, p. 92.

In 6 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. Ed.), § 3943, p. 614, it is said: "Per-

mission or consent may be implied. Thus permission is not limited to that expressly granted, but may arise and be implied from a course of conduct pursued with knowledge of the facts for a considerable time, as where there is a prolonged, frequent, and habitual use with the knowledge and acquiescence of the owner, which must be regarded as a 'permission' within the policy. But no implication arises from use on a specific occasion for a specific purpose by the insured or one of his household of permission to others to operate the automobile even for a use closely connected and related in purpose and time, and permission to use the automobile for a given purpose does not imply permission to use it for all other purposes."

In Bekaert v. State Farm Mutual Automobile Ins. Co., 230 F. 2d 127, eliminating the factual situation, the court said: "* * * such Nebraska cases as there are in the omnibus-clause field, appear to make the question of permission on the part of the named insured to the use of the automobile by another at the time of an accident one that ordinarily is to be resolved, in its express or implied existence, as a matter of actual and found fact. Cf. Wigington v. Ocean Accident & Guarantee Corp., 120 Neb. 162, 231 N. W. 770; Andrews v. Commercial Casualty Ins. Co., 128 Neb. 496, 259 N. W. 653; Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413.

"In each of these three cases, as examination will show, the Nebraska Supreme Court primarily engaged in testing the sufficiency of the evidence in the record to sustain the factual appraisal and general finding of permission or lack of permission which the trial court had made." See, also, Beatty v. Hoff, 382 Pa. 173, 114 A. 2d 173, and cases cited therein.

In the case of Witthauer v. Employers Mutual Casualty Co., 149 Neb. 728, 32 N. W. 2d 413, it appears that there was an accident allegedly caused by the driver of a truck owned by Paxton-Mitchell Company and causing

personal injuries. Paxton-Mitchell Company appealed and a judgment against it was reversed and the cause dismissed. Thereafter the plaintiff brought an action against the defendant as insurer of Paxton-Mitchell Company. The evidence disclosed that one Gryva was the regularly assigned driver of a particular truck owned by his employer, the Paxton-Mitchell Company. On one working day he was on a mission for the employer, and returned from that trip too late to order one of the hot lunches which the company prepared and provided for its employees. He then drove the truck to a cafe some blocks away for lunch, and had an accident while returning from his lunch. This court held that no permission, express or implied, was shown, and refused to imply permission from the fact that the employee had been allowed to be in charge of the truck and to use it for certain purposes. This court stated the material question to be, "was the 'actual use' of the truck at the time of the accident 'with the permission of the Named Insured,' " and held that it was not.

There is no contention in the instant case relating to express permission given by Reverend Kersey to Merreta Kersey to drive the Oldsmobile. Consequently, the question that arises from the facts is whether or not Merreta Kersey had implied permission to drive and use the Oldsmobile.

It appears from the evidence that there is no basis for the implication of permission for Merreta Kersey to drive the automobile without adult company, without supervision, and without asking whether she might drive the Oldsmobile.

We believe, from the evidence adduced, that the trial court based its decision on ample evidence to show that Merreta Kersey lacked implied permission to drive the Oldsmobile.

In the light of the evidence and the authorities heretofore cited, we conclude that other matters raised by the defendants need not be determined, and that the judg-

ment of the trial court should be and is hereby affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE TELEPHONE CHARGES OF THE UNITED TELEPHONE COMPANY OF THE WEST IN THE CITY OF SCOTTSBLUFF, NEBRASKA.

CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLANT, V. UNITED TELEPHONE COMPANY OF THE WEST, A CORPORATION, APPELLEE, NORTHWESTERN BELL TELEPHONE COMPANY ET AL., INTERVENERS-APPELLEES, IMPLEADED WITH STATE OF NEBRASKA, APPELLEE.

106 N. W. 2d 12

Filed November 18, 1960. No. 34792.

1. **Public Service Commissions.** "Rate tariffs and any rules of interpretation thereof" are rules and regulations of general application which deal with and fix schedules and classifications of rates and charges by the Nebraska State Railway Commission, and all such rules and regulations are specifically not included within the provisions of sections 84-901 to 84-908, R. R. S. 1943.
2. ———. The power of the Nebraska State Railway Commission to fix the rates to be charged by common carriers is legislative and not judicial in character.
3. **Telecommunications: Public Service Commissions.** The Nebraska State Railway Commission has the power and authority to legislatively enter an order or orders permitting a telephone company to amend and revise its general rules and regulations and thereby impose pro rata against its subscribers within the territorial limits of a city or village an occupation tax levied by such city or village.
4. **Public Service Commissions.** On appeal from a decision of the Nebraska State Railway Commission involving the rates to be charged by common carriers it is presumed that the rates prescribed are just, reasonable, and not arbitrary, and are otherwise lawful.
5. ———. Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited.
6. **Public Service Commissions: Appeal and Error.** On appeal from

a decision of the Nebraska State Railway Commission, which requires the exercise of legislative authority, the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made.

7. **Public Service Commissions.** Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the Nebraska State Railway Commission and not the courts.

8. ———. Where it is shown that an order of the Nebraska State Railway Commission is within the scope of the powers vested in it, and such order is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission.

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

Loren G. Olsson and *Nelson, Harding & Acklie,* for appellant.

Wright & Simmons and *James R. Hancock,* for appellee United Telephone Co. of the West.

Bert L. Overcash, Edward Sklenicka, and *Gerald J. Hallstead, for* interveners-appellees.

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

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

CHAPPELL, J.

On September 30, 1959, the City of Scottsbluff, herein called plaintiff, filed a complaint, No. 935, with the Nebraska State Railway Commission, herein called commission, seeking as a municipal corporation and as a subscriber on behalf of all other subscribers within said city, to have set aside and vacated orders of the commission entered January 26, 1959, and April 21, 1959, which authorized United Telephone Company of the

West, herein called defendant, to amend and revise its general rules and regulations applying to telephone service and tariffs and approve same to provide that: "* * * when any city or village served by applicant imposes upon applicant an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall be billed annually pro rata by the Company to the exchange customers receiving service within the territorial limits of such municipal corporation." Only an occupation tax imposed by plaintiff was or is directly involved.

The grounds for plaintiff's complaint were substantially that no notice was given of hearing held by the commission on defendant's applications filed December 30, 1958, and April 10, 1959, of which plaintiff allegedly had no notice or knowledge until April 25, 1959; that the commission was without jurisdiction to enter its orders of January 26, 1959, and April 21, 1959; that such orders were void and defendant was without authority to so bill the occupation tax to its subscribers within the territorial limits of plaintiff city or charge them in excess of the rates theretofore fixed by the commission on August 8, 1958; and that such pro rata charge to subscribers resulted in an unreasonable service rate and a rate unjustly discriminatory against subscribers located within plaintiff city.

Notice of hearing on plaintiff's complaint having been given, defendant filed a voluminous answer on October 14, 1959, traversing generally the material allegations of plaintiff's complaint and denying that plaintiff had such an interest as would give it a right to maintain the action. Certain admissions were made in defendant's answer which need no recitation at this point in the opinion.

On October 19, 1959, the Nebraska Telephone Association filed an application for leave to intervene, together with a showing in support thereof, for the purpose of opposing plaintiff's complaint. A hearing was held by the commission on the issues thus joined on

October 26, 1959, and November 5, 1959, whereat counsel for the city of Crete appeared as intervener in oral support of plaintiff's complaint. Counsel for Northwestern Bell Telephone Company also appeared as intervener in oral opposition to plaintiff's complaint, and an assistant attorney general appeared only in an advisory capacity for the commission.

Thereafter, the commission entered an opinion, findings, and order dismissing plaintiff's complaint and thereafter overruled plaintiff's motion for rehearing. Therefrom plaintiff appealed to this court, assigning substantially that: (1) The commission erred in dismissing plaintiff's complaint and overruling its motion for rehearing; (2) that the commission's orders entered January 26, 1959, and April 21, 1959, were void for failure to comply with sections 84-901 to 84-908, R. R. S. 1943; and (3) that the decision of the commission was contrary to the evidence and law. We do not sustain the assignments.

The material facts involved are not in dispute, and the questions presented by the pleadings and evidence are: (1) Did the plaintiff as a municipal corporation and a subscriber of telephone service from defendant and on behalf of all other such subscribers within the limits of the city have a right to maintain the action; (2) were the orders here involved rules and regulations within the provisions of sections 84-901 to 84-908, R. R. S. 1943; (3) did the commission have the power and authority to enter an order or orders permitting defendant to amend and revise its general rules and regulations and thereby impose pro rata against its subscribers within plaintiff city an occupation tax levied by it; and (4) were such orders unreasonable and arbitrary or discriminatory.

Plaintiff is a municipal corporation organized under the laws of Nebraska and a city of the first class, having a population of about 14,000. Defendant has a franchise from the city which did not require payment of any

franchise fee. On May 1, 1959, defendant's main office was located in plaintiff city and there were 4,438 telephone stations of defendant located within the city, not including stations subscribed by the United States, the state, and agencies or political subdivisions of either. Also, on May 1, 1959, defendant owned and maintained local service exchanges in the cities or villages of Scottsbluff, Gering, Bayard, Mitchell, Morrill, Lyman, Minatare, Broadwater, Oshkosh, Lewellen, and Chappell, in Nebraska, and in addition thereto owned and maintained telephone stations located within rural areas in Scotts Bluff, Banner, Morrill, Garden, Deuel, and Sioux counties. The total number of telephone stations served by defendant in Nebraska on May 1, 1959, including those within plaintiff city but not including stations subscribed by the United States, the state, or agencies or political subdivisions thereof, was 11,399.

On April 21, 1958, defendant filed an application, No. 21298, with the commission, seeking authority to increase rates and charges for telephone service furnished by it within Nebraska. On August 6, 1958, after a hearing whereat plaintiff city participated as a protestant, an order was entered by the commission which granted such application, in part overruled objections thereto, and ordered defendant to submit for the commission's approval a schedule of rates and charges for telephone service in Nebraska that would produce the additional revenue allowed.

On August 8, 1958, in application No. 21298, the commission approved defendant's attached schedule of increased intrastate rates and classification of exchanges, and authorized defendant to charge for and collect such schedule of rates effective as of August 11, 1958. Such orders became final without appeal therefrom.

On December 30, 1958, defendant filed an application, No. 21629, with the commission, referring therein to its application, No. 21298, and the commission's order of August 8, 1958, authorizing defendant's schedule of rates

and charges, and proposing "to revise its general rules and regulations to provide that when a city or village of a rate group imposes upon the telephone company an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall be billed pro rata to the exchange customers receiving service within the territorial limits of such municipal corporation, annually." Defendant's prayer was all inclusive and for exactly that relief, with no exception for any such subscribers.

Thereafter, on January 6, 1959, a letter from the commission addressed: "TO ALL PERSONS INTERESTED:" was received by plaintiff city, directing its attention to an attached letter dated December 23, 1958, which pertained "to occupation tax levied against telephone companies operating in the State of Nebraska." Such attached letter, signed by an assistant attorney general and received by the commission, said in part: "It appears that the city of Scottsbluff has imposed an occupation tax on this company, which in turn has asked permission of the Commission to pass the tax on to only the telephone subscribers located in the city of Scottsbluff, in the form of increased rates." The substance of the opinion so given by the assistant attorney general in his letter of December 23, 1958, was that the occupation tax was "only another general expense and in the same category as other taxes and it can be considered only as a part of the general structure used to determine a fair rate of return and that the impact of such tax cannot be shifted to any particular locality." Such conclusion was reached by analogy without citing any authority.

On January 26, 1959, a letter from the commission addressed: "TO ALL PERSONS INTERESTED:" was received by plaintiff city. It called attention to the commission's letter of January 6, 1959, and the letter of December 23, 1958, attached thereto, then pointed out that on January 13, 1959, the commission had received another letter from the assistant attorney general which

stated that the letter of December 23, 1958, was erroneous and that his attached letter of January 13, 1959, was to correct that error. Such letter cited many authorities, and concluded that: "The authorities hold generally that it is proper, where an occupation tax or license is levied by municipalities, to pro rate such tax or fee among the subscribers in the municipality which imposes such taxes or fees. The decisions are based on the principle that if such items of expense are assessed to all the subscribers, those who live outside the territorial limits of the municipality imposing the tax pay a share of the tax of those who receive the benefit of the tax imposed and that this results in discrimination against the nonresident subscribers."

In the meantime, on January 26, 1959, plaintiff enacted an ordinance imposing an occupation tax of $3,600 upon telephone companies maintaining an office and doing an intrastate business within the limits of the city on May 1 of any year, which tax was due and payable in advance on May 1 of each year. Also, on January 26, 1959, and evidently prior to enactment of the aforesaid ordinance, the commission, without further notice to plaintiff, granted defendant's application No. 21629 theretofore filed by it December 30, 1958. It did so: "Upon consideration of the application and attending circumstances, and being fully advised, the Commission is of the opinion and finds that the application is fair and reasonable, is in the public interest and should be granted." The order of the commission was that defendant "be and it is hereby authorized to revise its general rules and regulations applying to telephone service as set forth in the opinion and findings and by this reference made a part hereof," to wit "to provide that when a city or village imposes upon the telephone company an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall be billed prorata to the exchange customers receiving service within the territorial limits of such municipal corpora-

tion." This conformed to defendant's application No. 21629.

Also, on April 10, 1959, defendant filed application No. 21737 with the commission seeking approval of its "General Rules and Regulations applying to telephone service," a copy of which was attached to defendant's application. In that connection, without further notice to plaintiff city, an opinion, findings, and order were entered by the commission on April 21, 1959, finding that defendant's general rules and regulations were "in substance a recodification of the General Rules and Regulations applying to telephone service of applicant, now on file with the Commission and heretofore approved by it although not issued all in one instrument, together with a provision made in the General Rules and Regulations in compliance with the order of this Commission on January 26, 1959, in application No. 21629." The order of April 21, 1959, authorized defendant "to issue General Rules and Regulations applying to telephone service, a copy of which is attached to the application." As far as important here, such rules and regulations provided that: "When any city or village imposes upon the Telephone Company an occupation tax, license tax, permit fee or franchise fee, such tax or fee shall, insofar as practicable, be billed prorata to the exchange customers receiving service within the territorial limits of such municipal corporation."

Thereafter, on April 27, 1959, the occupation tax of $3,600 imposed upon defendant by plaintiff, commencing May 1, 1959, was paid to the city by defendant and same was accepted by plaintiff. Upon billing subscribers for services beginning in the month of May, defendant added 80 cents to the statements of each of the 4,438 subscribers using telephone service within the city, which sum was separately designated as the subscriber's pro rata share of the occupation tax for 1959 assessed to defendant telephone company.

True, such charge was not billed by defendant to plaintiff city as a subscriber for its telephone services, but it will be noted that defendant's applications, Nos. 21629 and 21737, the orders of the commission in response thereto, and defendant's general rules and regulations duly filed with and approved by the commission, covered all "exchange customers receiving service within the territorial limits of such municipal corporation," which included plaintiff as a subscriber therein. Whether plaintiff was billed as a subscriber or not is of little importance here. It may have been good business policy for the company not to bill the city as a subscriber but the controlling question is not what was done but what could have been done under the authority sought by defendant and granted by the commission. In other words, the city was a subscriber having the same interest as any other subscriber who had a right to maintain this action. Whether the commission could have excepted the city as a subscriber is not an issue here. The fact is that it did not do so and that defendant did not even request it. Contrary to defendant's contention, the opinion in In re Application of Nebraska Power Co., 147 Neb. 324, 23 N. W. 2d 312, does not foreclose plaintiff's right to maintain this action and appeal to this court. In that connection, section 75-401, R. R. S. 1943, specifically provides in part that: "When any * * * person in his own behalf or in behalf of any class of persons similarly situated, * * * or any body politic or municipal organization, shall make complaint to the State Railway Commission that any rate or rates fixed by the commission in the schedule mentioned in section 75-302, or in any subsequent revised or modified schedule, * * * is unreasonably high or low, unjust or discriminating, the commission shall immediately fix a day for hearing the same, and shall cause notice thereof containing the substance of the complaint to be served upon the railroad company, common carrier, or other person or persons hereinbefore named complaining, and

the railway company or common carrier complained of, and the day and date upon which hearing will be had upon the complaint; * * *."

Also, section 75-405, R. R. S. 1943, provides that any person who shall be dissatisfied with the decision of the Nebraska State Railway Commission affirming, revising, annulling, or modifying any rate or rates complained of in the original schedule or any subsequent schedule, or with the decision of the commission with reference to any rate, classification, rule, charge, order, act, or regulation made or adopted by the commission, may institute proceedings in this court to reverse, vacate, or modify the order complained of, if such person has been affected by the decision of the commission.

We turn then to the question whether orders of the commission here involved were void for failure to comply with sections 84-901 to 84-908, R. R. S. 1943, which allegedly required publication of notice and a public hearing on defendant's application, and that in any event the rules adopted or amended would be invalid and ineffective unless approved by the Attorney General and filed with the Secretary of State, which admittedly was not done. In that connection, plaintiff relies upon Mogis v. Lyman-Richey Sand & Gravel Corp., 90 F. Supp. 251, which was affirmed in 189 F. 2d 130 by the United States Court of Appeals. Those opinions involved a controversy which arose and was instituted under the aforesaid statutes as they existed prior to the time section 84-901, R. R. S. 1943, was amended by Laws of Nebraska, 1951, Chapter 342, section 1, page 1128, known as L. B. 241, which was evidently done for the purpose of making such decisions no longer controlling. See, Statement of Government Committee, In re L. B. 241, dated March 7, 1951.

As so amended, section 84-901, R. R. S. 1943, effective August 27, 1951, provided in part: "(2) 'rule' means the written statement of any rule, regulation, standard or policy of general application issued by an agency,

including the amendment or repeal thereof, and designed to implement, interpret, or make specific the law enforced or administered by it, or governing its organization or procedure, but not including regulations concerning the internal management of the agency not affecting private rights or interests, *and not including rate tariffs, and any rules of interpretation thereof;* * * *." (Italics supplied.) The italicized language aforesaid was the amendment added to the act in 1951. The aforesaid section was again amended in 1959, effective September 28, 1959, to make crystal clear what the Legislature intended by the 1951 amendment. See § 84-901, R. S. Supp., 1959. As amended in 1951, "rate tariffs, and any rules of interpretation thereof" are rules and regulations of general application which deal with and fix schedules and classifications of rates and charges. See, Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F. 2d 130; Union Wire Rope Corp. v. Atchison, T. & S. F. Ry. Co., 66 F. 2d 965.

Contrary to plaintiff's contention, we find no legal distinction between rate tariffs and rate orders. Such rules and regulations and any rules of interpretation thereof are not included in section 84-901, R. R. S. 1943. Also, contrary to plaintiff's contention, sections 84-907 and 84-908, R. R. S. 1943, enacted in 1953, and effective March 24, 1953, which are in pari materia with section 84-901, R. R. S. 1943, and deal with rules adopted, amended, or repealed by any state agency, likewise do not include or have application to "rate tariffs, and any rules of interpretation thereof" by the commission, which are clearly excepted and not included in said sections.

In Nebraska Limestone Producers Assn. v. All Nebraska Railroads, 168 Neb. 786, 97 N. W. 2d 331, we reaffirmed that: "The power of the State Railway Commission to fix the rates to be charged by common carriers is legislative and not judicial in character."

Plaintiff not only had notice of defendant's pending application but it also enacted an occupation tax on the

same day after defendant's application had been granted. Thereafter, plaintiff accepted payment of the occupation tax from defendant on April 27, 1959, and, with plaintiff's knowledge, defendant billed subscribers within the city pro rata therefor from May 1959, until September 30, 1959, before plaintiff instituted this action, although plaintiff admittedly knew on April 25, 1959, that such billing had been authorized by the commission and would be made. Be that as it may, we conclude, under the circumstances presented herein, that no notice to plaintiff was required to be given by the commission before it acted legislatively in permitting defendant to revise and amend its rate rules and regulations to permit it to collect pro rata from its subscribers within the city the occupation tax imposed by the city unless a statute specifically required notice. We have not been cited and we have not found such an applicable and controlling statute in situations comparable with that at bar.

As far as important here, section 75-201, R. R. S. 1943, provides in part: "The State Railway Commission shall have the power to regulate the rates and services of, and to exercise a general control over, all * * * telephone * * * companies, and any other carrier engaged in the * * * transmission of messages for hire." See, also, § 75-245, R. R. S. 1943; Art. IV, § 20, Constitution of Nebraska. As we view it, such cited and quoted sections and sections 75-302, 75-401, 75-402, 75-403, 75-404, and 75-405, R. R. S. 1943, have application and are controlling here. Thereby, plaintiff and other subscribers and common carriers as well were timely given ample notice and just protection of all their rights. As a matter of fact, the pleadings filed in this action were amply sufficient to bring the issues and procedure squarely within such provisions.

Finally, we turn to the issue of whether the commission had the power to enter orders as such permitting defendant to amend and revise its rules and

regulations and thereby pass the occupation tax imposed by plaintiff on to its subscribers within the city pro rata and whether such orders were unreasonable or were discriminatory in the light of section 75-501, R. R. S. 1943.

With regard to the question of the commission's power to render such orders, plaintiff cites and relies upon State ex rel. City of St. Louis v. Public Service Commission, 362 Mo. 977, 245 S. W. 2d 851, 93 P. U. R. N. S. 454, in support of its contention that such power did not exist. Plaintiff admits that such Missouri opinion was subsequently overruled in State ex rel. City of West Plains v. Public Service Commission (Mo.), 310 S. W. 2d 925, 23 P. U. R. 3d 164. However, plaintiff argues that we should follow a dissenting opinion filed therein which we do not find supported by any other authority. In that majority opinion, the Missouri court said: "We are of the view, therefore, that the commission, as a part of its power and duty to establish reasonable rates which would produce a fair return, could lawfully provide for and prescribe the reguations and practices to be indulged by the utility to produce the desired result, including the power to permit Western to file a general rule with its rate schedule authorizing that utility to pass on license and occupation taxes to certain subscribers." No authority cited or found holds otherwise. Such conclusions are ably supported by authorities from other jurisdictions.

In City of Newport News v. The Chesapeake & Potomac Telephone Company of Virginia, 198 Va. 645, 96 S. E. 2d 145, 17 P. U. R. 3d 284, the court said: "The power of the Commission to enter an order of the kind involved on this appeal seems clear. * * * The Commission stated in the conclusion of its opinion that the charges authorized by its order to be added to the bills of the company's local customers 'place the added burden on those who should bear it and prevent each locality from upsetting the state-wide system of rate-making

for its own advantage and to the disadvantage of consumers living outside the taxing locality.' It is within the constitutional and statutory powers of the Commission to accomplish that result."

In State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service, 19 Wash. 2d 200, 142 P. 2d 498, 52 P. U. R. N. S. 6, as interpreted and clarified by State ex rel. City of Seattle v. Department of Public Utilities, 33 Wash. 2d 896, 207 P. 2d 712, the Washington Supreme Court in this particular opinion was reviewing and upholding the opinion and order of the Department of Public Service, which appears in 37 P. U. R. N. S. at page 321, as follows: "By Advice No. 392, filed June 22, 1938, the company sought to pass on to its subscribers municipal occupational license taxes within seven cities which now levy such taxes. * * *

"The company maintains that the failure to pass on this tax pro rata to the subscribers in the cities in which it is levied, inevitably creates a situation prejudicial and unjustly discriminatory in respect to subscribers in areas in which no such taxes are levied.

"It would be manifestly unfair to impose upon the many thousands of telephone subscribers in this state, who live elsewhere than in the seven cities in which such taxes are now levied, the burden of providing the dollars necessary to pay occupation taxes in those cities. (It is no answer to say that the company should itself pay this tax, for the company must necessarily pay it out of dollars received from its subscribers. In our opinion, it is much more equitable to provide that the subscribers in the various cities should assume that responsibility, if such cities have used that method of providing additional tax revenue, than to require subscribers throughout the state to help carry the cost of paying the taxes exacted by these particular cities. There can be no doubt that an unjust and unreasonably discriminatory situation now exists in respect to these particular taxes, and that this burden must be

placed where it should be, namely, upon the subscribers in the particular localities in which the taxes are levied.)

"Two methods have been suggested for accomplishing this end, one being to fix special exchange rates in the several localities in question sufficient to allow for these taxes under operating expenses, and the other to allow the pro rata passing on of the tax itself to the subscribers in the taxing localities, as proposed by the company.

"The second suggestion is more equitable. It has the advantage of immediately imposing upon ratepayers in any community which elects to derive revenue from such a tax, the burden of providing those dollars. Conversely, whenever any such tax is repealed by any of the levying cities, the subscribers in question will be relieved automatically and concurrently of the burden which has been imposed upon them by their own municipalities.

"An additional reason for this conclusion is that if we countenance the recurrent imposition of similar taxes by the host of municipalities in this state upon the various utilities subject to our jurisdiction, the inevitable result will be, as in this case, continually mounting operating expenses over which we can exercise no control. This may well lead to a procession of rate cases requiring the expenditure of much time and expense both by the utilities and by the Department.

"We, therefore, direct the company to pass on municipal occupation taxes."

In that connection, we point out that the opinion, findings, and decision of the commission in the case at bar contain an almost verbatim adoption of the above quotation about which the opinion of the Supreme Court of Washington said: "We are convinced that the Department, insofar as such taxes are concerned, has the power to fix special exchange rates applicable to the different communities, which will in

effect require the ratepayers in each community to absorb a sum equal to the amount of the tax which respondent is required to pay to that municipality. More than this, the Department cannot do." State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service, *supra.*

Also, in a second opinion, in that case, wherein the cities again appealed, contending that the lower court had misconstrued the Supreme Court's opinion, the Washington Supreme Court said: "The questions were all considered by the superior court when it reviewed the department's order. This court in its opinion examined the questions relating to all the taxes. The superior court entered its judgment on the remittitur, and included therein the following:

" 'The Department may order the Relator to pass on to the subscribers in any municipality any * * * occupation taxes * * *.'

"When this court denied the petition for recall of remittitur and correction of the judgment, it in effect approved the judgment entered by the superior court." State ex rel. City of Seattle v. Department of Public Utilities, *supra.*

In City of Elmhurst v. Western United Gas & Electric Co., 363 Ill. 144, 1 N. E. 2d 489, the court said: "The discrimination forbidden by paragraph 53 (sec. 38) is as to rates between customers of the same class in the territory. Customers residing in subdivisions of the same territory served by the public utility where an annual percentage of its gross receipts is exacted from the public utility, are not in the same class as those patrons who live in a municipality where such percentage is not exacted. * * * It would be unjust to spread the burden of this annual franchise payment over the whole northern division. It should be borne by the company's consumers residing within the city as that city alone receives the advantage of such annual payment. So, also, it is immaterial in what form the pro rata share

of the consumers' payment of the annual payment be made to the city. There is no statute in this State prescribing the method of allocating such item and it may properly be written on the consumer's statement as three percent." The statute referred to therein is comparable with section 75-501, R. R. S. 1943. See, also, Ogden City v. Public Service Commission, 123 Utah 437, 260 P. 2d 751, 2 P. U. R. 3d 521; Ogden City v. Public Service Commission, 123 Utah 443, 260 P. 2d 754, 2 P. U. R. 3d 525.

Other authorities from utility commissions in Alabama, Arkansas, California, Colorado, Idaho, Kansas, Missouri, West Virginia, and Wyoming, too numerous to cite here, uphold the power and authority of the commission to pass such character of taxes on to subscribers within the limitations of the city pro rata and that such orders are not discriminatory or unreasonable.

In Nebraska Limestone Producers Assn. v. All Nebraska Railroads, *supra,* we held that: "On appeal from a decision of the State Railway Commission involving the rates to be charged by common carriers it is presumed that the rates prescribed are just, reasonable, and not arbitrary, and are otherwise lawful.

"Under the statutes of this state it is only unjust discriminations and undue preferences under substantially similar circumstances and conditions which are unlawful and prohibited.

"On appeal from a decision of the State Railway Commission the only questions to be determined are whether or not the commission acted within the scope of its powers and whether or not the order complained of is reasonable and not arbitrarily made.

"Where there is substantial evidence supporting factors by which rates of common carriers are fixed which are in conflict with other recognized factors, the power to resolve such conflicts ordinarily rests with the commission and not the courts.

"Where it is shown that an order of the State Rail-

way Commission is within the scope of the powers vested in it, and such order is not unreasonable, arbitrary, or prohibited, and is supported by competent and relevant evidence, the courts have no authority to interfere with the judgment of the commission."

In the light of the evidence which will not support a finding that the commission's orders here involved were arbitrary and unreasonable, and in the light of the aforesaid authorities, we conclude that plaintiff as a subscriber had a right to maintain the action at bar before the commission and appeal to this court; that the orders of the commission entered January 26, 1959, and April 21, 1959, were not void for failure to comply with sections 84-901 to 84-908, R. R. S. 1943; that the commission had legislative power and authority to render the orders involved; that plaintiff and other subscribers and common carriers as well were given ample notice and just protection of all their rights by statutes heretofore cited; and that the commission's orders were not discriminatory, unreasonable, or arbitrary. For reasons heretofore stated, the decision of the commission dismissing plaintiff's complaint should be and hereby is affirmed.

AFFIRMED.

CHARLES HILFERTY ET AL., APPELLANTS, V. RAY MICKELS, APPELLEE.
106 N. W. 2d 40

Filed November 18, 1960. No. 34840.

1. **Automobiles: Negligence.** The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or if it is greater than is reasonable and prudent under the existing circumstances.
2. ———: ———. A charge of speed of an automobile as negligence may, as any other specification of negligence, be found to exist from circumstantial evidence if it indicates with reasonable certainty the truth of the charge.

3. **Evidence.** Circumstantial evidence concerning an accident may be sufficient to overcome direct evidence as to the speed of an automobile involved therein.
4. **Automobiles: Negligence.** The observance of a practice or custom which is contrary to a statute on the subject does not prevent a motorist from being guilty of a violation of the statute.
5. **Automobiles: Highways.** A motorist entering a public highway from a private driveway on the east and turning north in the east lane thereof is not required to yield the right-of-way to the east half of the highway to an automobile which is being operated in the center of the highway in a southerly direction. The driver of the latter automobile is only entitled to the right-of-way of the west half of the highway.
6. ———: ———. A right-of-way does not include a right to encroach on that part of a highway on which a vehicle from the opposite direction is entitled to travel.
7. ———: ———. It is a motorist using a public highway approaching a private driveway who is proceeding in his proper lane of travel in a prudent and reasonable manner, as the law prescribes, who is given the right-of-way by section 39-752, R. R. S. 1943.
8. ———: ———. **The user of a public highway is required at all times to use reasonable care considering the existing conditions and circumstances.**
9. ———: ———. A motorist must be attentive to where he is traveling on a highway, to what is ahead of him in the direction of his travel or in the direction from which others may be expected to approach, and to know what is in front of him for a reasonable distance.

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

McGinley, Lane, Shanahan & McGinley, for appellants.

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

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

BOSLAUGH, J.

This is an appeal from a judgment for property damage rendered against Charles Hilferty in favor of ap-

pellee on his counterclaim for damages caused, as he claimed, by a collision of the automobile negligently operated by Charles Hilferty with an automobile operated by appellee and from an order of the district court overruling the motion of appellants for a new trial.

The substance of the petition of appellants to the extent it is required to be recited herein was as follows: Appellants owned a Dodge sedan automobile, hereafter designated the Dodge, which was operated by Charles Hilferty in the forenoon on or about February 1, 1959, on a north-and-south county highway about 3.5 miles east and 6.2 miles south of Madrid. He entered upon the county highway to travel towards the north at which time he saw appellee approaching in a Ford sedan automobile, hereafter designated the Ford, on the left or east side of the highway moving towards the south at a high and excessive rate of speed, considering the condition of the highway. Appellee did not have the Ford under control and he caused or permitted it to collide with the Dodge which had been stopped in the east lane of the highway. The Dodge was damaged by the collision caused by the negligence of appellee specified in the petition as follows: Operating the Ford on the left side of the center of the highway at an excessive speed, considering the condition of the highway and the traffic thereon; failing to respect the right-of-way of appellant to be and travel upon the right or east side of the highway; failing to maintain a proper lookout for other vehicles on the highway; and failing to have and keep the Ford under control so as to avoid a collision with the Dodge which was in plain sight and properly upon the east lane of the highway. Appellants asked judgment for $460.75 against appellee.

Appellee by answer in substance admitted the operation and the collision of the Dodge and the Ford at the time alleged in the petition; denied all other claims made therein; and pleaded contributory negligence more than slight of Charles Hilferty, hereafter referred to

as appellant, as the cause of the collision. Appellee interposed a cross-petition in which he by reference incorporated the contents of his answer as part of it and in substance further stated therein the following: Appellee before the collision of the Dodge and the Ford was operating the latter on the county highway towards the south in a prudent manner at a lawful speed in view of the condition of the highway, and when he was about 200 feet north of the place where the county road and a private farm lane extending from the east intersected the county highway appellee saw the Dodge proceeding towards it from the east about 15 feet from the county highway. An earlier view of the Dodge traveling on the private road was prevented by continuous trees which extended north from it on the east of the county highway for a distance of approximately 200 feet. Appellant did not stop before proceeding from the private lane onto and upon the county highway but in violation of the requirement of the law in that respect entered upon the county highway and commenced a turn to the north or right and proceeded in such a manner that he reached and traveled on the west side of the county highway which was then occupied and used by appellee as he traveled thereon towards the south. Appellee applied the brakes of the Ford but was unable to avoid a collision with the Dodge. Appellant negligently drove the Dodge into and against the Ford causing damage to it. The cause of the collision was the negligence of appellant which was specified in substance as follows: Failure to keep a reasonable lookout for vehicles traveling on the frequently used county highway of which appellant had knowledge; failure to have the Dodge under control so that he could have stopped it at the intersection of the private road with the county highway and thereby have yielded the right-of-way as required by section 39-752, R. R. S. 1943; failure of appellant to prevent the Dodge from going upon the west part of the county

highway in the path of the Ford which was then rightfully occupied and used by the Ford and which was in plain sight of appellant; failure of appellant to stop the Dodge before entering upon the county highway from the private lane and thereby have avoided a collision by it with the Ford which was traveling on the county highway in plain view of appellant; failure of appellant to look to the north before driving the Dodge upon the county highway or a failure, if he did look to the north, to see the Ford on the highway moving to the south in close proximity to appellant; and failure of appellant to operate the Dodge before and at the time of the collision in a careful and reasonable manner so as not to endanger or injure appellee. The Ford was because of the negligence of appellant damaged in the sum of $375.62 for which appellee asked judgment.

A jury trial of the issues of the case was waived and the parties by stipulation consented to a trial thereof by the court without the presence or participation of a jury. The district court found generally against appellant and in favor of appellee and that the cause of the collision and damage sustained by appellee was the negligence of appellant in entering the county highway from the private lane without yielding the right-of-way to appellee. A judgment was rendered for appellee against appellant for $375.62, interest, and costs.

This is an action at law tried and determined by the district court by stipulation of the parties without the presence or participation of a jury. Its findings have the effect of a verdict of a jury and may not be disturbed unless they are clearly wrong. This court may not resolve conflicts in or weigh evidence in such a case. In reviewing the judgment rendered this court will conclusively presume that controverted facts were decided by the trial court in favor of the successful party and its conclusion will not be set aside unless it is clearly wrong. In considering it, if the evidence sustains the findings and judgment in such a case tried

without a jury, the evidence will be considered most favorably to the successful litigant and the benefit of reasonable inferences deducible therefrom will be accorded him. This court in reviewing and deciding an appeal in such a case will regard as established every fact favorable to the successful party which the evidence proves or tends to establish. Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532; Dunbier v. Stanton, 170 Neb. 541, 103 N. W. 2d 797.

It is in observance of these requirements that the evidence is summarized: Appellee at about 9:30 o'clock on the morning of February 1, 1959, accompanied by his wife, left their home about 10½ miles from the place where the accident involved in this case occurred. They were commencing an intended trip to Stratton. They traveled south in the Ford operated by appellee on a county highway which extended north and south, the traveled portion of which was about 18 feet wide. It was a nice, clear day. The trip from their home to near the place of the collision was without unusual incident and during that time the speed of the Ford was about 45 or 50 miles per hour and not more than the latter. The speedometer 1 mile north of where the accident happened showed its speed was 48 or 49 miles per hour. It was about 10½ miles between the home of appellee and the John Hilferty farm which was on the east side of the county highway on which appellee was traveling that morning. The collision happened at 10:10 a. m. The continuous driving time of appellee in going the 10½ miles from his home to the place of the accident was about 40 minutes. On the John Hilferty farm there was a private lane which extended from the east to the west and joined the county highway on the east. The private lane was about 16 feet wide until it approached the county highway and then it fanned out to the north and south until it was about 30 feet where it came to the east side of the county highway. On the north of the private lane extending east

from the east side of the county highway for about 400 feet were trees. Likewise from the north side of the private lane north along the east side of the county highway were trees for a distance of at least 300 feet. The trees were continuous and obstructed vision of the private lane or a vehicle thereon from a traveler on the county highway moving towards the south until he was at or past the trees along the east side of the highway. The surface of the county highway was spoken of as graveled. However, a state patrolman testified the road was supposed to be graveled but he could not detect any gravel on it and he classed it as dirt. Another witness described it as a good country road, portions of which had been graded and parts of which had not been graded. The surface of the highway west of the trees along the east of it was on the day of the accident covered with ice with a light snow on the ice and frost on the snow. The surface of the highway at that area was very slippery where the traffic had traveled on it.

When appellee was an estimated 200 feet north of the north part of the trees which were east of the highway he noticed ice thereon about opposite where the trees commenced. This condition continued to the south for about 300 feet. He removed his foot from the accelerator of the Ford and permitted it to coast. Its rate of speed decreased when it reached the location in the road where the ice and snow commenced until its speed was between 35 and 40 miles per hour. When appellee was about 200 feet north of the private lane he saw for the first time an automobile operated on it towards the west approaching the county highway and he then applied the brakes on the Ford. He watched the automobile on the private lane, which was the Dodge, and he noticed that it was not stopping. It was moving about 10 miles per hour and he could not see that its speed had decreased from what it was when he first saw it. Appellee as he traveled south on the ice and

snow on the highway followed the tracks thereon that had been made by previous traffic which were about in the center of the traveled portion of the highway and he continued to travel in that position until the collision. There is no evidence that there was any traffic on the highway that morning as appellee traveled south. The highway was straight and level and there was no obstruction to view of the highway to the north of the private lane for at least a half mile or of the highway to the south from the private lane for at least 60 or 70 rods. When appellee saw that appellant was going to enter the highway without stopping the Dodge, appellee severely applied the brakes on the Ford and did all he could to drive it to the right or the west part of the highway. He was not successful because of its condition.

Appellant did not stop the Dodge before he entered the highway but drove it at a speed of about 10 miles per hour on and from the private lane to and upon the highway and was attempting to make a turn to the north which was not completed when the Dodge and the Ford collided. The impact of the cars was on their respective left fronts. Probably 150 feet from where the automobiles came in contact appellee applied the brakes on the Ford severely. They were in proper condition but they were ineffective because of the condition of the surface of the highway except the speed of the Ford was somewhat decreased. At the time appellee was attempting to drive the Ford to the west part of the highway and at the time of the impact of the automobiles the speed of the Ford was not more than 15 miles per hour. Appellee testified that the Dodge had not completed the turn to the north, that the left side of it was in the west lane of the highway at least 8 inches, and that is where it was struck. A witness produced by appellee testified that the Dodge was not entirely in the east lane of the highway as it attempted to make the turn to the north. The front

wheels of the Dodge were turned to the right as they would have been in making a turn of it to the north at the time of the collision and the left front wheel was firmly held in that position by part of the Dodge which was forced against it by the impact. The wheel could not be moved until the part that was bearing on it was taken off by considerable mechanical force. The Ford stopped in the highway at the time of the impact. There were 4 feet 4 inches between the automobiles when they came to rest after the collision. The Dodge at the time of the collision was in front or opposite the west end of the private lane. Appellant when he was on the north half of the private lane where it fans out on its north side as it approaches the county highway, first saw appellee 700 or 800 feet to the north coming towards appellant in the middle or on the east side of the highway, traveling at a speed of 70 or 75 miles per hour. He later said when he first saw appellee he was about 600 or 700 feet but not less than 600 feet away and that he traveled at least a quarter of a mile while appellant traveled 30 feet.

Appellee marked on a photograph taken soon after the collision before there had been any change in the situation the location on the highway of the Ford as it traveled south to the place of the collision and this shows that it traveled in about the center of the highway.

A member of the State Highway Patrol who was at the scene of the accident before the automobiles concerned in it had been moved or any other change made, said there were skid marks on the highway north from the Ford for 173 feet; that the left wheel marks of the Ford were 6½ feet from the east shoulder of the highway and the right wheel marks of the Ford were 6 feet from the west shoulder of the highway; that these measurements were made from the outer edges of the part of the highway that was used for traffic and the width of this part of the highway was 18 feet; that the distance

from the left front of the Dodge to the edge of the west shoulder of the highway was 10 feet; that the distance from the midsection of the right side of the Dodge to the edge of the east shoulder of the highway was 2½ feet; that it was 8⅓ feet from the east edge of the highway to the center of the debris which the witness found on the highway near where the automobiles came to rest after the collision; and that the impact of the automobiles was not a full head-on collision but was what the patrolman called a semi head-on in which one vehicle strikes a part of the front of another vehicle. The area of the impact of the front of the automobiles in this instance was quite limited and involved about 18 inches of the width of the front of them.

A witness said he saw the Ford about 400 feet north of the place of the collision traveling south in the center of the highway; that as it approached the Dodge the brakes of the Ford were applied and the back of it swerved and it slid into the Dodge; and that more than half of the width of the Ford when it collided with the Dodge was on the east side of the highway in the east lane.

Appellee was about 200 feet north of the commencement of the icy condition of the surface of the highway when he saw and recognized this hazard to safe passage over it. He had been proceeding at a speed of 45 or 50 miles per hour and he released the accelerator on his Ford and let it coast so that when it reached the commencement of the slippery part of the highway the speed of the Ford was decreased to 35 or 40 miles per hour. The road condition was so hazardous that appellee deemed it prudent to utilize the tracks other traffic had made along either side of the center of the usable part of the highway which was 18 feet wide. This appellee did and he was in that position with the Ford traveling on the center part of the road for about 300 feet until the collision happened. When appellee was about 200 feet north of the private lane he saw the

Dodge approaching the highway and he lightly applied the brakes on the Ford by pumping them. He estimated that when he was 100 or 150 feet from the private driveway he was convinced that the Dodge was not going to stop before it entered thereon and then for the first time appellee forcibly and severely applied the brakes on the Ford. The record does not state the speed of it at that time but it does indicate that the estimate of distance made by appellee was incorrect because the wheel or tire skid marks made by the Ford from the north to the rear wheels of it when it came to rest at the time of the impact were 173 feet in length. During that distance the brakes were applied sufficiently to stop the wheels rotating so that they skidded on the surface. Appellee said he was then unsuccessfully attempting to drive the Ford to the west side of the highway because the brakes were ineffective to stop or to help control the Ford on account of the slippery condition of the surface but the speed of the Ford was reduced some, how much was not estimated.

The speed of the Ford was not at any time in excess of the prima facie limits allowed by the statute. § 39-7,108, R. R. S. 1943. However, that statute contains other specifications for prudent and reasonable speed of motor vehicles in the language of the following parts of it: "* * * The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed * * * when special hazards exist * * * by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care * * *." 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.

What is a reasonable speed is necessarily largely dependent on the situation and the surrounding circumstances, it being obvious that a speed which would be safe, reasonable, and proper in some places and under some circumstances might be highly dangerous, unreasonable, and improper in other places and under other circumstances. The speed of an automobile may be unlawful even though it is within the statutory prima facie limits if it is unsafe or is greater than is reasonable and prudent under the existing conditions. Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571; Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20.

The existing conditions of which appellee had knowledge were such that the speed of the Ford prevented its brakes from performing the purpose for which they were furnished as a necessary equipment of the vehicle. The speed of it was sufficient to prevent control of or the turning or driving of the Ford in such a manner as to avoid a collision with the Dodge although the distance between the automobiles when the necessity therefor was known was at least 200 feet. The speed was such that the driver of the automobile, of more than 40 years' experience, could not or did not stop it. It could not be controlled or diverted to some other position on the highway in the distance above stated. It is the duty of all persons in the operation of an automobile to use due or reasonable care to prevent accident or injury. The user of a highway is required to use reasonable care, considering the existing conditions and circumstances. 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 he 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 highway, 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. The existence of negligence is a question of fact and may be found from circumstantial evidence and physical facts if they indicate with reasonable certainty the negligence charged. This is true as to a charge of speed as well as any other specification of negligence. Circumstances or physical facts or both concerning an accident may be sufficient to overcome direct evidence as to the speed of an automobile involved therein. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758. The speed or control of the Ford as shown by the circumstances of this case was neither reasonable nor prudent under the existing circumstances.

Appellee said when he came to the ice-covered portion of the highway he saw that several cars had been through there and they made one track close to the middle of the road and he naturally followed that track. He also said that he did not know his location on the highway at the time of the collision until measurements had been made. He thought before that he was on his side (the west side) of the highway. The statute, subject to exceptions, requires the driver of a vehicle to drive it upon the right half of the highway. § 39-746, R. R. S. 1943. Drivers of vehicles traveling in opposite directions are required to pass on the right, each giving to the other half of the main-traveled portion of the roadway as nearly as possible. § 39-748, R. R. S. 1943. Appellee operated the Ford down the center of the highway from north to south a distance of about 300 feet immediately before and at the time the automobiles came in contact. The contact of the automobiles was near the very center of the highway. There is no showing in the record that the highway was in any better or safer condition for traveling in the center of it than it was in the west or the right lane of the highway. The reason appellee gave for traveling in the

center of it was that several cars had done so and naturally or as a matter of course or custom he followed that conduct in that regard. The observance of a practice or custom which is contrary to a statute upon the subject does not prevent a motorist from being guilty of a violation of the statute. Mann v. Standard Oil Co., 129 Neb. 226, 261 N. W. 168. The record is convincing that appellee was continuously occupying and using the center of the highway from the place where the ice commenced on it for a distance of about 300 feet to the place and time of the accident, including the distance he traveled after he said he knew appellant was not going to stop before he moved from the private lane onto the highway. The statement in Callahan v. Prewitt, 141 Neb. 243, 3 N. W. 2d 435, is not wholly inappropriate to this situation: "The defendant contended that when he first saw the Doerfler car they were about 550 feet apart, and Doerfler was driving on the wrong side of the road, but defendant did not pull over clear to the right, or pull over clear to the left of the center line, but continued right down the middle of the road; in other words, it appears that he did the only thing he could do to insure that an accident would occur." The conduct of appellee in the respect last discussed was a total disregard under the circumstances of this case of the prudence and due care which the law exacts of a motorist.

Appellee argues that appellant was required by the law of the road to yield the right-of-way to all vehicles approaching on the public highway because appellant was moving from a private driveway to and upon a public highway. Appellee says it was the duty of appellant to have yielded the right-of-way upon such county highway to appellee. Appellee further says that the finding of the trial court that the sole and proximate cause of the collision and the damage was the negligence of appellant in entering a county highway from a private lane without yielding the right-of-way

to appellee was the only reasonable conclusion that could have been reached in this case. Implicit in these statements is the idea that the right-of-way to which appellee was entitled extended to and included the whole of the county highway. The relevant statute, section 39-752, R. R. S. 1943, provides in part: "The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway."

In Klaus v. Soloman Valley Stage Lines Co., 130 Neb. 325, 264 N. W. 747, this court said: "A driver upon a public highway at a lawful and reasonable rate of speed has the right of way over vehicles entering the highway from a private road or drive, and is not required to slow down or stop upon the appearance of such other vehicle about to enter the highway until it should appear to a reasonable person in his position that the driver of such vehicle was not going to comply with the law and yield the right of way." See, also, Kohrt v. Hammond, 160 Neb. 347, 70 N. W. 2d 102.

It is not every traveler upon a public highway, then, who is entitled to the right-of-way over one entering from a private lane or drive because by the reference above made such right is limited to a driver on a public highway who is traveling at a reasonable and lawful rate of speed. The court also observed in Klaus v. Soloman Valley Stage Lines Co., *supra*, the following: "This involves a consideration of the duties which a driver upon a public highway owes to persons entering upon such highway from a private driveway. Generally speaking they are: To drive at a reasonable rate of speed, to keep a proper lookout, and to avoid a collision if it can be done by the exercise of ordinary care."

Bainter v. Appel, 124 Neb. 40, 245 N. W. 16, considered the right-of-way of a motorist who was traveling west on the north or right lane of a highway in a cloud of dust and was struck by an eastbound truck which encroached upon the north lane of the highway. The

court said: "In the present case the car of plaintiff was correctly placed and at the time of the impact, as well as prior thereto, was traveling in a lawful manner where and as the terms of this enactment directed. Plaintiff, then, as to the north half of this highway, had the exclusive statutory right of way as against eastbound traffic thereon."

Carley v. Zeigler, 156 Cal. App. 2d 643, 320 P. 2d 165, considered these facts: The accident took place in the east half of Snyder Lane, a county highway which extended north and south. Carley admitted he was driving down the center of Snyder Lane in a southerly direction when his automobile struck a milk truck being operated by Zeigler which entered Snyder Lane from a private driveway on the east and was turning north thereon. The front wheels of the truck were from 2 to 4 feet from the east edge of Snyder Lane when it was struck by the automobile of Carley. A provision of the Vehicle Code of California provided that the driver of a vehicle about to enter or cross a highway from any private road or driveway shall yield the right-of-way to all vehicles approaching on such a highway. The court said: "A truck driver entering a highway from a private driveway on the east and turning north was not required to yield the right of way to the east half of the highway to a vehicle being driven down the center of the highway in a southerly direction; the driver of the other vehicle only had the right of way to the west half of the highway. * * * A right of way does not include a right to encroach on that half of a highway on which cars coming from the opposite direction are entitled to travel. * * * Before a vehicle driver is entitled to the right of way he must be operating his vehicle within the law and not in violation thereof; if he drives down the center of the highway without excuse or justification in violation of Veh. Code, § 525, declaring that a vehicle shall be driven on the right half of the roadway, he does not have the right of way." In the

opinion the court said: "The accident herein occurred in the east half of Snyder Lane where respondent (Carley) had no right to be. Appellant (Zeigler) had no duty to yield 'the right of way' to the east half of Snyder Lane. Respondent only had the 'right of way' to the west half of Snyder Lane. The 'right of way' does not include a right to encroach upon that half of the highway upon which cars coming from the opposite direction are entitled to travel. * * * Moreover, 'before the driver of any vehicle is entitled to the right of way such driver himself must be operating his vehicle within the law and not in violation thereof.' (Hayes v. Emerson, 110 Cal. App. 470, 477 [294 P. 765].)." See, also, Hemrich v. Koch, 177 Wash. 272, 31 P. 2d 529; Dyer v. Wallner, 189 Wash. 486, 65 P. 2d 1281; Berman v. King Union Co., Inc., 80 R. I. 181, 94 A. 2d 428.

The statute concerning right-of-way of a vehicle traveling upon a public highway over a vehicle entering it from a private lane quoted above does not mean that any vehicle traveling on any part of the highway in any manner, however negligently approaching the private drive, has the right-of-way in the entire highway. It is the driver of a vehicle on a public highway approaching a private drive who is proceeding in his proper lane of travel in a prudent and reasonable manner, as the law requires, who is entitled to the right-of-way provided for by the statute. The right-of-way which the statute makes available does not include a right to encroach on the half or part of a highway on which traffic coming from the opposite direction is entitled to travel. A provision of law granting a right-of-way to a user of a highway is generally not absolute but relative and subject to the qualification that the person entitled to claim the right will exercise it with proper regard for the safety of himself and others.

Appellee was, under the circumstances of this case, guilty of negligence as a matter of law which was a

proximate cause of the collision involved herein and he may not in any event have a recovery of damages on his cross-petition. However, the amount of damages sustained by appellant is an issue of fact to be tried and determined and, because of matters hereinbefore set out, is subject to the defense of contributory negligence of appellant. Because of the comparative negligence statute, even though appellee was guilty of negligence as a matter of law and if it may be found that appellant was guilty of only slight negligence, the question of whether or not the negligence of appellee was gross in comparison therewith would still be a factual one for determination of the trier of the facts. Bezdek v. Patrick, 170 Neb. 522, 103 N. W. 2d 318.

The judgment should be and is reversed and the cause is remanded to the district court for Perkins County for further proceedings according to law.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

FRANK RODINE, APPELLEE, V. IOWA HOME MUTUAL CASUALTY COMPANY, AN INSURANCE CORPORATION, APPELLANT.
106 N. W. 2d 391

Filed November 25, 1960. No. 34760.

1. **Principal and Agent. The apparent authority or agency for which a principal is liable must be traceable to him. A principal is only liable for that appearance of authority or agency caused by himself.**
2. **———. Evidence of acts or declarations of an agent concerning the existence or extent of his authority is not admissible against a principal to prove its existence or extent.**
3. **———. A principal is not bound if the agent exceeds the scope of his authority and the absence of authority is known to the person dealing with him or if the third person knows or should know the limitation of the authority of the agent.**
4. **———. It is an essential requirement of a valid and effective**

ratification of an unauthorized act by the principal that he have complete knowledge of the unauthorized act and of all matters related to it.

5. **Insurance: Reformation of Instruments.** If an insured can prove that he made a different contract from that expressed in the written policy furnished him by the insurer, he may have it reformed to conform to the contract he claims he made and he is not prevented by the fact he accepted the policy and did not examine it until after a loss occurred for which he claims the right of recovery.
6. **Insurance: Actions.** An insured cannot, however, disregard a written contract as evidenced by a policy of insurance furnished him by the insurer and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery thereon not warranted by the terms of the policy of insurance.

APPEAL from the district court for Adams County: EDMUND NUSS, JUDGE. *Reversed and remanded with directions.*

Haney & Walsh, for appellant.

Melvin K. Kammerlohr and *Whelan & Whelan*, for appellee.

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

BOSLAUGH, J.

Appellee asked damages for breach of an alleged oral contract with appellant indemnifying appellee against loss for damages caused to the property of others by reason of the operation of a truck owned and operated by appellee. The amount of the recovery sought was the expenditures appellee was required to make because of damages caused by an accident in which his truck was involved about December 22, 1952.

The substance of the cause of action stated in the second amended petition of appellee, hereafter designated petition, is that appellant through Sam Arnold, its authorized local selling agent at Hastings, Nebraska, in consideration of a premium, agreed to insure appellee for 1 year on or about December 16, 1952, with

a policy of insurance identical with a policy previously issued to appellee by appellant on the same specifically-described property and on the same terms and conditions except for the commencement and expiration dates of the term of the policy, the expiration date of said previous policy being October 3, 1952, a copy of portions of the policy being attached to and made a part of the pleading; that Sam Arnold, the agent, had actual or apparent authority from appellant to sell property damage liability insurance with a coverage not to exceed $5,000 on each vehicle insured and of unlimited territorial coverage within the United States and to bind appellant thereby; that appellant by action of its home office in Des Moines, Iowa, accepted and ratified the agreement of its agent, Sam Arnold, on the day it was made; that all of said written and oral agreements constituted the contract between appellant and appellee; that appellant became liable under the terms of the agreement to pay any amount not in excess of $5,000 for which appellee became liable for damages to property because of the ownership and operation of the truck described in said agreement and owned by appellee and in reference to which the said agreement was made; that by the agreement appellant bound itself to defend any suit against appellee and pay all expenses and costs incident thereto; that on or about December 22, 1952, the truck while being operated by an employee of appellee in the State of Missouri was involved in an accident as a result of which damages were caused to property of other persons in that state on account of which appellee was compelled to and did pay the sum of $3,592.93; that as a direct result of the accident appellee was required to incur and pay for services of his legal counsel $743.95 and other necessary expenses in the sum of $84.37; and that all of the expenditures were necessary, fair, and reasonable and were caused by the refusal of appellant to perform its agreement with appellee made and existing as aforesaid.

The recovery sought by appellee was $4,421.25 with interest and costs.

The answer of appellant was a denial of the claims made in the petition of appellee and an assertion by appellant that any contract entered into by it and appellee was a written one consisting of a policy of insurance issued to appellee by appellant on December 17, 1952, in accordance with the request of the former for sufficient insurance to secure the release of his truck from the port of entry at Fort Scott, Kansas, and to cover it on the return trip to Hastings, Nebraska, a copy of which policy of insurance was attached to and made a part of the answer of appellant; that the issuance of the policy of insurance was confirmed by telegram to the port of entry that date and a copy of the telegram was attached to and made a part of the answer; that any prior oral dealings of appellee and appellant were merged in the said written contract; and that the policy of insurance by its terms provided no insurance or indemnity coverage to appellee for any accident occurring in the State of Missouri.

The trial of the case resulted in a verdict against appellant and in favor of appellee in the amount claimed. Appellant made a motion for a directed verdict at the close of the testimony offered and received in the case, which was denied. A motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial was made by appellant and was denied. Judgment was rendered in accordance with the verdict. This appeal contests the correctness of the action of the trial court.

Appellee in December 1952 lived near Hastings, was a farmer, a feeder of cattle, a buyer of grain, a dealer in all kinds of feeds, and the owner and operator of a truck. He had transported grain to Kansas, Missouri, Oklahoma, and Texas and on the return trips hauled feed and salt until there was a decrease in the demand for the service about October 1952 when he ceased main-

taining a regular schedule and contemplated selling his truck.

In December 1952 he owned a Chevrolet tractor, motor No. FEA 358154, and a 1946 Fruehauf semi-trailer, factory No. SF 14089. The tractor and trailer will be referred to herein as the truck. In that month appellee loaded the truck with a cargo of baled hay for transportation to a government disaster area in Kansas and Missouri for the purpose of selling it there because he thought it would bring more money than it would elsewhere. Raymond Osgood, designated Osgood herein, a driver for appellee, operated the truck on this trip. He was given no specific instructions by appellee. Appellee heard from Osgood when he was about 50 or 75 miles west of Scott City, Kansas. Fort Scott, Kansas, was probably intended rather than Scott City, Kansas. Osgood reported that he could not sell the hay. The driver of the truck reported to appellee when he was at the port of entry at Fort Scott, Kansas. He then said that the truck would not be given clearance because it had no insurance coverage.

Appellee called on Sam Arnold, hereafter called Arnold, who was engaged in the insurance business in Hastings, the following morning, December 17, 1952. Appellee had secured insurance to meet his needs at different times during a period of about 17 years through Arnold from appellant. The premiums on the insurance policies which he secured from Arnold were paid to him by appellee when the policies were received from the company which issued them. Any claim appellee made because of the insurance was presented through the office of Arnold. All insurance policies appellee secured from appellant were issued by it at its home office at Des Moines, Iowa.

The truck had public liability and property damage insurance coverage issued by appellant for 1 year which expired on October 3, 1952. That policy on the truck was not renewed. A renewal policy was prepared and

tendered by appellant to appellee for an additional 1-year period from October 3, 1952, but it was not accepted by appellee because he was attempting and intended to sell the truck.

Appellee told Arnold at his office on December 17, 1952, that the insurance on the truck had expired but appellee thought insurance would not be required for transportation of hay since it was a farm commodity; that he had never been detained at a port of entry before when he was trucking hogs or cattle to St. Joseph and Kansas City, Missouri; and that was what he figured on the hay—that he did not need insurance. He told Arnold that he had hay on the truck and he had to have some insurance. Appellee testified he said to Arnold in his office on that date that he, appellee, wanted the same kind of a policy as the last one he had that was in force—the old policy. Arnold asked appellee for the number of it but he did not have it. Arnold secured the number of the old policy that was in force from his files and wrote something, "* * * a policy or a thing right there at that time, and when he fixed it all up for us * * *." Appellee figured he was insured. Appellee said he left the office of Arnold with that in mind, that he was protected, and "I had insurance made out * * *." Appellee afterwards testified that he did not know what Arnold wrote at that time and that he then received nothing in writing from Arnold. Appellee said that when he told Arnold he wanted insurance the same as the policy last in force he referred "To the policy that was in force and had no limitations on" which expired October 3, 1952. When appellee left the Arnold office that morning he advised the port of entry at Fort Scott, Kansas, by telephone that he had made arrangements for insurance on the truck. The person with whom he talked asked where the policy of insurance was made out and the appellee told him at Des Moines. The man at the port of entry told appellee he would not accept information of

the existence of insurance over the telephone and that appellee should get a telegram from the office at Des Moines before the port of entry could consider whether satisfactory insurance had been secured. Appellee returned to the Arnold office and told him what the man at the port of entry had said and what he requested. Arnold called the insurance company office in Des Moines by telephone and told the person with whom he talked what the port of entry required. Appellee was present but in his testimony did not attempt to state what he heard Arnold say in that conversation. The next time appellee heard from Osgood he was in Springfield, Missouri.

Appellant on December 18, 1952, issued a new policy of public liability and property damage insurance on the truck to appellee as insured which policy was in all respects satisfactory to him except it contained a provision limiting the use of the truck covered by the insurance to "within a 300 mile radius of Hastings, Nebraska, in the State of Nebraska; 260 miles into Kansas from a point where U. S. Highway No. 281 intersects the Nebraska-Kansas state line." Appellant advised the Kansas port of entry at Fort Scott, Kansas, by telegram that it had issued public liability and property damage coverage on the truck of appellee while it was used in the State of Kansas. The policy of insurance issued by appellant December 18, 1952, was sent to Arnold and was delivered by him to appellee. He on January 16, 1953, requested that the policy be canceled because he claimed it was not what he had requested on December 17, 1952, because of the limitation contained therein concerning the area within which the use of the truck was covered by the policy. The policy was that day canceled on request of the insured. Appellee paid the premium on the policy from December 17, 1952, to January 16, 1953, the date it was canceled. The policy of insurance of appellant issued to appellee which expired October 3, 1952, afforded public liability and

property damage coverage on the truck without limitation as to the use of the truck in the United States.

Arnold testified he had been in the general insurance business at Hastings for 30 years and he represented a number of insurance companies including appellant. The scope of his authority as a representative of appellant is stated in a document produced in evidence which contains the following: "The Company hereby appoints the said S. A. Arnold dba Arnold Insurance Agency as a soliciting Agent for Hastings, Nebraska and vicinity, with authority only to solicit applications for insurance acceptable to the Company, and to collect and receipt for fees for transmission to this Company at Des Moines, Iowa, on such applications as are approved by the Company and upon which policies are issued by the Company." Appellant did not furnish Arnold any incompleted forms of insurance policies and he had never filled out, completed, or issued any policies of insurance for appellant. His authority to represent appellant was only as a soliciting agent. Arnold was acquainted with appellee for a considerable period of time and had during that time secured insurance policies for him from appellant. Arnold made application to appellant at the solicitation of appellee for a policy of insurance covering a truck owned by him for the period of 1 year which expired October 3, 1952. The policy was issued at the home office of appellant, mailed to Arnold, and he delivered it to appellee. He came to the office of Arnold December 17, 1952, and they had a conversation about insurance of the truck which appellee said was then at Fort Scott, Kansas. He requested Arnold to see if he could get appellee insurance coverage on the truck. Appellee said that the truck was detained at the Fort Scott, Kansas, place and he needed some insurance to get it released so that he could get it home. The home of appellee was Hastings, Nebraska. Arnold after the conversation made an oral application to appellant by a telephone call to its home office in Des Moines for public liability

and property damage coverage so that appellee could get the truck loose from the port of entry. Arnold asked appellant for a 300-mile radius provision in the policy because the local radius was 75 miles, the next or intermediate was 150 miles and that was not enough to get appellee to and from Fort Scott, Kansas, so Arnold asked a 300-mile radius from Hastings, Nebraska. Arnold said he referred the home office of appellant in the telephone conversation of December 17, 1952, to the last policy that had been issued, in which appellee was named as insured and which was then in the home office files, for information to complete the policy he had asked for such as description of the truck, motor number, and serial number. The policy referred to by Arnold as the last policy issued was dated September 18, 1952. The policy period was stated therein as October 3, 1952, to October 3, 1953, and the policy was identified, offered in evidence, and admitted in the trial of this case as exhibit No. 8. This policy was not ordered or accepted by appellee and it never became effective. Arnold made no request to appellant to issue any coverage on the truck for appellee in Missouri. The request of Arnold was accepted by appellant, a policy was issued (exhibit No. 2), sent by mail to Arnold, and he transmitted it to appellee. He afterwards returned that policy of insurance to Arnold for cancellation and it was canceled January 16, 1953, as shown by the exhibit. Arnold said he asked appellant for a 300-mile radius because that was necessary to get the truck home to Hastings, Nebraska. Arnold and appellee had no conversation December 17, 1952, regarding any territorial limitation in the policy he asked Arnold to get for him.

Appellee testified that Osgood called him and told him about the accident. Appellee next saw the truck after it left Hastings in charge of Osgood shortly before Christmas of 1952 at Forrest City, Missouri. It was in bad condition. It was standing in the filling station or against it all mashed up. The canopy of the service sta-

tion had fallen down onto the truck. Appellee told Arnold before Christmas in 1952 about the accident in which the truck was involved and what had happened in Forrest City. The truck appellee saw at Forrest City, Missouri, at the filling station was the same one appellee had asked Arnold to secure coverage for at his office December 17, 1952. Forrest City, Missouri, is 160 miles from Hastings. There were numerous claims for damages asserted against appellee as a result of the accident in which the truck was involved. Appellant failed and refused to take any action in reference to them. Appellee necessarily, fairly, and reasonably expended an amount equal to the recovery he seeks in this case in defending against and disposing of the claims for damages against him.

The essence of the claim of appellee as stated in his petition is that on or about December 16, 1952, Arnold was an authorized local selling agent for appellant at Hastings, Nebraska; that he as such agent had authority, actual or apparent, from appellant to sell property damage liability insurance not in excess of $5,000 on each vehicle insured with unlimited territorial coverage within the United States and thereby by his acts in that regard to bind appellant by an agreement made with Arnold that appellant by and through Arnold, its authorized local selling agent, agreed to insure appellee for 1 year from that date by a policy of insurance identical, except as to the policy period, with a policy previously issued to him by appellant on the same specifically-described property, that is, his truck, which previous policy expired on October 3, 1952, and is exhibited by the record as exhibit No. 1; that appellant at its home office accepted and ratified the agreement of its agent Arnold on the day it was made and became thereby liable to pay an amount not in excess of $5,000 for which appellee became responsible for damages because of his ownership and operation of the truck which was thus insured; and that appellant was by the agreement bound

to defend any action against appellee for such damages and to pay all costs and expenses incident thereto.

There is an absence of evidence that Arnold had actual authority of the character and extent alleged by appellee in his petition and above recited. The actual authority granted to Arnold by appellant was evidenced by and expressed in a written and executed agency agreement between appellant and Arnold in which the former was called "Company" and the latter the "Agent." The relevant parts thereof are the following: "* * * nothing contained herein shall be construed to create the relation of employer and employee between said Company and said Agent. * * * The Company hereby appoints the said S. A. Arnold dba Arnold Insurance Agency as a soliciting Agent for Hastings, Nebraska and vicinity, with authority only to solicit applications for insurance acceptable to the Company, and to collect and receipt for fees for transmission to this Company at Des Moines, Iowa, on such applications as are approved by the Company and upon which policies are issued by the Company. * * * All fees and money received by the Agent for business transacted under this agency contract shall be in trust for the said Company to be transmitted promptly to its office at Des Moines, Iowa * * *. The Company retains the right to reject, alter, suspend, or cancel at any time any application or any policy and return the unearned fees on such policy * * *." There was no effort made herein to show anything contrary to the terms and provisions of the agency agreement or that either party thereto at any time acted contrary to or in violation of its terms. The presentation of this case in this court by appellee does not include a contention that there was any evidence of actual authority of Arnold granted him by appellant to make such an oral agreement binding upon appellant as appellee pleaded in his petition. The written argument of appellee in this court goes no further than a claim of apparent authority of Arnold to make

the alleged agreement of December 16, 1952, and to bind appellant by it.

The evidence relied upon by appellee to support his claim that Arnold had apparent authority to enter into a policy of insurance or to make an agreement to do so binding upon appellant was that Arnold had previously presented policies of insurance to appellee which he had ordered through Arnold and which were issued and fully executed at the home office in Des Moines, Iowa, and were sent to Arnold to be given to appellee; that Arnold had received the premiums on the policies from appellee for transmission to appellant; and that appellee had presented any claims he had because of insurance to the Arnold office in Hastings, Nebraska. There was no other fact concerning any such claim. There was nothing in any of these acts that had any relation to authority of an agent to make an agreement for insurance or to issue an insurance policy binding upon the principal. The participation in or approval by appellant of any of these acts did not reasonably create an appearance of authority for Arnold to validly issue a policy of insurance or to make the agreement claimed by appellee.

Apparent or ostensible authority or agency for which a principal may be liable must be traceable to him and cannot be established by the acts, declarations, or conduct of the agent. The principal is only liable for appearance of authority caused by himself. Ostensible and apparent agency have been treated in this jurisdiction as being synonymous. In Farmers Cooperative Shipping Assn. v. Adams Grain Co., 84 Neb. 752, 122 N. W. 55, this court said: "It is well established that the authority of an agent cannot be established by his own acts and declarations. * * * Consequently, when we speak of the apparent authority of an agent as binding his principal, we mean such authority as the acts or declarations of the principal give the agent the appearance of possessing. Closely related to this doctrine

of apparent authority, and really a part of it, is the doctrine of estoppel under which a party who has knowingly permitted others to treat one as his agent will be estopped to deny the agency,"

Maryland Casualty Co. v. Moon, 231 Mich. 56, 203 N. W. 885, states: "The apparent authority for which the principal may be liable must, however, be traceable to him and cannot be established by the acts and conduct of the agent. The principal is only liable for that appearance of authority caused by himself."

American Nat. Bank v. Bartlett, 40 F. 2d 21, declares: "The underlying rule of the law of agency is that 'The party dealing with the agent * * * must be able to trace the authority on which he relies back to some word or deed of the principal.' Mechem on Agency (2d Ed.) §§ 210, 750."

In Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co., 156 Neb. 366, 56 N. W. 2d 288, it is stated: "This court has treated ostensible and apparent agency as synonymous."

It is stated in Restatement, Agency, § 8, p. 25, that: "Apparent authority is the power of an apparent agent to affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestations of consent to such third person that such agent shall act as his agent." That statement of the law was quoted with approval by this court in Oleson v. Albers, 130 Neb. 823, 266 N. W. 632, 105 A. L. R. 714. See, also, Ware v. Home Mutual Ins. Assn., 135 Neb. 329, 281 N. W. 617; Stewart v. Spade Township, 157 Neb. 93, 58 N. W. 2d 841; 2 Am. Jur., Agency, § 103, p. 85.

It is generally required before a recovery may be predicated upon apparent authority that the person dealing with the agent must establish that at the time he dealt with the agent he believed that the agent was acting within the scope of his authority and that he had no notice or knowledge of any fact or circumstance

which would indicate to a reasonably prudent person in similar circumstances that the agent had no actual authority to bind his principal in the matter.

Appellee has secured the insurance he desired at various times during a period of about 17 years through Arnold from appellant. All of the policies were issued by appellant and fully executed by it at its home office in Des Moines, Iowa. They were sent to Arnold by the appellant, Arnold presented them to appellee, and Arnold received from him the premiums for transmission to appellant. This was notice to and knowledge of appellee that Arnold could not bind appellant on a contract of insurance. Arnold during this long period had not, to the personal knowledge of appellee, attempted to exercise any such authority.

There was additional evidence of appellee the effect of which was that he actually knew on December 17, 1952, while he was negotiating with Arnold that he had no authority to make any policy or agreement of insurance for appellant. Appellee after he left the office of Arnold the first time on the morning of December 17, 1952, advised the port of entry at Fort Scott, Kansas, by telephone that he had made arrangements for insurance on his truck and that the port of entry could release it. The person there to whom appellee talked inquired where the policy of insurance on the truck was made out and appellee answered that inquiry by saying at Des Moines. The man at the port of entry told appellee he would not accept information of the existence of insurance by telephone and that appellee should get a telegram from the insurance company at Des Moines before the port of entry would even consider whether satisfactory insurance had been secured on the truck of appellee. The testimony of appellee in this respect was definite, positive, and conclusive that appellee knew that Arnold had no authority to make any contract of insurance binding on appellant and that any insurance secured from appellant had to be acted

upon and made at its home office in Des Moines, Iowa. There is no evidence in this case of apparent authority of Arnold to make such an agreement as that relied upon by appellee in this litigation as a foundation for his claimed right of recovery from appellant.

A principal is not bound if the agent exceeds the scope of his authority and the absence of authority is known to the person dealing with him or if the third person knows or should know the limitation of the authority of the agent.

In Dietz v. City Nat. Bank of Hastings, 42 Neb. 584, 60 N. W. 896, it is said: "Where it was known to the president of a bank that the indorsement of the name of the payee on a note by one assuming to make such indorsement as the payee's agent, was outside the scope of his powers, such indorsement is not binding on the alleged principal."

Heitsch v. Minneapolis Threshing Machine Co., 29 N. D. 94, 150 N. W. 457, L. R. A. 1915D 349, states: "It is well established that a principal is not bound by the unauthorized acts of an agent which are not ratified by him, and where the lack of authority is known or should be known to the third party." See, also, National Council Junior Order United American Mechanics v. Thompson, 153 Ky. 636, 156 S. W. 132, 45 L. R. A. N. S. 1148; 2 Am. Jur., Agency, § 103, p. 85.

Appellee pleaded as a part of his cause of action that appellant at its home office accepted and ratified the alleged agreement which he claimed was made on or about December 16, 1952. There is no evidence that appellant knew before the commencement of this litigation almost 3 years after that date that appellee claimed he told Arnold on December 17, 1952, that appellee wanted a policy on his truck identical, except as to the policy period, with the previous policy thereon which expired October 3, 1952, identified herein as exhibit No. 1, and that he claimed that Arnold agreed for appellant to insure appellee as to his truck on that basis. There is no

proof that appellant before this litigation had any information from any source of the insurance agreement claimed to have been made about December 16, 1952, as alleged in the petition of appellee. Arnold is the only person who communicated with appellant concerning the negotiations and conversation had by appellee and Arnold on December 17, 1952. He testified that appellee came to his office that date and they had a conversation about the truck of appellee which he said was at Fort Scott, Kansas. He said it was detained there and he needed some insurance to get it released so that he could get it home, and he requested Arnold to see if he could get appellee insurance coverage on the truck. Arnold made an oral application to appellant at its home office in Des Moines for public liability and property damage coverage on the truck to assist appellee in getting the truck released from the port of entry and back to Hastings. Arnold asked appellant for a 300-mile radius from Hastings provision and referred the home office to the last policy that had been issued in which appellee was named as insured, identified in the record as exhibit No. 8, for information to complete the policy he had asked to be issued to appellee. Arnold said no request was made to him by appellee for coverage on the truck in Missouri and there was no conversation about territorial limitation but he asked for a 300-mile radius which he thought was necessary to get the truck from where it was to Hastings.

There could not have been any acceptance or ratification by appellant of the insurance agreement appellee claimed was made because acceptance or ratification is impossible for one who has no knowledge of the subject matter.

In Dietz v. City Nat. Bank of Hastings, *supra,* it is said: "To the ratification of an unauthorized indorsement of his name, knowledge of the act to be ratified must be shown to have been had by the party sought to be charged by the alleged ratification."

LeBron Electrical Works, Inc. v. Livingston, 130 Neb. 733, 266 N. W. 589, declares: "In order for a ratification of the acts and declarations of a third person to be binding upon a person, it must, as a rule, be made by him with full knowledge of all the facts necessary to an intelligent exercise of the right of election."

American Nat. Bank v. Bartlett, *supra*, contains the following: "From this statement, it is apparent that no question of ratification in fact, or of ratification by voluntary retention of the benefits of an agent's unauthorized act, is present; and this for the reason that neither the corporation nor Mr. Mayer had any knowledge of the execution of the mortgage prior to the bankruptcy. Full knowledge of the unauthorized act, and of all material matters related to it, is an essential of a valid ratification."

The oral application for an insurance policy covering the truck of appellee was made to appellant by Arnold on December 17, 1952, it was accepted, and a fully executed policy was issued by appellant in which appellee was designated the insured for the period of December 17, 1952, to December 17, 1953. It was transmitted by mail to Arnold and he delivered it to appellee. Appellant advised the port of entry of the issuance of the policy and passage of the truck was cleared by it. Appellee testified that the policy was satisfactory in all respects except the provision therein limiting the use of the truck within designated areas. Appellee on January 16, 1953, requested that the policy be canceled because he claimed it was not what he asked for on December 17, 1952. His objection was to the limitation of the policy concerning the areas in which the use of the truck was covered. Appellee paid the premium on the policy from December 17, 1952, to January 16, 1953, and it was canceled on the last date named. The petition of appellee in this litigation does not mention the issuance and existence of the policy of insurance last described. He elected to wholly disregard it though

it was in force at the time of the accident in which the truck of appellee was involved on December 22, 1952. Appellee did not seek reformation of the policy to eliminate the provision therein to which he objected but he has sought recovery on the basis of the alleged oral agreement for insurance which he says was made about December 16, 1952, by Arnold on behalf of and for appellant. This course of procedure has been disapproved by this court.

A recent decision of this court definitely indicates that if it is contended by an insured that a policy issued does not conform to the policy allegedly ordered from the agent, the remedy of the insured is not a suit at law, such as appellee is attempting to maintain to have a recovery otherwise than in accordance with the terms of the policy, but the proper remedy is for a reformation of the policy to conform to the alleged oral understanding. Adolf v. Union Nat. Life Ins. Co., 170 Neb. 38, 101 N. W. 2d 504. Of course, if appellee can prove that he made a different contract from that expressed in the policy which appellant issued to him on December 18, 1952, he may have it reformed and then have a recovery on it as reformed. It is said in Mutual Benefit Health & Acc. Assn. v. Milder, 152 Neb. 519, 41 N. W. 2d 780: "If the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity, and he is not prevented by the mere fact that he accepted and retained the policy and did not examine it until after a loss occurred." See, also, Mogil v. Maryland Casualty Co., 147 Neb. 1087, 26 N. W. 2d 126. A litigant cannot, however, disregard the written contract as evidenced by a policy of insurance issued to him and have an action at law upon an alleged oral agreement inconsistent with the policy or a recovery not warranted by the policy.

The motion of appellant for a judgment notwithstanding the verdict should be sustained. The judgment is reversed and the cause is remanded to the dis-

trict court for Adams County with directions to sustain the motion of appellant for a judgment notwithstanding the verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

ANNA LEE HAITH, APPELLANT AND CROSS-APPELLEE, V. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE AND CROSS-APPELLANT.
106 N. W. 2d 169

Filed November 25, 1960. No. 34790.

1. **Trial: New Trial.** When a party litigant has appropriately filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial, the granting of the motion for new trial operates as a denial of the motion for judgment notwithstanding the verdict.
2. **Insurance: Evidence.** In cases such as that at bar, the presumption against death by suicide is prima facie only and rebuttable by defendant. Such presumption is overcome and disappears when either direct or circumstantial evidence is introduced by defendant showing that the death was caused by suicide and the burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide.
3. **Insurance: Trial.** Generally, when the evidence, either direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide, and the evidence is clearly inconsistent with any other explanation, the trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict.
4. **Trial: New Trial.** It is also the rule that a verdict which is contrary to the evidence and thus clearly wrong should be vacated for the reason that it is not sustained by the evidence and is contrary to law, and that in such cases if a motion for directed verdict has been timely made and overruled a request for judgment notwithstanding the verdict should be sustained and judgment rendered in conformity with the motion to direct a verdict instead of granting a new trial.

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

John R. Doyle, for appellant.

Mason, Knudsen, Dickeson & Berkheimer, for appellee.

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

CHAPPELL, J.

Plaintiff, Anna Lee Haith, as the wife of David A. Haith, deceased, hereinafter called Haith, and as the beneficiary of a $3,000 life insurance policy issued to Haith on November 28, 1956, during his lifetime by defendant, The Prudential Insurance Company of America, brought this action against defendant seeking to recover $6,000 under the "Accidental Death Benefit Provision" of the policy. In that connection, plaintiff alleged that on or about April 15, 1958, while said policy was in full force and effect, Haith met his death through external, violent, and accidental means, namely by a gunshot wound. A copy of the policy was attached to and made a part of plaintiff's petition.

Defendant's answer admitted issuance of the policy involved as alleged; that plaintiff was beneficiary therein; that from the time the policy was issued to and including the time of Haith's death on April 15, 1958, all of the monthly premiums had been paid on said policy; and that plaintiff had filed a proof of loss, which claim defendant had refused to pay. Defendant then denied generally and alleged that a suicide clause of said policy provided that: "Suicide. — Death of the Insured from suicide within two years from the policy date, whether the Insured is sane or insane, shall limit the company's liability to the return of the amount of premiums paid." Defendant then alleged that the death of Haith was from suicide caused by a self-inflicted gunshot wound with the intention of taking his own life and bringing about self-destruction, which suicide occurred on April 15, 1958, within 2 years of November 28, 1956, the policy date; that total premiums paid on such policy amounted

to $132.77; and that no amount was due on the policy to plaintiff from defendant except such amount of premiums paid. Defendant then alleged that one of the accidental death benefit provisions of the policy stated that: "Exceptions: No Accidental Death Benefit shall be payable if injury or death results (1) from suicide or any attempt thereat, whether the Insured is sane or insane: * * *," and that since Haith's death was caused from suicide as theretofore alleged, there was no accidental death benefit due and owing plaintiff from defendant. Defendant also alleged that on August 27, 1958, and again on September 17, 1958, defendant tendered to plaintiff the sum of $132.77 for the total premiums paid.

Plaintiff's reply denied generally the new matter in defendant's answer, but admitted that the policy contained the "Suicide" clause and "Exceptions" as alleged by defendant; that the death of Haith resulted from a gunshot wound; and that defendant had tendered to plaintiff $132.77, the total sum of the premiums paid as alleged by defendant, which tenders were refused by plaintiff.

Upon trial to a jury, and at conclusion of the evidence, defendant moved for a directed verdict in favor of plaintiff for only the amount of the premiums paid because the evidence was insufficient to show an accidental death under the accidental death benefit provisions of the policy, and that the evidence showed that the only reasonable hypothesis was that of suicide. Such motion was overruled.

Thereafter, upon submission to a jury, it returned a verdict for plaintiff, and judgment was rendered accordingly. Thereafter, defendant filed a motion for judgment notwithstanding the verdict, in accord with its motion for a directed verdict, or in the alternative for a new trial. After a hearing thereon, the court set aside the verdict and judgment and granted a new trial without giving a reason for that decision and with-

out directly disposing of defendant's motion for judgment notwithstanding the verdict, which, however, in legal effect operated as a denial of defendant's motion for judgment notwithstanding the verdict. See, Krepcik v. Interstate Transit Lines, 153 Neb. 98, 43 N. W. 2d 609; Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640; Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

Thereafter plaintiff appealed, assigning that the trial court erred in granting a new trial, and defendant cross-appealed assigning that the trial court erred in failing to sustain defendant's motion for directed verdict and in failing to grant defendant's motion for judgment notwithstanding the verdict. We sustain defendant's cross-appeal.

Plaintiff relies upon certain rules reaffirmed in Myers v. Platte Valley Public Power & Irr. Dist., 159 Neb. 493, 67 N. W. 2d 739, wherein we held that: "A new trial is to be granted for a legal cause and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons.

"The Supreme Court is not vested with authority by the Constitution or laws of the state to set aside the verdict of a jury, having for its support sufficient competent evidence, even though this court may be of the opinion that had it been the trier of the case, it would have reached a different conclusion.

"While the trial judge need not give his reason for reaching a decision, the justification of the decision must be one that can be established from the record.

"Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

Plaintiff also relies upon Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772, wherein the

trial court granted a new trial and we held that: "If the trial court gave no reasons for its decision, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions." However, herein defendant cross-appealed and thus had a right to point out the prejudicial error that defendant contends exists in the record and which defendant contends did not justify the decision of the trial court in granting a new trial when a judgment notwithstanding the verdict should have been rendered.

On the other hand, defendant relies upon Sawyer v. Mutual Benefit Health & Accident Assn., 121 Neb. 504, 237 N. W. 615, a case comparable in all material respects with that at bar. Therein this court cited and quoted with approval from Grosvenor v. Fidelity & Casualty Co., 102 Neb. 629, 168 N. W. 596. Such cases concluded, and it is the well-settled rule in this jurisdiction, that the presumption against death by suicide is prima facie only and rebuttable by defendant, and such presumption is overcome and disappears when either direct or circumstantial evidence is introduced by defendant showing that the death was caused by suicide, and the burden is then upon plaintiff to adduce evidence that the death was accidental and not from suicide. See, also, Dodder v. Aetna Life Ins. Co., 104 Neb. 70, 175 N. W. 651; Peabody v. Continental Life Ins. Co., 128 Neb. 23, 257 N. W. 482. Such cases are also authority for application of the rule that when the evidence, whether direct or circumstantial, shows that the only reasonable hypothesis would be that of suicide and the evidence is clearly inconsistent with any other explanation, the

trial court should, when the question is properly raised, take the case from the jury, treat the matter as a question of law, and direct a proper verdict; and that a verdict which is contrary to the evidence and thus clearly wrong should be vacated for the reason that it is not sustained by the evidence and is contrary to law.

As we view it, the sole material and decisive question presented is whether or not the trial court should have sustained defendant's motion for directed verdict and whether a judgment notwithstanding the verdict should have been rendered in conformity with the motion to direct a verdict instead of granting a new trial. In that connection, as held in Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

We have heretofore summarized the pleadings and admissions made therein, which will not be again repeated at length. The substance thereof, together with evidence adduced by plaintiff in chief, was that plaintiff was the wife of Haith at the time of his death and the beneficiary named in the policy of insurance issued by defendant to Haith on November 28, 1956, a copy of which was attached to and made a part of plaintiff's petition and the original of which was offered by plaintiff and received in evidence. Its provisions applicable herein and the interpretation thereof are not questioned in any proper manner, and admittedly such policy was in force and effect on April 15, 1958, the date of Haith's death, when all monthly premiums in the total sum of $132.77 had been paid. Admittedly, Haith's death resulted from a gunshot wound, and he was identified as

dead on April 15, 1958, by a deputy sheriff and a Lincoln lieutenant of police, and again on April 17, 1958, by plaintiff at the mortuary. Also, Haith's death admittedly occurred within 2 years from the policy date. Plaintiff testified, and their official "Record of Marriage," received in evidence, discloses that she married Haith in Nebraska City on March 12, 1956, when she was 29 years old and he was 24 years old. He had been twice previously married and divorced, and she had been once previously married and divorced. Prior to April 14, 1958, they had lived together at Elmwood with two children, one of whom was 11 years old and one of whom was 2½ years old at the time of trial.

Haith was a sheet metal worker employed by Capital Steel Company since December 1957. He left their home at Elmwood about 6:30 a.m. on April 14, 1958, driving a 1953 Ford two-door car owned jointly by the parties. That was the last time he was seen alive by plaintiff. She testified that they seldom quarreled; that he had a happy disposition; that he was easy to live with; that he was a good father; and that he provided for plaintiff and the children. She testified that she never knew him to buy a gun but that once shortly after their marriage he had borrowed a rifle which was taken back when she asked him to do so, and that she never saw a rifle around the house again. She knew that he had been to a named doctor in Lincoln a couple of weeks before his death for treatment of an earache about which he had complained, but that he had theretofore made no other complaints except once when he got a piece of steel in his eye which steel had been properly removed. The named doctor was not called as a witness at the trial. Plaintiff testified that Haith was about 5 feet 6 inches tall; slight of build; weighed 130 to 140 pounds; and that he had short arms requiring him to wear shirts about size 14, with 30 inch sleeves. Plaintiff then rested.

Thereupon, uncontradicted evidence adduced by de-

fendant was as follows: The Lincoln police department usually called the sheriff of Lancaster County and his deputies in cases such as that at bar because they were acting county coroners. A deputy sheriff was called to investigate the death of Haith at about 2:27 a. m., April 15, 1958. Upon his arrival at 2051 Worthington, the residence of one June I. Lawson and her husband, the deputy sheriff found that a lieutenant and two other police officers of the Lincoln police department had already arrived. There Haith was found dead in the two-door Ford car parked in the Lawson driveway. He was sitting on the left front seat of the car behind the steering wheel with the ankle of his right leg on the driver's seat cushion up under his buttocks, and with his left foot at an angle on the floor of the driver's side. His head drooped down upon his chest. His left hand was in his lap. His right arm hung over the back of the left front seat and he was bleeding profusely from a bullet wound on his forehead about an inch above the bridge of his nose. His right index finger was in the trigger guard of a 22-caliber rifle. The butt of the rifle stock was resting on the back seat and the barrel was pointing toward the front of the car through the space between the two front jump seats. There was one or two empty coke bottles and a 7-Up bottle half full sitting upright on the little open door of the glove compartment. The bottles had the odor of alcoholic contents, and a three-fourths empty quart of whiskey and some full coke bottles were found elsewhere in the car.

The interior of the car and Haith's clothing were examined. His clothing was not in disarray and no evidence of a struggle was found on his body or in the car. The deputy sheriff took the rifle from the car into his custody and subsequently delivered it to the sheriff's office where it was kept in a gun case in that office until the trial, whereat the rifle was offered and received in evidence. At the trial the rifle was officially identified as a 22-caliber Marlin bolt-action repeater,

and when found it had a clip of seven 22-caliber shells in it and an empty shell case in the chamber of the barrel. There is ample competent evidence that the wound in the forehead of the deceased and that his death as well were caused by a 22-caliber bullet. Also, there were powder burns on his forehead and under the surface of the skin around the wound, caused by a discharge of the weapon while pressed against the skin.

Once or twice a week for several months previously, during his lifetime, deceased had been a customer of the Midway Tavern in Lincoln during the day or evening. There he would drink beer and play games with the waitresses when they were not busy. In doing so, he became acquainted with a Mrs. Meyers, a waitress named Mrs. Densberger, who was unmarried and lived with Mrs. Meyers at 412 South Twenty-fifth Street, and a waitress named Mrs. Lawson, who was married and lived at 2051 Worthington. During the evening of April 14, 1958, they had all planned to go out to Lavonne's Tavern located northeast of Lincoln on the Cornhusker Highway, where beer and foods were served and a band played for dancing. About 8 p. m., Haith drove his car and took Mrs. Densberger and Mrs. Lawson out to the Lawson home, where they all had a highball and Mrs. Lawson washed up and changed her clothes while Haith and Mrs. Densberger visited together. After about one-half hour, the three of them left as planned and went out to Lavonne's Tavern. Mrs. Meyers was there with others when they arrived. There they all drank beer, ate sandwiches, visited, and watched the dancing, but they did not dance. They stayed there until about midnight and upon leaving, Mrs. Lawson bought six bottles of coke and 7-Up to drink with whiskey. They then fixed one drink for each of them, spiked with Haith's whiskey, before leaving. They each had one such drink in Haith's car on the road home. Mrs. Lawson sat in the right front seat and Mrs. Densberger and Mrs. Meyers sat in the back seat of Haith's

car while he drove Mrs. Densberger and Mrs. Meyers to their home at 412 South Twenty-fifth Street where they arrived about 12:30 a. m. Haith then drove with Mrs. Lawson to 2051 Worthington where he parked his car on the driveway.

There he and Mrs. Lawson had one more spiked drink together, and, being without matches to light a cigarette, Haith suggested that she look in the glove compartment for them. She looked and found no matches therein but did find parts of a gun which Haith said belonged to his rifle. She also saw therein two boxes of 22-caliber shells, one of which contained 22 shorts and the other of which contained 22 longs. As they continued to visit, Haith said: " 'I haven't got much longer to live.' * * * 'The doctor said that I've got cancer of the brain and I've only got six months to live.' " She then expressed her sympathy and suggested that he go to Mayo Brothers where they did wonderful things, but he said, " 'No, the doctor said I haven't got much longer to live, maybe six months.' * * * 'You know, I'm in love with you.' * * * 'I'm in love with you, and I can't have you,' * * * 'You're in love with your husband' " to which she replied " 'Yes.' " Because Haith had always said that he was divorced, she then said: " 'There's a lot of girls around town,' " whereupon he said, " 'I haven't got much time to live, only about six months.' * * * 'I haven't got nothing to live for, and you haven't either.' " Haith then reached back in the car, pulled the rifle up, stuck the barrel between her eyes, clicked the gun, and said: " '* * * I'm going to kill you and then I'm going to kill myself,' " whereupon he started to push the gun down in her face so she grabbed it, pushed it up, and he pulled it around again, saying, " 'If you don't want me to kill you, I'll kill myself,' * * *." Thereupon she shoved the gun up against the roof top and said, " 'Don't be silly, you don't want to do that. If you want to kill yourself, go ahead, and I don't have to stay here and watch,'

* * *." She then became afraid, took out her house key, pushed down on the door handle, jumped out of the car, and ran into the house. There she turned off the living room light so no light could be seen in the house and so that she could pull back the window blinds and look out to see if Haith had left. There she heard no shot but she kept watch and never saw anyone else around the car but she could see that Haith's car still remained in the driveway. After waiting and watching until about 2 a. m. and Haith had not left, she called Mrs. Densberger by telephone, explained the situation, and asked her to come out at once. Mrs. Densberger then came to 2051 Worthington in a taxicab and entered the house. Upon being told what had happened, she went out alone to Haith's car and with the aid of a flashlight she saw blood upon him and thought something was wrong, so upon her return to the house, Mrs. Lawson called the police, repeated Haith's threats, and asked them to send someone out to her home. When the police came, she told them what had happened, and upon returning from observation of the car and the situation therein, the police called the deputy sheriff heretofore mentioned, who then came out to Lawson's home. About 4 a. m. Mrs. Lawson's husband was called at Columbus where he was then working, and he came to their home. The rifle was later identified as one belonging to Haith's brother.

Defendant's evidence heretofore set forth appeared in the testimony of the deputy sheriff, the police lieutenant, Mrs. Densberger, and a material portion of a deposition of Mrs. Lawson received in evidence after it had been shown by a deputy sheriff that Mrs. Lawson had moved to Wichita, Kansas; that she was out of the county of the place of trial or hearing; and that defendant had been unable to procure the attendance of the witness, Mrs. Lawson, by subpoena. Also, there was no showing that her absence was procured by defendant who offered the deposition. See subsections 3(b) and

3(d) of § 25-1267.04, R. R. S. 1943. True, upon offering such deposition testimony, defendant called attention to the wrong alphabetical subsections of section 25-1267.04, R. R. S. 1943, but the foundation for admission of the deposition testimony was complete and proper, in compliance with subsections 3(b) and 3(d) heretofore mentioned.

In rebuttal plaintiff called only Mrs. Densberger as a witness. The substance of her testimony was that she sat in the back seat of Haith's car while riding from the Lavonne Tavern to her home at 412 South Twenty-fifth Street; that during such period she did not knowingly sit on any gun or notice one on the floor of the car because she was not looking for any rifle or weapon and had no reason to do so; that she did not examine the ledge up by the rear window of the car or see a gun up there when she got in Haith's car; and that she then saw the cokes and 7-Up which they had obtained at Lavonne's but that she didn't notice anything else although there could have been something in the car, because she wasn't looking for anything. She testified that she saw a rifle in the car resembling the one received in evidence when she looked in Haith's car after she had arrived at the Lawson home in a taxicab.

As we view it, the evidence adduced in plaintiff's behalf amounted to no more than to create a presumption which was overcome by the undisputed facts and circumstances adduced by defendant which were so conclusive and inconsistent with any other hypothesis or explanation except suicide that the trial court should have directed a verdict as requested by defendant. Therefore, we conclude that the order of the trial court granting a new trial should be and hereby is reversed and the cause is remanded with directions that the trial court sustain defendant's motion for judgment notwithstanding the verdict, as requested by defendant, and accordingly render a judgment in favor of plaintiff and

against defendant for $132.77 with interest at the legal rate from April 15, 1958, to August 27, 1958, with costs taxed to plaintiff.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

CHARLES HUEFTLE, APPELLANT, V. EUSTIS CEMETERY ASSOCIATION, APPELLEE.
106 N. W. 2d 400

Filed November 25, 1960. No. 34815.

1. Statutes. In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon.
2. ———. It is a general principle of interpretation that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Under this principle the enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated and an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases.

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

William S. Padley, for appellant.

Schroeder & Schroeder, for appellee.

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

SIMMONS, C. J.

This is an action for injunction. The appeal presents primarily the question as to whether or not the word "city" in the first sentence of section 12-515, R. R. S. 1943, includes "village." By sustaining a general demurrer to plaintiff's petition, the trial court held that it did not. Plaintiff, given leave to file an amended petition, did not do so. His action was dismissed. He ap-

peals. We affirm the judgment of the trial court.

Plaintiff alleged condemnation proceedings by the defendant, Eustis Cemetery Association; that the land involved was "located within a distance of less than one mile from the corporate limits of the Village of Eustis"; that the land sought to be taken was for the purpose of an "addition to said cemetery"; and that the cemetery association was without legal authority to take the land by eminent domain. Plaintiff prayed for an injunction. Defendant demurred for the reason that the petition did not state facts sufficient to constitute a cause of action. The result has been stated above.

Plaintiff presents a question of the power of the defendant to acquire the land by eminent domain. The question of the procedure to be followed is not involved.

Plaintiff assigns as error here the sustaining of the demurrer and the dismissal of his petition.

Defendant here relies upon sections 12-201 and 12-205, R. R. S. 1943. The language involved was originally enacted in Laws 1915, Chapter 172, page 355. The act was a grant of power to "Any incorporated city or village, any incorporated cemetery association" to "secure additional lands adjoining for cemetery and burial purposes in the manner hereinafter set forth."

By its language the "act shall not apply to lands or property within the limits of incorporated cities or villages."

So far as applicable to any situation, the act was a grant of power with a prescribed procedure for securing the rights covered by the power.

Then came Laws 1951, Chapter 101, page 451. This act repealed the strictly procedural provisions of the 1915 act, leaving the 1915 act as it now appears in sections 12-201 and 12-205, R. R. S. 1943. The 1951 act sets up a uniform procedure. It was amended in the legislative process, but not as to portions here involved. The Judiciary Committee in reporting the bill said: "The purpose of this bill is to provide a uniform method

under which the power of eminent domain may be exercised.

"There are, at the present time, over thirty different methods by which various public bodies condemn private property for public use. The Legislative Council and Judicial Council both studied the subject during the past biennium. Public hearings were held. As a result, the Judicial Council adopted as a pattern one of the oldest statutes providing for condemnation, namely, that relating to acquisition of property by railroads. The Legislative Council voted to accept the bill of the Judicial Council.

"While the bill itself seems very long, the procedure is set forth in the first 24 sections of the bill. The remainder of the bill changes existing statutes on eminent domain to conform thereto.

"It is the belief of the Committee that adoption of the bill will bring about not only uniformity in procedure but a decided improvement in the method by which private property is acquired for public use."

The applicable rule is: In construing a statute to determine the legislative intent a court may consider the history of its passage, the amendments offered, and action taken by the Legislature thereon. School District No. 42 v. Marshall, 160 Neb. 832, 71 N. W. 2d 549.

It appears obvious that the 1951 act was intended to be and was a procedural bill leaving in effect the powers granted in the 1915 act, for that which is now section 12-201, R. R. S. 1943, was section 31, and section 12-205, R. R. S. 1943, was section 32 of the 1951 act.

The first sentence of what is now section 12-515, R. R. S. 1943, appears as the last sentence of Laws 1911, Chapter 27, section 1, page 176. It provided a procedure whenever it was necessary to establish or enlarge the boundaries of any cemetery, located outside of the corporate limits of "any city" and provided further that no land shall be thus taken by eminent domain either for the location of or addition to any cemetery which shall

be within one mile of the limits of "any city." Then came Laws 1917, Chapter 12, page 71, granting the power of eminent domain to cemetery associations and again referring to the boundaries outside the corporate limits of "any city." It added a proviso as to an association whose burial ground was within the corporate limits of "a city or village." Then came the act, Laws 1925, Chapter 138, page 365; and then the act, Laws 1941, Chapter 18, page 103, each of which again makes the distinction between "any city" and city "or village" that is contained in the present section 12-515, R. R. S. 1943.

We are now asked to hold that, after distinguishing between city and village in several consecutive acts, the Legislature in every instance meant to include "village" within the term "city."

It has long been the rule that: It is a general principle of interpretation that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Under this principle the enumeration of certain powers implies the exclusion of all others not fairly incident to those enumerated and an affirmative description of cases in which certain powers may be exercised implies a negative on the exercise of such powers in other cases. Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753.

We conclude that section 12-215, R. R. S. 1943, means just what it says—"any city"—and does not apply to a "village."

We call attention to the fact that our Constitution recognizes that "villages" and "cities" are separate and distinct. Art. III, § 18; Art. VIII, § 1; Art. XI, §§ 2, 5, Constitution. Throughout the statutes, too numerous to cite, the Legislature has granted separate and distinct powers to villages and cities of various classes, and it has established different municipal organizations and imposed different limitations of powers. To hold that "city" and "village" mean one and the same thing in this instance could only be done for compelling reasons.

They do not exist here. A contrary conclusion is clearly indicated.

Finally the plaintiff argues that in the petition he did not allege that Eustis was a village, and that the court was required to go outside the record and take notice of the fact that Eustis was a village. Twice in the petition is an allegation concerning "the corporate limits of the Village of Eustis." Plaintiff argues that this is not an allegation that Eustis is a village instead of a city. Plaintiff was given 20 days to amend his petition had he been dissatisfied with the construction the court put upon it. He did not do so. The conclusion of the trial court appears to have been a rational one as to Eustis being alleged to be a village. If the plaintiff desired to contest that conclusion, he had ample opportunity to amend his petition in such a way as to clearly present the issue. The contention does not merit further discussion.

We affirm the judgment of the trial court.

AFFIRMED.

CONNIE KAY INGERSOLL, BY OTIS A. INGERSOLL, HER FATHER AND NEXT FRIEND, APPELLANT, V. MONTGOMERY WARD & COMPANY, INCORPORATED, A CORPORATION, APPELLEE.
106 N. W. 2d 197

Filed November 25, 1960. No. 34817.

1. **Trial: Judgments.** The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try.
2. ———: ———. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.

4. ———: ———. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.

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

Maupin, Dent, Kay & Satterfield, Thomas O. David, and *James J. Duggan,* for appellant.

Baskins & Baskins, for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Lincoln County by Connie Kay Ingersoll, by her father and next friend, Otis A. Ingersoll, plaintiff, against Montgomery Ward & Company, a corporation, defendant, for damages due to personal injuries alleged to have been sustained by Connie Kay Ingersoll when she caught her hand in a defective door at the defendant's store in North Platte, Nebraska, on December 12, 1957.

The defendant moved the trial court to render a summary judgment in favor of the defendant because the pleadings, answers to interrogatories, and depositions on file showed that there was no genuine issue as to any material fact, and that the defendant was entitled to a judgment dismissing the plaintiff's action as a matter of law.

The trial court sustained the defendant's motion for summary judgment and dismissed the plaintiff's petition with prejudice.

The plaintiff filed a motion for new trial which was overruled. From the order overruling the plaintiff's motion for new trial, the plaintiff perfected appeal to this court.

It is admitted that the defendant was a corporation qualified to do business in this state and that it maintained and operated a retail store at North Platte, located

in the Masonic Temple Craft Building in North Platte.

The plaintiff's amended petition alleged that the store was equipped with swinging doors constructed of plate glass; that on or before July 19, 1957, the doorchecks on the south front doors of the defendant's store were in a worn and defective condition which permitted the doors to swing rapidly from 10 to 24 inches past the closed position with great speed and force, rendering the doors unsafe and dangerous to persons passing through them; and that on or about July 19, 1957, the defendant, by its agent Walter J. Allinger, inspected the doors and discovered the defective and dangerous condition of the doorchecks. The acts of negligence charged against the defendant were as follows: In permitting the doors to remain in defective and dangerous condition for a period in excess of 140 days after the defects of the doors were discovered by the defendant; in failing to warn defendant's customers of the dangerous and defective condition of the doors and to prevent customers from using the doors while they were in such condition; and in failing to repair the doors within a reasonable time after the defective and dangerous condition of the doors was discovered.

The plaintiff's amended petition further alleged that on December 12, 1957, the plaintiff entered the store with her parents for the purpose of examining merchandise offered for sale; that thereafter the plaintiff and her parents departed from the store passing through the south front doors; that at about the time the plaintiff and her parents were leaving the store a woman entered the store through the south doors and at that time plaintiff's hand was caught between the halves of the south front doors; and that as a direct and proximate result of defendant's negligence the plaintiff suffered severe injuries.

The defendant's answer alleged that it was the duty of the owners of the Masonic Temple Craft Building to keep the doors in repair on the property occupied by

the defendant, and not the duty of the defendant to make repairs to the doors. The answer further denied all allegations of the plaintiff's amended petition not admitted.

The plaintiff's reply was a general denial of the allegations of the defendant's answer, except such as were specifically admitted.

The plaintiff assigns as error that the trial court erred in sustaining defendant's motion for summary judgment, and in overruling the plaintiff's motion for a new trial.

Before summarizing the facts in this case we deem it advisable to set forth certain propositions of law pertinent to a determination of this appeal.

The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and that no genuine issue remains for trial. The purpose of the statute is not to cut litigants off from their right of trial by jury if they really have issues to try. Mecham v. Colby, 156 Neb. 386, 56 N. W. 2d 299.

In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn therefrom. See, Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244; Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259; Ramsouer v. Midland Valley R. R. Co., 135 F. 2d 101; Dulansky v. Iowa-Illinois Gas & Electric Co., 191 F. 2d 881.

The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented in the case, but to discover if any real issue of fact exists. See, Dennis v. Berens, *supra;* Sprague v. Vogt, 150 F. 2d 795. In other words, the court can merely determine that an issue of fact does or does not exist. If such an issue does exist, the Summary Judg-

ments Act has no application; if such issue does not exist, a motion for a summary judgment affords a proper remedy. The burden is upon the moving party to show that no issue of fact exists, and unless he can conclusively do so the motion for summary judgment must be overruled. See, Illian v. McManaman, *supra;* Dennis v. Berens, *supra,* and cases cited therein; Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77.

In Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112, this court said: " 'All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury.' Markussen v. Mengedoht, 132 Neb. 472, 272 N. W. 241."

The facts are presented by the depositions of Connie Kay Ingersoll, her father Otis A. Ingersoll, her mother Esther Ingersoll, Carlie Andre, Walter H. Kohn, manager of the defendant's store in North Platte, and certain interrogatories and the answers thereto.

For convenience we will refer to Connie Kay Ingersoll as Connie, to her father as Otis, to her mother as Esther, and to Walter H. Kohn as the manager.

The manager of the store testified that he had served in that capacity for a period of 1 year and 8 months.

A superintendent's inspection report of the defendant's store prepared by Walter J. Allinger on July 19, 1957, is in the record. The first paragraph of the report reads as follows: "The Rixson door checks on two of the glass entrance doors are worn out of (sic) should be replaced. These doors swing from 10" to 24" past closed position when released and no further adjustment could be made."

Another exhibit titled "Public Accident Report" was made by the manager of the store and bears his signature. This report was written in longhand and reads as

follows: "Mother says that Connie was following her father out door but dallied behind to look at something, then Connie caught edge of one door, and a woman coming in the other door, released it and the two doors came together and cut off first joint, 2nd and 3rd fingers of left hand."

There were certain interrogatories propounded by the plaintiff to the defendant. The most pertinent questions and answers appearing therein are as follows: Question 10. "Were any repairs made or started upon the south front doors of the retail store in North Platte, Nebraska between August 5, 1957 and December 12, 1957?" Answer. "No." Question 14. "What was the defect in the south front doors of the retail store in North Platte, Nebraska?" Answer. "The door checks were worn." Question 27. "Was Montgomery Ward & Company in exclusive possession and control of the interior of the ground floor building located at 5th and Dewey Streets in North Platte, Nebraska, in which it was maintaining and operating a retail store December 12th, 1957?" Answer. "Yes." Question 28. "Was W. H. Kohn in sole and complete charge of the premises on behalf of Montgomery Ward and Company * * * subject to supervision only by a superior or superiors located some place other than North Platte, Nebraska, on December 12th, 1957?" Answer. "Yes."

There was a letter dated February 12, 1958, to the Masonic Temple Craft, Inc., attention of Wilfred C. Boldt, relating to the accident of December 12, 1957, calling attention to the injuries received by Connie on that date, and in which it was stated: "It is our understanding of the accident that the cause was the fact that the door checks were not working. This condition was called to your attention on August 5, 1957 by Mr. Vogt of Wards Real Estate Department and again verbally on or about December 5, 1957 by the Store Manager."

The record shows that Otis, his wife Esther, and

Connie went to North Platte on December 12, 1957, and entered the defendant's store about noon of that day for the purpose of looking at merchandise. They stayed in the store approximately 5 minutes. Otis testified that his wife went out the door first, he followed her, and Connie was a step or two behind him. Connie screamed, and he turned and observed that the ends of her fingers were cut off. He further testified that he did not see the accident happen; that only one lady saw the accident; that he did not know how Connie got her fingers in the door; that the lady coming from the south who entered the store let go, and both doors were very free and "swung completely without any hesitation or stoppage whatsoever" past the center stopping point; and that he was holding the door open when the lady coming from the south entered into the door, and when she let her door go is evidently when Connie's fingers were cut off.

Connie testified that she did not remember how the accident happened. At the time her deposition was taken she was 9 years of age. She further testified that the doors were both closed until her mother pushed the door open.

Esther testified that she did not see what happened, but noticed the lady coming into the store as they were going out; that when Connie screamed the lady was probably well within the store; that there were a lot of people there; and that she did not have any idea who the lady who entered the store was, but she did remember seeing her enter the store and let loose of the door.

Carlie Andre testified that at the time the accident happened she was a little bit south of the south entrance of the store, going north; that she was not close enough to see Connie's hand caught in the door, but was close enough to see her parents out on the sidewalk, and to hear the door come shut with a thud and Connie scream; that she saw Connie's father come running back toward

her; that people were coming and going, and she walked toward the door but did not go inside; that she noticed the little stubs of Connie's fingers and blood spattered on the floor 4 or 5 feet inside the door; and that she did not actually see the accident.

We believe there is a genuine issue of fact that exists in this case as to whether or not Connie lost her fingers by virtue of the defective condition of the doors in the building occupied by defendant, whether or not the defendant was negligent in failing to have the defective condition of the doors corrected, and that the defendant had notice of the defective condition of the doors for more than 140 days.

Under the authorities heretofore cited, we conclude that the trial court was in error in rendering a summary judgment in favor of the defendant.

For the reasons given herein, we reverse the judgment and remand the cause for trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

A. F. KEHR, REAL AND TRUE NAME, ALBERT F. KEHR, REVIVED IN NAME OF ROBERT KEHR, EXECUTOR OF THE ESTATE OF A. F. KEHR, DECEASED, ET AL., APPELLEES, V. HERB BLOMENKAMP ET AL., APPELLEES, IMPLEADED WITH UNIVERSAL SURETY COMPANY, A CORPORATION, APPELLANT.
106 N. W. 2d 179

Filed November 25, 1960. No. 34838.

1. **Liens.** The existence of a lien securing an original loan furnishes a presumption that a renewal was not a discharge of the original lien where the renewal is not secured.
2. **Bills and Notes.** The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.

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

Firmin Q. Feltz, for appellant.

McGinley, Lane, Shanahan & McGinley, for appellees Kehr.

A. Paul Johnson, for appellee Melville Inv. Co.

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

YEAGER, J.

This action, as originally instituted, was one by A. F. Kehr, real and true name, Albert F. Kehr, plaintiff, against Herb Blomenkamp and L. Marguerite Blomenkamp, husband and wife, Universal Surety Company, a corporation, and J. H. Melville Lumber Company, a corporation, defendants, to foreclose a mortgage on certain real estate given on February 16, 1955, by the defendants Blomenkamp to the plaintiff to secure the payment of a promissory note of even date therewith for $15,000 on which there was a balance due which was represented and evidenced by a promissory note in the amount of $8,000, given by the defendants Blomenkamp to the plaintiff as of June 1, 1956.

J. H. Melville Lumber Company, a corporation, was made a party defendant by reason of the fact that the defendants Blomenkamp had given to it a mortgage on the same real estate on November 14, 1956. This mortgage was assigned to Melville Investment Company, a partnership, thus causing the partnership to become a substitute defendant.

Universal Surety Company, a corporation, was made a party defendant by reason of the fact that the defendants Blomenkamp had given to it a mortgage on the same real estate on December 3, 1956.

The Universal Surety Company filed an answer and cross-petition. By the answer it denied the validity of the mortgage which the plaintiff sought to foreclose. By the cross-petition it denied the validity of the mortgage of the Melville Investment Company, repeated its

denial of the validity of the plaintiff's mortgage, and sought a foreclosure of its own mortgage as a first lien on the real estate. There is much more contained in these pleadings but for reasons which will become apparent a further statement thereof is not of importance herein.

The Melville Investment Company filed an amended answer and cross-petition, a statement of the contents of which is not required herein except that in them it is contended that the lien of its mortgage has priority over the mortgage of Universal Surety Company.

The case was tried to the court and a decree was rendered foreclosing the mortgage in accordance with the prayer of the plaintiff. The mortgage of the plaintiff was adjudged a first lien; the mortgage of the Melville Investment Company, a second lien; and the mortgage of the Universal Surety Company, a third lien.

A motion for new trial was duly filed by defendant Universal Surety Company. This motion was overruled but before that was done revivor in the names of Robert Kehr, executor of the estate of A. F. Kehr, deceased, May Kehr, Robert Kehr, Ruth Gile, Stella May Fritzler, and Mildred Williams, heirs at law of A. F. Kehr, plaintiffs, was ordered on account of the fact that A. F. Kehr, the original plaintiff, had died.

An appeal was duly taken from the decree and the order overruling the motion for new trial by the defendant Universal Surety Company, which will hereinafter be referred to as the appellant. The Melville Investment Company did not appeal and of course is here as an appellee. The defendants Blomenkamp did not appeal and they have made no appearance in this court. It is also true that they made no appearance in the case in the district court.

The brief of the appellant contains assignments of numerous grounds on which it contends it is entitled to have the decree of the district court reversed. On a determination of one of these depends the question of

whether or not the others require consideration herein. That one is as follows: "The court erred in finding that plaintiff had a first lien on real estate involved herein."

The court adopted the theory of the plaintiff and in effect found and decreed that the mortgage given to the plaintiff by the defendants Blomenkamp on February 16, 1955, to secure the $15,000 note of even date thereof remained as security for the note for $8,000 given as of June 1, 1956, and as such was a first lien on the real estate. The further effect of the theory was that the note for $8,000 was a renewal note for the balance due on the other note, in consequence of which the obligation and security of the mortgage remained in full force and effect.

The appellant on the other hand contends that the note for $8,000 was a new obligation and transaction which was not secured by the mortgage.

The principles of law on which this question must be determined were stated early in the decisions of this state. There has been no departure from the early statements. In Davis v. Thomas, 66 Neb. 26, 92 N. W. 187, it was said: "Nothing but payment or a formal release will discharge a mortgage. The existence of a lien securing the original loan, furnishes a presumption that any renewal was not a discharge of the original, where the renewal is not secured."

This principle was approved in Auld v. Walker, 107 Neb. 676, 186 N. W. 1008. The following was also said in this case: "The taking of a new note for an existing note is a renewal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt."

In Berwyn State Bank v. Swanson, 111 Neb. 141, 196 N. W. 125, these principles were approved in the following words: "But, whatever the rule may be in other jurisdictions, it is well settled in this state that—'The taking of a new note for an existing note is a re-

newal of the old indebtedness, and not a payment of the debt, unless there is a specific agreement between the parties that the new note shall extinguish the original debt.'" See, also, City Nat. Bank v. Denslow, 114 Neb. 600, 209 N. W. 254; Mettlen v. Sandoz, 131 Neb. 625, 269 N. W. 98.

By what was said in these cases it is clear that the specific agreement that a new note will extinguish the original debt must be one between the parties to the transaction.

In the record before this court there is no evidence either direct or circumstantial in proof of a specific agreement between the plaintiff and the defendants Blomenkamp that the note for $8,000 should or would extinguish the original debt.

This lack of evidence renders applicable and controlling in this case the unvaried rule that the existence of a lien securing an original loan furnishes a presumption that any renewal was not a discharge of the original where the renewal is not secured, the effect of which is to say that the contention of the appellant that the mortgage was released is presumptively without merit. This coupled with the absence of any evidence of a specific agreement that the note for $8,000 extinguished the original debt makes it clear that the contention of the appellant that the decree of the district court was erroneous is without merit.

While it does not appear necessary to go further on the question of whether or not the parties to the $15,000 note and mortgage and the $8,000 note regarded and treated the transaction as to the $8,000 as a renewal, it appears expedient to refer to the evidence relating thereto. This evidence in its entirety in purport and effect negatives any intent of the parties to extinguish the original debt and supports the position that the $8,000 was in renewal of the obligation of the other note.

In answer to a set of interrogatories submitted by the plaintiff to the defendants Blomenkamp it was stated in

substance that it was the intention that the mortgage should remain as security for the $8,000 note.

The note for $15,000 was introduced as evidence. On its back appeared in the handwriting of L. Marguerite Blomenkamp the following: "Nov. 15, 1955— $7000.00 June 1956 Renewal note $8000.00." Below this appeared the following: "Paid June 4, 1956 A. F. Kehr." The answer of the defendants Blomenkamp to an interrogatory is that these endorsements were placed on the back of the note the day that the plaintiff marked payment.

In response to a letter written to the defendant Herb Blomenkamp it was stated that the $7,000 was paid on November 15, 1955, and a renewal note for $8,000 was given on June 1, 1956.

There is no competent evidence to the contrary. There is an affidavit in the record made by the attorney for the appellant the pertinent gist of which is a deduction and conclusion of the affiant that the endorsement on the back of the note made by L. Marguerite Blomenkamp was made after the $8,000 note was executed and after the $15,000 note had been returned, whereas the only evidence in the record is that it was made at the same time.

Whether or not what the defendants said as to the time of the endorsements is true may not be regarded of any controlling importance. It cannot in anywise be evidence to overcome the presumption that a renewal was intended or as evidence in proof of a specific agreement between the parties that the new note extinguished the original debt.

The assignment of error quoted herein is without merit. This conclusion renders unnecessary a consideration of the other assignments. The decree of foreclosure and the allocation of priority of liens was correct. The mortgage of the appellant is by its terms subject to that of the plaintiff and of the Melville Investment Company. On its face and as a part thereof

it is stated that it is "subject to prior mortgages of record." The other two are prior mortgages of record.

The judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JOHNSON FRUIT COMPANY, A CORPORATION, PLAINTIFF, V. ROSCOE STORY, AS COUNTY ASSESSOR OF ADAMS COUNTY, NEBRASKA, ET AL., DEFENDANTS.

106 N. W. 2d 182

Filed November 30, 1960. No. 34835.

1. **Statutes: Penalties.** A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions.
2. ———: ———. In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give effect to the statute.
3. **Statutes.** Where two statutes dealing with the same subject matter are amended at the same session of the Legislature, and are in conflict, the last of the two acts enacted supersedes the former.
4. ———. Where the later of two statutes passed at the same session of the Legislature does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together so far as the first still stands.
5. **Taxation.** Section 77-413, R. S. Supp., 1959, construed and held applicable to a situation where a taxpayer fails to make a return of personal property subject to taxation or omits taxable property from his return, and unapplicable to a voluntary return made later than the time fixed by statute.
6. **Taxation: Penalties.** A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation or for omitting taxable property from his return may not properly question the constitutionality of the act.

Original action. *Demurrer overruled.*

Stiner & Boslaugh, for plaintiff.

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

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

CARTER, J.

This is an original action for a declaratory judgment brought by the plaintiff Johnson Fruit Company praying for an injunction against the defendants the county assessor and county treasurer of Adams County, Nebraska, and the state Tax Commissioner of Nebraska. The defendants filed a general demurrer to the petition. The issue is, therefore, whether or not the petition states a cause of action entitling the plaintiff to the relief sought.

The petition alleges that the plaintiff is a corporation with its principal place of business in Hastings, Adams County, Nebraska. On January 1, 1960, the plaintiff was the owner of intangible personal property, Classes A and B, having the fair market value of $327,371. Plaintiff, without having applied for or obtained an order extending the time for filing its personal property tax return, filed with the county assessor of Adams County a personal property tax return and two supplemental personal property tax returns on March 7, March 11, and March 30, 1960, thereby disclosing and reporting all the intangible personal property owned by it on January 1, 1960, and the fair market value thereof.

The petition also alleges that the defendants or any of them did not on or prior to March 30, 1960, examine or check any personal property tax returns for the purpose of determining whether or not the plaintiff had failed to return its property for taxation for the year 1960, or investigate, examine, or inspect any property of the plaintiff for that purpose, or examine the plaintiff, its officers or agents, as to its property, or make

any finding that any personal property of the plaintiff was not returned for taxation for the year 1960. In other words, the petition alleges that the plaintiff voluntarily returned all of its intangible personal property for taxation, although beyond the time fixed by the statute for so doing.

The petition further alleges that the defendants, unless enjoined, will find that plaintiff failed to return its intangible personal property for the year 1960 and will compute the penalty for such claimed failure and omission pursuant to section 77-413, R. R. S. 1943, as amended by L. B. 51, 1959, now section 77-413, R. S. Supp., 1959. The plaintiff contends that the foregoing section has no application to a situation where a full and complete return of intangible personal property has been made, although filed beyond the time fixed by law for so doing. The defendants contend that the penalties provided in section 77-413, R. S. Supp., 1959, apply to a filing of a return of intangible personal property for tax purposes beyond the time fixed by statute for so doing, even though the late filing constitutes the only failure of compliance on the part of the plaintiff.

The pertinent part of section 77-413, R. S. Supp., 1959, provides: "If the county assessor from examining and checking the returns of the personal property, the investigation, examination and inspection of property of the taxpayer and from the examination of the taxpayer under oath as to his books, records and papers shall find that any personal property, either tangible or intangible, was not returned for taxation for the year 1959 or for any taxing period thereafter, he shall compute the tax for the year or years during which the payment of taxes on personal property was avoided, and the interest and penalties, in the manner following: (1) Any intangible property omitted and not returned commencing with the year 1959, or omitted or not returned for any year thereafter, shall be placed upon the tax rolls and taxed at the same rate as would have been

imposed had it been properly returned for taxation, and to such tax shall be added a penalty computed by multiplying the actual value of such omitted or not returned property by the total rate for tangible property as fixed at the time of the last preceding levy for the taxing districts in which such property should have been returned; * * *."

The foregoing section is clearly a penalty statute which must be strictly construed. Its import may not be extended by construction. Such a statute may not be applied to situations or parties not fairly or clearly within its provisions. In construing such a statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakably implied in order to give the statute full operation. State ex rel. Weasmer v. Manpower of Omaha, Inc., 161 Neb. 387, 73 N. W. 2d 692; Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N. W. 2d 446; Macomber v. State, 137 Neb. 882, 291 N. W. 674; 50 Am. Jur., Statutes, § 388, p. 404.

Applying the foregoing rule of construction to section 77-413, R. S. Supp., 1959, it is plain that the penalties contained in that section apply to situations where the county assessor, from examining and checking the returns of personal property, or from investigation, examination, and inspection of the personal property of the taxpayer, or from the examination of the taxpayer under oath as to his books, records, and papers finds that personal property was not returned for taxation. In other words, in the language of plaintiff's counsel contained in its brief, such section of the statute applies where personal property was "smoked out" for taxation purposes by the efforts of the taxing authorities. We concur with this view. It has no relation by its terms to voluntary returns of personal property which were filed beyond the time fixed by the statute for so doing.

By the demurrer the defendants admit that all of plaintiff's property was returned for taxing purposes

for the year 1960. No property was omitted or not returned for the year 1960, and consequently no basis existed for the assessment of a penalty under section 77-413, R. S. Supp., 1959. The factual situation set out in plaintiff's petition does not bring it within the scope of the 1959 act and it is not therefore subject to the penalties provided by that statute.

The defendants assert that section 77-413, R. S. Supp., 1959, in effect repeals section 77-1235, R. S. Supp., 1959, and if this be so, the construction we have given to section 77-413, R. S. Supp., 1959, would create a void in that no penalty for filing a personal property tax return after the time fixed by statute for so doing would exist. It is not disputed that the 1959 amendment as contained in section 77-413, R. S. Supp., 1959, was passed by the Legislature subsequent to the 1959 amendment to section 77-1235, R. R. S. 1943, now found in section 77-1235, R. S. Supp., 1959. We do not deem it necessary to determine if the amendment to section 77-413, R. R. S. 1943, as contained in section 77-413, R. S. Supp., 1959, was void for failure to comply with the Nebraska Constitution for reasons hereafter stated. We shall consider the present case on the theory that the 1959 amendment to section 77-413, R. R. S. 1943, was valid insofar as the Constitution is concerned.

Section 77-1235, R. S. Supp., 1959, provides: "In every case where any person shall fail, neglect or refuse to make out and deliver to the county assessor, or any of his assistants, the statement of all personal property which he is to list required under section 77-1229, or as required by any other law, the county assessor shall proceed to assess the number and description of the several enumerated articles of property and shall add to the value thereof fifty per cent." It cannot be logically questioned that the penalty provided by that section of the statute applies to situations involving late filings of personal property returns for taxing purposes as well as in cases where no return was made or

where property was omitted from a return made. The use of the words "where any person shall fail, neglect or refuse" to make and deliver to the county assessor the statement of all personal property subject to taxation plainly sustains such conclusion. In section 77-413, R. S. Supp., 1959, the Legislature did not use the word "neglect" and limited the application of the amendment to property not returned or omitted from the return made, and the increased penalties were clearly limited to such situations.

Where two statutes dealing with the same subject matter are amended at the same session of the Legislature, and are in conflict, the last of the two acts enacted supersedes the former. State v. Omaha Elevator Co., 75 Neb. 637, 106 N. W. 979; Chilen v. Commercial Casualty Ins. Co., 135 Neb. 619, 283 N. W. 366. It is clear therefore that, assuming the constitutional validity of both statutes, the later amendment in point of time was intended only as a partial repeal of the former. In other words, section 77-413, R. S. Supp., 1959, purports to increase the penalty for failing to return or omitting from a return personal property subject to taxation. It was clearly the intention of the Legislature to increase the penalty for such failures and not to amend section 77-1235, R. S. Supp., 1959, as it applied to returns of personal property belatedly made and delivered to the taxing authorities. The amendments so construed are harmonious and give effect to each. State v. Omaha Elevator Co., *supra*. The contention advanced by the defendants that the amendment contained in section 77-413, R. S. Supp., 1959, enacted later in point of time than the amendment contained in section 77-1235, R. S. Supp., 1959, was intended as a complete repeal of section 77-1235, R. S. Supp., 1959, is not well taken. In any event, since a penalty statute is to be strictly construed, the courts will not interpolate words omitted by the Legislature or extend the language used by implication under such circumstances

as we have here. The court must assume that the Legislature intended to do what it did in dropping the word "neglect" and its connotations from section 77-413, R. S. Supp., 1959. If the Legislature had intended section 77-413, R. S. Supp., 1959, to apply to personal property returns filed after the time fixed by statute, it would have been a simple matter to have said so in appropriate language. Cogent reasons exist why the increased penalties should apply to property omitted or not returned, and not apply to returns of personal property filed out of time. We must assume that the Legislature was cognizant of such reasons and intended to exclude from the increased penalties the taxpayers who voluntarily made their personal property returns to the assessor beyond the time fixed by statute. We are of the opinion that if we were to adopt the interpretation advanced by the defendants, the court would be increasing the scope of section 77-413, R. S. Supp., 1959, and thereby subject a class of taxpayers to the increased penalties provided in the act who were not intended by the Legislature to be included within its scope.

A taxpayer who is not within the scope of a statute providing penalties for failure to make a return of personal property subject to taxation, or for omitting taxable property from his return, may not properly question the constitutionality of the act.

Plaintiff is entitled to a judgment declaring, under the facts contained in the petition, that section 77-413, R. S. Supp., 1959, is not applicable to the plaintiff and, if the taxing authorities seek to apply the penalties contained in such statute under the pleaded facts, an injunction affords a proper remedy. The demurrer of the defendants is overruled and defendants given 20 days to answer.

DEMURRER OVERRULED.

GENEVIEVE R. CREIGH, APPELLEE, V. RICHARD R. LARSEN, STATE TREASURER OF THE STATE OF NEBRASKA, ET AL., APPELLANTS, L. I. MCGOWAN, INTERVENER-APPELLEE.

106 N. W. 2d 187

Filed November 30, 1960. No. 34892.

1. **Taxation: Penalties.** Penalties imposed on a taxpayer for failure to return property for taxation are not a part of the tax.
2. ———: ———. The imposition of penalties for failure to return property for taxation is a method commonly used to induce the return of taxable property for taxation. The remission of penalties imposed for failure to comply with taxing statutes, by a general law, is likewise a method that may be employed to induce compliance therewith.
3. ———: ———. Since the imposition of a penalty is not the assessment of a tax, Article VIII, section 1, of the Constitution has no application thereto.
4. **Statutes.** The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences in situations and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.
5. **Taxation.** Taxpayers who fail to return property for taxation may properly be designated by the Legislature as a class for the purpose of enacting legislation dealing with their failure to return property for taxation.
6. **Taxation: Penalties.** Sections 77-702 and 77-703, R. R. S. 1943, provide a state-wide uniform rate of taxation on intangible property as classified therein. A failure to return such property for taxation is therefore an identical offense in all of the taxing districts of the state.
7. ———: ———. Under such a statute with a state-wide uniform tax a provision of statute imposing a penalty computed by multiplying the actual value of property not returned by the total rate for tangible property as fixed at the time of the last preceding levy for the taxing district in which such property should have been returned, such tangible rate being substantially different in the various taxing districts of the state, is not uniform as to class and discriminatory among members of the class.
8. **Constitutional Law: Taxation.** L. B. 51 and section 2 of L. B. 42, Laws 1959, now sections 77-413, 77-716, and 77-318, R. S.

Supp., 1959, not being uniform as to class and being discriminatory among members of the class, are violative of Article III, section 18, and Article I, section 25, Constitution of Nebraska, and wholly void.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Clarence S. Beck, Attorney General, *Homer G. Hamilton, John J. Hanley, John C. Burke, Edward M. Stein,* and *Wm. Ross King,* for appellants.

Thomas P. Leary, for appellee.

McGowan & Troia and *Ross & O'Connor,* for intervener-appellee.

Raymond G. Young, Kenneth B. Holm, Keith Miller, and *Edmund D. McEachen,* amici curiae.

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

CARTER, J.

This is a class action brought by the plaintiff on behalf of herself and others similarly situated against the State Treasurer, the state Tax Commissioner, the county treasurer of Douglas County as such and as the treasurer ex officio of the City of Omaha and the School District of Omaha, the county assessor of Douglas County, the County of Douglas, the City of Omaha, and the School District of Omaha.

The record shows that the state Tax Commissioner reported to the county assessor of Douglas County certified stocks owned by the plaintiff which were not listed for taxation. The assessor on July 28, 1959, valued the stock at $1,455 which was taxed at the Class B intangible tax rate amounting to $5.82 and imposed a penalty by multiplying the value of the stock by the total tangible rate in the city of Omaha of 64.05 mills, which resulted in a penalty of $93.19. It is the contention of the plaintiff that L. B. 51 and L. B. 42, Laws 1959, now

cited as sections 77-413, 77-716, and 77-318, R. S. Supp., 1959, on the authority of which the penalty was imposed, are unconstitutional and void. The trial court held the foregoing sections of the statute to be violative of the Constitution, and the defendants have appealed.

Plaintiff asserts that the foregoing acts of the Legislature offend several provisions of the state Constitution. We shall deal only with the provisions of the Constitution necessary to the determination of the case. It is first contended that the acts are violative of Article VIII, section 1, Constitution, relating to uniformity in the levying of taxes. Plaintiff also advances the contentions that the questioned acts are special laws violating the requirements of uniformity inhibited by Article III, section 18, Constitution, and discriminatory between taxpayers of the class contrary to Article I, section 25, Constitution, generally referred to as the equal protection clause.

The acts before us deal with the collection of taxes on intangible personal property not reported for taxation and the penalties to be assessed for omitting such property from the tax return. We point out that under the provisions of sections 77-702 and 77-703, R. R. S. 1943, Class A intangible property is assessed at the rate of $2.50 per $1,000 of value and Class B intangible property is assessed at $4.00 per $1,000 of value. The tax is state-wide and uniform in its operation wherever taxed. The penalties imposed by the questioned acts for failure to return intangible property for taxation provide generally that the penalty shall be computed by multiplying the actual value of such omitted or not returned property by the total rate for tangible property as fixed at the time of the last preceding levy for the taxing districts in which the property should have been returned.

The rate of taxation on tangible property varies throughout the taxing districts of the state in accordance with the aggregate needs of the taxing bodies of such districts. Admittedly, similar mill levies in amount

are the exception rather than the general rule. The effect of the penalty provisions of section 77-413, R. S. Supp., 1959, and the other acts under consideration as well, is to produce substantially different penalties on the same value of intangible property in the different taxing districts of the state. As an example, the normal tax on the Class B intangible property omitted by plaintiff from her return is $5.82. The penalty imposed was $93.19, based on the total tangible tax rate of 64.05 mills where she was assessed. The record discloses that the total levies in the various school districts in Douglas County vary from a high of 80.02 mills in Valley to a low of 28.26 mills in School District 23. If plaintiff lived in Valley the penalty would have been $116.43; if she lived in School District 23 it would be $41.12. In Valley the penalty for failing to list a bank account, Class A intangible, is 3200 percent of the amount of the tax; in School District 23 the penalty is 1130 percent of the tax. In Omaha the penalty for failure to list a Class B intangible is 1600 percent. It is the contention of the plaintiff that the penalty provisions of the statutes under attack are wanting in uniformity and are void under the provisions of Article VIII, section 1, of the Nebraska Constitution; that they are special legislation resulting in a want of uniformity of operation inhibited by Article III, section 18, of the Constitution; and that they are discriminatory and violate Article I, section 25, of the Constitution, the equal protection clause.

The Legislature has broad powers in dealing with the subject of taxation, and its general power to provide penalties to procure the return of property for assessment and to coerce the payment of taxes properly assessed, when related to legitimate purposes, is limited only in that such penalties must not be oppressive or unreasonable. State v. Martin, 193 Ind. 120, 139 N. E. 282, 26 A. L. R. 1386. It cannot be logically disputed that the formula for assessing penalties under the questioned statutes results in total want of uniformity in

their application. A penalty in a tax statute is an exaction which imposes a liability upon those who fail to comply with the tax laws in the respects set forth. The question before the court resolves itself into the question of whether or not a statute imposing penalties must comply with constitutional provisions requiring uniformity, inhibitions as to the enactment of special laws, and be nondiscriminatory under the equal protection clause.

The general rule is: " 'The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated.' " State ex rel. Ralston v. Turner, 141 Neb. 556, 4 N. W. 2d 302, 144 A. L. R. 138. See, also, Steinacher v. Swanson, 131 Neb. 439, 268 N. W. 317. We do not question the fact that taxpayers who do not return taxable property, or who omit taxable property from their return, constitute a reasonable classification for purposes of legislation concerning their failure to return their property for taxation. It is plain from what we have heretofore set out that the law does not operate uniformly and alike upon every member of the class designated and that it discriminates between taxpayers for identical violations of the taxing statutes.

It is the contention of the defendants that penalties imposed on a taxpayer for failures in the reporting of property for taxation are not a part of the tax and are not subject to the constitutional requirements of uniformity or the general inhibitory provisions of the Constitution. In this respect this court has held that a penalty imposed for not reporting taxable property, or the failure to report the same within the statutory

period, or a failure to pay the tax assessed within the time fixed by law, is no part of the tax. Steinacher v. Swanson, *supra;* Tukey v. Douglas County, 133 Neb. 732, 277 N. W. 57; School Dist. of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24. Consequently, the imposition of a tax penalty is unrelated to Article VIII, section 1, Constitution, providing that taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises and uniform as to class on all other property. The defendants rely largely upon Tukey v. Douglas County, *supra,* to support their contention. We point out that the issue in that case was whether or not uniformity of operation was required by a statute which provided for the waiver or remission of a penalty, a matter wholly unrelated to a statute imposing a penalty. In that case we said, quoting from Steinacher v. Swanson, *supra:* "We are aware that some authorities hold that constitutional requirements as to uniformity of operation do not apply to statutes providing for a waiver or remission of a penalty. Penalties, including interest and costs, are generally considered punitive in their nature and a statute remitting them is one of grace to which the question of uniformity has no application." In the present case the statute is clearly punitive as to taxpayers within its terms, and to some extent compensatory to the state, but it is in no sense of the term an act of grace, the controlling factor in the Tukey case. Neither the Tukey case, nor any other that we have been able to find, holds that the Legislature may ignore the rule of uniformity in the imposition of penalties required generally in all legislation enacted by it. We point out that there is no constitutional provision which prohibits a waiver or remission of penalties by general law such as we had before us in the Tukey case, although it was not an issue in that litigation. The Constitution does prohibit a waiver or remission of penalties by a local or special law as specifically provided in Article

III, section 18, whether or not the act be one of grace.

It is also contended by the defendants that the legislative acts presently before us are no less discriminatory nor any less wanting in uniformity than in the case of tangible property where the penalties imposed vary with the different mill levies in the various taxing districts in the state. We point out that the rate of taxation on Class A and Class B intangible property is uniform throughout the state and consequently the magnitude of the offense for not returning or omitting intangible property is identical in each taxing district of the state. On the other hand, the magnitude of the offense in the case of tangible property is dependent upon the valuation of such property and the mill levy made in each taxing district of the state. The penalty imposed on one who failed to return or who omitted tangible property bears a relation to the magnitude of the offense when the statute provides a penalty based on a percentage increase of the value of the property or of the tax levied upon it. But the application of the tangible rate to intangible property has no reasonable relation to the magnitude of the offense where the intangible rate is uniform throughout the state. It discriminates between members of the established class in that it produces varying penalties for identical offenses among members of the class. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N. W. 2d 408; Webster v. Williams, 183 S. C. 368, 191 S. E. 51, 111 A. L. R. 1348; State ex rel. Mitchell v. Mayo, 15 N. D. 327, 108 N. W. 36.

It is clear to us that L. B. 51 and section 2 of L. B. 42, Laws 1959, now cited as sections 77-413, 77-716, and 77-318, R. S. Supp., 1959, are discriminatory between members of a class contrary to Article I, section 25, and nonuniform in their operation contrary to Article III, section 18, Constitution of Nebraska.

The conclusion at which we have arrived makes it unnecessary to pass on other asserted grounds of un-

constitutionality, to wit: Article I, section 15, providing that all penalties shall be proportionate to the nature of the offense; Article I, section 3, relating to due process; and Article III, section 14, relating to amendments.

The trial court found the questioned statutes to be unconstitutional and void for the foregoing reasons, and others as well. For the reasons stated, the decision of the district court is correct and its judgment is therefore affirmed.

AFFIRMED.

MILES W. JOHNSTON, APPELLEE, V. ARTHUR J. L. ROBERTSON ET AL., APPELLANTS.
106 N. W. 2d 192

Filed December 2, 1960. No. 34804.

1. **Trial.** A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Appeal and Error.** The function of this court, in determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts.
3. ———. It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence.
4. **Trial: Appeal and Error.** It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.
5. **Trial.** Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined.

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

W. L. Dwyer, for appellants.

William M. Grossman, for appellee.

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

MESSMORE, J.

This is an action at law brought in the district court for Lancaster County by Miles W. Johnston, plaintiff, against Arthur J. L. Robertson and Laversa Mae Robertson, defendants, to recover on an alleged contingent fee contract for services rendered to the defendants in recovering certain real estate in Lincoln, Nebraska, for the defendants. The case was tried to a jury resulting in a verdict in favor of the plaintiff in the amount of $500. The defendants moved the court for a directed verdict at the close of plaintiff's evidence and at the conclusion of all of the evidence. These motions were overruled. The defendants filed a motion to set aside the verdict of the jury and the judgment on the verdict, and to enter judgment for defendants on the ground that the evidence was insufficient to sustain a verdict in the plaintiff's favor. The defendants filed an amended motion to set aside the verdict and enter judgment for the defendants notwithstanding the verdict on the ground that the evidence was insufficient to sustain a verdict for the plaintiff. Both of the above motions were overruled. The defendants appealed.

For convenience we will refer to the plaintiff Miles W. Johnston as plaintiff; to Arthur J. L. Robertson and Laversa Mae Robertson as Robertsons or defendants; to Richard D. Ferguson and Sophia R. Ferguson as the Fergusons; and to Dean E. Welch and Gladys Welch as the Welches.

The pleadings necessary to consider are as follows.

The plaintiff alleged that the reasonable value of the

property recovered was $6,000; that the defendants agreed to pay plaintiff one-third of the value of the recovery made by plaintiff if suit was required; that the plaintiff recovered said property for the defendants; that he was entitled to recover $2,000 from the defendants for his fee but that notwithstanding his entitlement he billed the defendants for and agreed to accept $1,500 in full for his services; that the defendants paid $200 of said amount; and that there was due and owing to the plaintiff from the defendants the sum of $1,300, for which amount he prayed judgment.

The defendants by their answer admitted that they retained the plaintiff to represent them to recover the possession of certain real estate described in the plaintiff's petition. The defendants alleged that they had a claim against the Fergusons, the persons who were wrongfully in possession of the property as described in the plaintiff's petition, in the sum of $2,325 for rent from January 1, 1957; that it was agreed between the plaintiff and these defendants that the plaintiff was to receive as his fee for services one-third of the sum recovered as rents in said action; that if he was unsuccessful in recovering a money judgment for rent, he was to receive the sum of $250 for his services in dispossessing the Fergusons of said real estate; that for some reason unknown to the defendants, the plaintiff abandoned the cause of action for rents and insisted that the defendants settle the case by taking possession of the real estate, and the action was so disposed of; that these defendants paid the sum of $200 on the fee of plaintiff for services rendered; and that they owed him the sum of $50 which amount they had tendered into court in full payment of the plaintiff's fee. The prayer was that the plaintiff's petition be dismissed.

The plaintiff's reply to the answer of the defendants denied each and every allegation therein contained which did not admit allegations of the plaintiff's petition.

It might be stated that the defendants filed a cross-

petition and the plaintiff filed an answer thereto which need not be set out.

The sole question presented on this appeal is whether or not the trial court erred in overruling the motions of the defendants, made at the close of the plaintiff's case in chief and again at the close of all of the evidence, for directed verdict and for judgment notwithstanding the verdict.

Before summarizing the evidence in this case, we set forth the following rules of law as being applicable.

"A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence. * * * The function of this court, in determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the evercise of its function as the trier of the facts." Harris v. Pullen, 169 Neb. 298, 99 N. W. 2d 238.

It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. In testing the sufficiency of the evidence to sustain a verdict, admissible testimony tending to support the case of the successful party should be accepted as the truth. See Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315.

It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. See Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557.

It has long been the rule that where different minds

may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. See Snyder v. Farmers Irr. Dist., *supra*.

The record discloses that on October 18, 1947, the Robertsons purchased Lots 1, 2, 3, 10, 11, and 12 in Block 7, Second Addition to Normal, now a part of Lincoln, Nebraska, obtaining a warranty deed from Fred C. Wick and his wife Martha. The property involved in this case is described as Lots 10, 11, and 12 in Block 7, as above described, and is also known as 5540 Saylor Street.

On November 3, 1947, the Robertsons mortgaged the above-described property to the Woodmen Accident Company, the consideration being $4,850.

On November 24, 1954, the Robertsons, by articles of agreement, agreed to sell to the Welches the property here involved for $7,250, $400 cash in hand, $900 cash at time of closing on or before December 4, 1954, and the sum of $70 per month commencing with payment January 1, 1955, and like payment the first of each month thereafter, with interest at 6 percent per annum. It was also agreed that in the case of a default in payment of principal or interest for a period of 30 days the contract could be forfeited as well as the payments made thereon. Upon the execution of the contract, the Robertsons were to execute a warranty deed to be placed in escrow with the Union Bank of Lincoln, Nebraska, to be delivered to the Welches on completion of the contract.

On November 7, 1955, the Welches gave a quit claim deed to the property here involved to Clara B. Marr, the mother-in-law of Dean E. Welch. The consideration in the deed was one dollar.

On November 25, 1955, the Welches entered into a written agreement to sell the property here involved to the Fergusons for the sum of $9,000, $800 to be paid on the execution of the contract and the balance of

$8,200 to draw interest at the rate of 6 percent per annum, and the sum of $75 to be paid each month commencing January 1, 1956, until the total sum of $8,200 was paid. This contract provided that if the Fergusons would default the payments for the monthly installments or any part thereof when due, or fail to perform any of the terms of the contract, the Welches could cancel the contract. The contract further provided that the Welches agreed to furnish the Fergusons an abstract which would show that the Welches were vested with merchantable title to such real estate, and that upon tender by the Fergusons of the balance of the purchase price, together with the payment of interest as provided for in the contract, the Welches agreed to execute and deliver to the Fergusons a warranty deed conveying such property free and clear of all encumbrances.

On December 9, 1955, Robertson wrote a letter to the Welches stating that it was all right for the Welches to sell their equity in the property, and to send the necessary papers and the Robertsons would execute the same if the client's credit rating was all right. This letter also acknowledged a December payment from the Welches under the contract. The Robertsons did not execute any instruments relating to the sale of this property from the Welches to the Fergusons.

The Welches defaulted in their payments under the contract with the Robertsons on or about January 1, 1957. Thereafter Dean E. Welch filed bankruptcy proceedings in the State of Washington. In consideration of the sum of $125 paid to the trustee in bankruptcy of the bankrupt's estate, a quit claim deed to the property here involved was made to Robertsons. The deed was given in lieu of foreclosure and forfeiture of the contract between the Robertsons and the Welches, the trustee in bankruptcy disclaiming any interest in said property.

After the Welches were in default of their payments under the contract with the Robertsons, the Robertsons

employed counsel to obtain possession of the property, but subsequently dismissed such counsel. On July 8, 1958, the Robertsons employed the plaintiff to represent them. They were without funds and, as a consequence, a contingent fee arrangement was made. The plaintiff testified that he told the Robertsons he would take the matter on the basis of one-third of the recovery if he had to file suit, however, if he could settle the matter without suit and get the Robertsons possession of the property, his fee would be one-fourth of the recovery. Suit in ejectment was filed in the district court for Lancaster County on July 29, 1958, titled Arthur J. L. Robertson et al., plaintiffs, v. Richard D. Ferguson et al., defendants. Appearance for the defendants was made in this matter, and the cause was continued.

The action in ejectment was obviously brought under the provisions of section 25-2124, R. R. S. 1943.

The remedy for the recovery of real estate by one claiming the legal title thereto against one in possession claiming an estate therein is an action of ejectment in which the facts may be submitted to a jury. See Snowden v. Tyler, 21 Neb. 199, 31 N. W. 661.

The essential elements of the action of ejectment are legal estate, a right of possession in the plaintiff, and unlawful detention by the defendant. See Bridenbaugh v. Bryant, 79 Neb. 329, 112 N. W. 571.

The Robertsons' contention is that the plaintiff agreed to handle the case on a contingent fee basis of one-third of the money recovered, and if no judgment was obtained for money recovered the Robertsons were to pay the plaintiff $250 for clearing the title and recovering possession of the property.

The Robertsons gave the plaintiff a power of attorney, and the plaintiff attempted to perfect a settlement under such power of attorney, but the negotiations failed. Thereafter further negotiations were carried on in an attempt to settle the matter as between the Robertsons and Fergusons, and a settlement was consummated on

the 16th or 18th of March 1959. At the time the case was finally disposed of, the Robertsons obtained possession of the property, a quit claim deed for the same, and the keys to the property from the Fergusons. This deed was executed on November 4, 1958, and remained in the possession of the defendants' counsel until the settlement was made as heretofore mentioned.

On November 8, 1958, the plaintiff wrote a letter to the Robertsons, stating: "* * * while our original agreement for fees was on a contingent basis of one-third of the recovery, if you desire to close the matter at the time of settlement with Mr. Ferguson my fee will be $750.00."

On December 31, 1958, Robertson wrote the plaintiff, stating: "It is good news that the Fergusons have given possession, along with a quit claim deed. * * * If we are to settle on the terms of possession only, as you recommend we do; we need to know your fee for the case. Forget Mrs. Marr for the present. (Mrs. Marr was the mother-in-law of Dean C. Welch to whom the Welches gave a quit claim deed to the property here involved.) Please let us know what your fee will be if we accept their terms; we will then consider their offer."

On March 14, 1959, in a hearing held before Judge Polk in the Lancaster County district court, Robertson stated that he had not dismissed the plaintiff as counsel as of that time; that they could not agree on the plaintiff's fee; that the plaintiff wanted $1,500 and Robertson could not afford to pay that amount; that he had made arrangements for a loan and was able to obtain $500; and that he was going to talk to the plaintiff to ascertain whether they could arrive at an amicable settlement with relation to the plaintiff's attorney fees.

On March 14, 1959, the plaintiff agreed to accept $1,500 as his attorney's fee.

On March 19, 1959, Robertson wrote to the plaintiff stating: "When we came to you last summer, we were

in bad financial straits (in a sense we still are). You backed us in spite of this; for that we are grateful to you. * * * I am inclosing $50 as the first installment on the fees due you. Please let me know what you regard as a fair fee for your services. We can then make financial arrangements to pay you."

The plaintiff testified in detail with reference to the services rendered the defendants, the time required by him spent on the case, and other elements of work, and stated that in his opinion he belived a reasonable fee would be in the amount of $2,000. However, he had reduced his fee to $1,500. He further testified that Robertson had paid him $200; and that he considered the value of the property recovered to be $6,000.

It does appear from the record that the Fergusons claimed to have some rights and interests in the property here involved, and that it would be necessary either to arrive at a settlement with the Fergusons or, in the alternative, to file suit to obtain possession of the property and dispose of any interests the Fergusons might claim with reference thereto. The evidence in this respect has heretofore been covered.

We believe the evidence in this case is sufficient to warrant the jury in arriving at its verdict of $500.

It is not the function of this court to pass upon the evidence, but only to determine whether or not there was sufficient evidence to sustain the verdict. We find that the evidence was sufficient and that no error was committed. The verdict and judgment of the district court are affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

JOHN S. DAVIS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

106 N. W. 2d 490

Filed December 2, 1960. No. 34818.

1. **Criminal Law: Evidence.** When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial.
2. **Criminal Law: Witnesses.** In such a case, it must affirmatively appear that the personal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown.
3. **Evidence.** A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description.
4. **Trial.** Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done.
5. ———. A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time.
6. **Larceny.** In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence.
7. **Criminal Law: Trial.** It is proper and not invasive of the province of the jury for the court, in charging on the flight of accused, to tell the jury that it is a circumstance which may be considered by it, and from which it may draw an inference of guilt in connection with other circumstances.
8. ———: ———. An instruction that accused's prior conviction may be considered only for the purpose of affecting his credibility is not prejudicial error as commenting on his credibility.
9. ———: ———. It is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged.

10. **Trial: Appeal and Error.** A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

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

SIMMONS, C. J.

This is a prosecution for grand larceny. Briefly the State's evidence is that the complaining witness parked a motor vehicle on a downtown street in Omaha near a hotel where he had rented a room and where the vehicle was, in part, visible from his room. There was a large amount of valuable electrical equipment in the vehicle.

About 1:30 a.m. the complaining witness from his room observed a car with distinct markings which parked behind his vehicle, and that a person got out and attempted to open the door of his vehicle. The complaining witness called the police. By the time they arrived, the car had left. It returned in about 20 minutes. The police were again called. Another witness observed a passenger from the car removing packages from the vehicle and placing them in the car. The police arrived. The car left. A chase followed. The car was wrecked. The defendant fled. He was captured. Parcels from the complaining witness' vehicle were found in the car in which defendant was riding. There followed a jury trial, a conviction, and an overruling of a motion for a new trial.

Defendant brings the matter here on petition in error. We affirm the judgment of the trial court.

Under the provisions of Revised Rules of the Supreme Court, rule 8a2(4), we consider errors assigned and discussed, and in the order presented by the defendant.

It appears that the trial above referred to was the second trial of the cause. The State produced a deputy sheriff who testified that in response to a subpoena he sought a witness for the State at her place of employment at the time of the first trial and was told that she no longer worked there. He next sought her at her residence address and was told she had married and left the city. He returned the subpoena reciting in the return that the witness was not found.

The defendant objected to the admission of the record of the former testimony of this witness, both direct and cross-examination. The court overruled the objection. The basis of the objection was that the State had not shown "a diligent search" for the witness.

The State says that the defendant waived the objection. We do not so read the record.

The trial court overruled the objection above recited. The State then asked the defendant to waive foundation for the reading of the record "from the transcript." The defendant waived the foundation so as to permit that to be done. The State reaches too far in this contention.

The right of the accused to "meet the witnesses against him face to face" (Art. I, § 11, Constitution) and the right of the State to prevent a miscarriage of justice because of the absence of a witness, have been presented and reconciled in this state.

In Koenigstein v. State, 103 Neb. 580, 173 N. W. 603, we held that: When a witness has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be procured for examination at the second trial, the evidence so given upon a former trial for the same offense may be used on the second trial. In such a case, it must affirmatively appear that the per-

sonal attendance of the witness at the trial cannot be had. This question is in the sound discretion of the trial court, and that discretion will not be interfered with upon appeal unless an abuse of discretion is affirmatively shown. In the body of the opinion we said: "* * * we ought not to reverse the action of the trial judge upon such questions as this, unless the facts proved make it clearly appear that he has abused his discretion."

This was followed in Meyers v. State, 112 Neb. 149, 198 N. W. 871, and subsequent cases.

In Trobough v. State, 122 Neb. 7, 238 N. W. 771, we held: "It is elementary that the evidence of a witness at a former trial may be read at a later trial, where such witness cannot be located to testify at a subsequent trial of the same case."

In Callies v. State, 157 Neb. 640, 61 N. W. 2d 370, we held: "There must be evidence of diligence on the part of the prosecution to locate the witness, and evidence of the unavailability of the witness to testify."

We do not find an abuse of discretion in this case. The claimed error is not sustained.

The next assignment relates to three pictures showing the property claimed to have been involved in this alleged offense which were offered and received in evidence. Defendant argues as error the admission of two of the pictures. He also argues as error the admission of a picture showing the parking place of the complaining witness' car taken from his hotel window, from which the complaining witness said he could see, in part, his motor vehicle. He also argues as error the admission of two pictures of the wrecked car which defendant was driving. The State produced evidence showing the presence of the material taken in the complaining witness' vehicle. It was then in boxes; a witness testified to seeing it taken from that vehicle and put in a car; other witnesses saw it in the car driven by the defendant; it was taken to the police station,

removed from that car and identified, and returned to the complaining witness; and it was later photographed. The chain of identity runs throughout the evidence. Although admitted early in the trial, the identification was reinforced as the trial progressed. Prejudice is not claimed by the admission after identification at the early stages of the trial.

The other pictures objected to are not claimed to be other than accurate representations of the things portrayed. While prejudice is claimed, it is not shown.

The rule repeatedly stated is: A photograph proved to be a true representation of the person, place, or thing which it purports to represent is proper evidence of anything of which it is competent and relevant for a witness to give a verbal description. Brockman v. State, 163 Neb. 171, 79 N. W. 2d 9.

The assignment is not sustained.

The next assignment of error arises from this situation: As previously suggested, the case had been tried before and a verdict of guilty set aside. This was the second trial. The State rested on January 27, 1960. The bill of exceptions does not show that the court had admonished the jury not to read newspaper articles.

On the morning of January 28, 1960, the defendant advised the court that an article appeared in an evening paper concerning the trial; that it referred to the former trial; and recited that the verdict in the former trial had been turned down for a technical error. The defendant claimed prejudice. He did not offer the alleged offending article for examination by the court. The trial court could hardly be expected to go buy the paper nor to advise the jury without seeing its contents. Defendant asked that the jury be polled to determine if any of the jurors had read the article and that, in the event they had, he would make a motion for a mistrial. The motion to poll the jury was overruled. Thereafter the newspaper article and affidavits of jurors were offered in evidence on the motion for a new trial.

Obviously instead of offering the claimed offending article in evidence when it was published, defendant elected to take his chances on a favorable verdict. He thereafter proceeded to offer his evidence-in-chief. A favorable verdict not having been had, he now seeks to take advantage of the claimed error.

We have repeatedly held: Whenever the facts stated in the record are consistent with the duty of the court, and nothing is shown to establish a contrary theory, it will be assumed that the court acted properly and all things were rightly done. Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

We have also held: A party is not permitted to proceed with the trial without objection and speculate on the outcome of the jury's verdict, and, if unfavorable, contend that a mistrial should have been declared, when he did not ask for the same at the time. Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315.

Our concluding paragraph in Millslagle v. State, 138 Neb. 778, 295 N. W. 394, seems applicable here: "We conclude the defendant consented to and acquiesced in the rulings of the trial court as heretofore designated, desiring to take his chances of a favorable verdict, with the power and intent to annul it as erroneous and void if the verdict should be against him. He cannot remain idly by and then profit by such conduct. To hold otherwise would be to definitely violate the right of the trial court to exercise its sound discretion in correcting errors * * *."

The jury found the value of the property taken to be $505. The complaining witness was a salesman in charge of the property. He sold on a commission basis. He testified that the retail price was a little over $500 and that the cost was $400. The complaining witness made out a report to the police department showing the approximate value of the property to be $505 as based on the five different articles, although there was an error in the totaling of the amounts. This witness

testified without objection that the values shown as to each item were the "reasonable fair value." The testimony as to value was not challenged by defendant's evidence.

We have held: In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence. Spreitzer v. State, *supra.*

The assignment does not merit further discussion. It is not sustained.

Defendant next complains of certain instructions. Instruction No. 14 was: "Evidence has been offered and admitted, tending to show flight by the defendant soon after commission of the offense charged in the Information, and before he had been apprehended or taken into custody.

"You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime, with which the person so fleeing has been charged, is a circumstance, not sufficient of itself to establish guilt, but a circumstance nevertheless which the Jury may consider in connection with all the other evidence in the case to aid you in determining the question of the guilt or innocence of such person."

The undisputed evidence was that defendant and his companion left the scene of the crime when a police car appeared; that they were chased several blocks; that shots were fired; that the pursuing and pursued cars collided and were damaged; and that defendant fled on foot and was finally taken after a struggle.

The defendant testified that he fled because he was driving the car without having a driver's license. The rule stated in 23 C. J. S., Criminal Law, § 1185, p. 725, is: "It is proper and not invasive of the province of the jury for the court, in charging on the flight of accused, to tell the jury that it is a circumstance which may be considered by them, and from which

they may draw an inference of guilt in connection with other circumstances."

Also in 23 C. J. S., Criminal Law, § 907, p. 147, it is stated: "The flight of accused is a circumstance to be considered against him in connection with the other evidence, its probative effect, as evidence of guilt, depending on the conditions and the motive which prompted it."

Further, in 53 Am. Jur., Trial, § 710, p. 537, it is stated: "Where, in a criminal case, there is evidence of the defendant's flight, the jury should be properly instructed as to the manner in which they should consider and weigh such evidence, * * *."

Under the circumstances here, the instruction given was favorable to the defendant. The instruction given was a proper one under the circumstances.

The court instructed the jury in instruction No. 12 that: "The defendant has testified in his own behalf as he had a right to do. You have no right to disregard the testimony of the defendant on the grounds alone that he is the defendant and stands charged with the commission of a crime; nor are you required to receive the testimony of the defendant as true, but you are fairly and fully to consider whether it is true, and for this purpose you have the right to consider the interest of this defendant in this prosecution. This last sentence is not intended to impeach or discredit the testimony of the defendant, but only as a reasonable precaution for you to observe.

"The law presumes this defendant to be innocent until he is proved 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."

The court also instructed the jury in instruction No. 13 that: "You are instructed that there has been testimony to the effect that the defendant has been pre-

viously convicted of felonies. This testimony is admissible and received only for the purpose of affecting the credibility of the defendant as a witness and is not to be considered by you except for that purpose, in determining his guilt or innocence of the offense charged."

Defendant complains about these instructions separately and together as giving undue prominence to the personal interest of the defendant in the outcome of the prosecution.

Instruction No. 12, with a cautionary instruction for the benefit of the defendant added, was substantially approved in Johnson v. State, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B 965, and again approved in Lovings v. State, 158 Neb. 134, 62 N. W. 2d 672. It is again approved.

As to instruction No. 13, the rule is stated: "An instruction that accused's prior conviction may be considered only for the purpose of affecting his credibility is not prejudicial error as commenting on his credibility." 23 C. J. S., Criminal Law, § 1181, p. 721.

The jury may be told that in deciding on the weight to be given the testimony of the accused it may consider the former conviction of the accused. 53 Am. Jur., Trial, § 789, p. 586.

We held in Vanderpool v. State, 115 Neb. 94, 211 N. W. 605, that it is the better practice for the court, even when no request is made, to instruct the jury that evidence as to the previous conviction of the accused of a felony is to be considered as affecting his credibility as a witness, and not as tending to prove the crime as charged. As stated therein: "Without such an instruction the jury are apt to regard the previous conviction as a circumstance tending to prove guilt of the offense for which accused is being tried."

The instruction was obviously for the benefit of the defendant. We find no merit in the assignments involving this instruction.

Finally, defendant asserts there was misconduct of

counsel for the State in making inflammatory references during argument to the jury to another police chase in the city of Omaha. The only references to it which we find or which have been pointed out are statements appearing in affidavits of jurors offered in support of a motion for a new trial. The rule is: A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chance of a favorable verdict. Johnson v. Nathan, 161 Neb. 399, 73 N. W. 2d 398.

The judgment of the trial court is affirmed.

AFFIRMED.

MARVIN HARGER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
106 N. W. 2d 176

Filed December 2, 1960. No. 34876.

1. **False Pretenses.** The gist of the offense of obtaining the money of another by false pretenses is false pretense with intent to cheat and defraud.
2. ———. A conviction for obtaining money by false pretenses may not be sustained in the absence of proof of false pretense and of intent to cheat and defraud.

ERROR to the district court for Jefferson County: ERNEST A. HUBKA, JUDGE. *Reversed and remanded with directions.*

George A. Skultety, for plaintiff in error.

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

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

YEAGER, J.

This is a criminal action wherein, in the district court for Jefferson County, Nebraska, Marvin Harger was

charged by information in the name of the State of Nebraska with the offense of obtaining money by false pretenses. The case was tried to a jury and a verdict of guilty was returned, after which the defendant was sentenced to serve a term of 1 year in the State Reformatory for Men. The defendant in the district court, as plaintiff in error here, has brought the record to this court by petition in error for review. He will for convenience be referred to as defendant. By his petition he asserts that his conviction and sentence were erroneous and should be reversed. The State of Nebraska is defendant in error but it will be referred to as the State.

The information on which the defendant was tried and convicted charges in substance that on October 10, 1959, the defendant with intent to cheat and defraud did falsely, knowingly, designedly, and unlawfully promise to marry Janice Kasparek; that he pretended and represented that he was placing himself in a position to marry the said Janice Kasparek, and that if Janice Kasparek would furnish money to make payments on an automobile owned by the defendant she would have an interest in the automobile and be secured in her advancements; that relying thereon Janice Kasparek gave to the defendant on or about October 10, 1959, $50; and that thereafter during October and November 1959, she gave him other money which with the first $50 amounted to a total of $400. Janice Kasparek will be hereinafter referred to as the prosecutrix.

The brief of the defendant contains six assignments of error as grounds for reversal. From an examination of the record it appears that only one requires specific consideration herein. By this one it is asserted that the court erred in failing to sustain the motion for directed verdict. This motion was made at the close of the State's evidence in chief.

Assuming, but not deciding, that the information is sufficient as a charge of crime, the determination upon

the assignment of error that the court erred in its refusal to direct a verdict in favor of the defendant at the close of the State's evidence depends upon the question of whether or not there was evidence to support the essential elements of the charge contained in the information.

The promise of marriage was proved. This is not disputed. It was also proved without contradiction that the alleged declaration of the defendant that he would attempt to put himself in a position which would permit him to perform his agreement of marriage was true. He did not however put himself in a position to contract a marriage.

He was already a married man. As to this the prosecutrix was informed. She testified that she met the defendant first in the last part of August 1959 in the daytime and that evening she had a date with him on which occasion he told her that he was married, had two children, and that he wanted to get a divorce. She testified that it was about 2 weeks later in Fairbury, Nebraska, that the subject of marriage came up. It was then that she agreed to marry him. She said she agreed to marry him but not until he got a divorce. She testified that no date for the marriage to take place was discussed but they thought they could be married by the first of the year.

She testified that some of the money given to the defendant was for payments on an automobile. She referred to all advances made as money loaned. She said as to the advances that the defendant told her that if she let him have the money "it would be just as much interest as it was mine if I let him have the money, and that I could use it whenever I wanted to." Nothing was ever said about the title to the car. She was allowed to use the car freely at all times until the defendant left Fairbury, Nebraska, and went to Wichita, Kansas, to seek new employment.

It has been pointed out that the promise of marriage

has been proved. Is there evidence on behalf of the State that this promise was false and fraudulent and if so was it breached? These are of course elements which require proof.

There is a total absence of proof on the part of the State that the promise of marriage in the light of the existing conditions, which had been disclosed and were well known to the prosecutrix, was in anywise false and fraudulent. Insofar as this record is concerned there is nothing to indicate that the promise was not made in good faith and there is nothing to indicate that it was not the intention of the defendant at all times to keep and perform the promise. It was not the defendant who breached the agreement. It was the prosecutrix who breached the agreement. The prosecutrix was asked questions and gave answers as follows: "Q Has Marvin ever refused to marry you? A No, he never did refuse to marry me. Q And so your romance was broken off when you told him on the phone that you didn't love him any more; that's when it was broken off? A Yes." With regard to the conversation to which these questions pertain she also testified: "And, so, I just told him, no, that I didn't want to have anything more to do with him." This conversation took place in December 1959. There is other testimony of the prosecutrix of like effect in the record, which will not be repeated herein, but none to the contrary. The original complaint charging the defendant with the offense for which he was prosecuted was filed on January 8, 1960.

As an observation, the defendant could not put himself in a position to marry the prosecutrix while residing in this state for a long period of time after the promise was made. The defendant came to Nebraska in August 1959. His previous marriage was contracted in the State of Nevada. His wife lived in California. Obviously no ground for divorce arose in this state. Under these conditions, even if the defendant had grounds for divorce,

no divorce could have been obtained under the laws of the state earlier than August 1961, or 2 years after he became a resident. See § 42-303, R. R. S. 1943.

The gist of the offense of obtaining the money of another by false pretenses is false pretense with intent to cheat and defraud. See, Ketchell v. State, 36 Neb. 324, 54 N. W. 564; Thompson v. State, 112 Neb. 389, 199 N. W. 806; Brennan v. State, 141 Neb. 205, 3 N. W. 2d 217; Dwoskin v. State, 161 Neb. 793, 74 N. W. 2d 847; Beyl v. State, 165 Neb. 260, 85 N. W. 2d 653.

In the light of what has been pointed out it becomes clear that the evidence of the State does not amount to proof of the charge against the defendant. The motion of the defendant for a directed verdict should have been sustained at the time it was made.

The evidence of the defendant in no particular amounts to proof of the charge against the defendant. On the entire record, therefore, the essential elements of the crime charged against the defendant stand without any evidentiary support. The result of this was that at the conclusion of the evidence there was no issue properly submissible to a jury.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the charge against the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

WILLIS BAER, APPELLEE, V. OTTO SCHAAP, DOING BUSINESS AS SPEEDWAY SCAFFOLD COMPANY, APPELLANT, IMPLEADED WITH PARSONS CONSTRUCTION CO., A CORPORATION, APPELLEE.

106 N. W. 2d 468

Filed December 9, 1960. No. 34497.

1. **Evidence.** While evidence admitted generally is in the case for any legitimate purpose, evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose.
2. ———. When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that if part of it be true the rest must be false, it cannot be accepted as the basis of a judicial conclusion.
3. **Torts.** Where there are two or more possible causes of injury, for one or more of which defendant is not responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, plaintiff cannot recover.
4. **Negligence.** The causal connection between defendant's act or omission and the injury must not be left a matter of surmise or conjecture, and cannot be established by evidence which is merely consistent with or indicates a mere possibility or probability thereof, as by evidence which merely shows two or more possible causes of the injury, for not all of which defendant is responsible; or which leaves it a matter of speculation or conjecture as between such causes; or which is equally consistent with the theory that the injury resulted from a cause for which defendant is not responsible.
5. ———. The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured.
6. **Trial.** 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.
7. **Evidence: Trial.** Where several inferences are deducible from facts presented, which inferences are opposed to each other but

equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover.

8. **Trial.** Where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. On motion for rehearing. See 168 Neb. 578, 97 N. W. 2d 207, for original opinion. Original opinion withdrawn. *Reversed and remanded with directions.*

Webb, Kelley, Green & Byam, for appellant.

Rice & Adams and *Schrempp & Lathrop,* for appellee Baer.

O'Dowd & Swift and *Crossman, Barton & Quinlan,* for appellee Parsons Constr. Co.

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

SIMMONS, C. J.

This is an action for damages for personal injuries. Our first decision in this case is found in Baer v. Schaap, 168 Neb. 578, 97 N. W. 2d 207. A rehearing was granted. The motion for rehearing presents only two questions. The first is the sufficiency of the evidence to justify submitting the cause to the jury. We now find it necessary to decide only that question. We conclude that our former decision was in error in holding the evidence sufficient. That decision is set aside.

We reverse the judgment and remand the cause with directions to sustain the motion for a directed verdict.

We refer to our former opinion and the dissent for a more detailed general statement of the issues and facts.

We refer herein to plaintiff as Baer, who was the

injured employee of defendant Parsons Construction Company. We refer to defendant Schaap as Speedway, as he operated under the name of Speedway Scaffold Company. Appellee Parsons Construction Company is referred to as Parsons. It is in the case seeking subrogation for compensation payments to Baer. To that extent Parsons' interests and Baer's interests are identical.

Baer alleged that Speedway "erected, set in place, and rented to" Parsons certain scaffolding around a building being remodeled and that the scaffolding "thus erected" was "not erected in a safe, suitable and proper manner," so that a plank thereon gave way and dropped plaintiff to the sidewalk below to his great injury. That allegation presented the essential issue and limits the scope of the inquiry.

We are presented with two difficulties appearing in the record. The accident involved herein occurred in September 1954. The petition was filed in June 1955. The cause was at issue in February 1956. It was tried in January 1958 on amended pleadings. The delay in bringing this matter to trial obviously accounts for some if not all of the confusion, lack of memory, and contradictory statements of witnesses. Trial courts could avoid this sort of a situation by insisting on a reasonably prompt trial in these cases.

Repeatedly in this record witnesses refer to exhibits, pointing out that about which they are testifying, and "indicating" it. We have repeatedly criticized trial courts for permitting such a record to be made. It is difficult, and at times impossible, for a reviewing court to read such a record and do more than speculate as to what lawyers, court, and jury had indicated to them. We again criticize the procedure here in that regard.

The first question here is: Did Speedway place the plank in the scaffold that upended and caused Baer to fall?

The parties are in general agreement that Speedway

built a scaffold for Parsons; that Parsons accepted and used it; that Baer was an employee of Parsons; and that a plank on which he was standing gave way, causing him to fall to his injury.

There is further general agreement that the scaffolding was built of steel uprights, 7 feet apart lengthwise, and 5 feet apart from side to side. The uprights were connected by horizontal steel bars upon which the scaffold floor boards were placed.

It was agreed at the bar here and in the briefs that the scaffold was erected about 2 feet from the building and that steel brackets were placed on the scaffold to reach from the inside upright to the building. These were in the shape of a right-angled triangle with the top arm at right angles to the building and about 22 inches in length. Speedway floored the scaffold proper with planks 2 inches thick and either 10 or 12 inches in width, and 14 and 16 feet long. This becomes important in the light of evidence to be cited later.

It is undisputed that Speedway put 16-foot-long planks side by side across two of the 7-foot spaces between the supporting uprights so that they extended 1 foot at each end beyond the crossbars on which they rested. Then two spaces were skipped and another side-by-side row of 16-foot-long planks were placed as before. Then 14-foot-long planks were placed bridging that opening. These lapped over the 16-foot planks 1 foot at each end.

Speedway's construction man testified that every one of the 14-foot-long planks was nailed to the 16-foot plank beneath it. Parsons' superintendent inspected the scaffold and testified that he found from 5 to 10 percent of the planks not nailed, and nailed them. It is, then, undisputed except by argument, that before Parsons began the use of this platform every 14-foot plank which Speedway put in the scaffold was nailed to the 16-foot plank beneath it and that the overlap was 1 foot.

We must accept as a fact from the jury's verdict that Speedway did not nail all of the planks and that Parsons

undertook to do so before it permitted its use by workmen. Parsons accepted the scaffold as satisfactorily constructed.

At this point the purpose of the nailing can be recited. It is likewise undisputed and testified to by a witness for Baer that the planks were nailed if employees were going to work on them for a long time and should be nailed if it was a matter of weeks and days "because they will work" or slide back and forth so that "one end may drop." It was in the interest of good safety to nail them down.

We are, then, confronted with a record that establishes without dispute that every 14-foot plank was above the end of a 16-foot plank and any "working" of it would be against the force of gravity and that the 14-foot plank would have to "work" at least 1 foot before it could upend and fall.

We are mindful of the testimony of Baer's witness that he measured the plank that flipped up as 14 feet in length so that if it slipped "an inch or so either way" it would upend and fall.

From this evidence it is argued here that the plank which upended had only a 1-inch overlap and had to slip only that distance before it would give away on its loose end.

The fallacy of this argument is that under the undisputed evidence the plank, if put there by Speedway, would have had to slip at least 1 foot before it would upend and fall when someone got on its short end, there being no evidence that any other plank on the platform was disturbed when the one plank gave way. There is no evidence that Speedway put 14-foot planks at this point in any other position than overlapping 16-foot planks. No witness testified that the plank that upended had been resting on a 16-foot plank.

Baer's witness and Parsons' superintendent testified to the fact that the planks were nailed together; and no one testified that a nailed plank will "work." We are

not unmindful of the fact that Baer's witness testified that there were neither nails nor nail holes in the plank that upended. From that evidence, however, no inference can arise that Speedway placed this plank in the scaffold.

Were there side brackets put on the scaffold by Speedway? It is conceded here that the answer is "Yes." Baer testified that he was an experienced construction man, had erected and used scaffolds for years, and was an experienced bricklayer and foreman at the time of the accident.

The conceded physical facts are that the scaffold was to be used in removing and repairing the wall of the building and that in part an overhanging cornice was to be removed. Yet Baer testified, in effect, that there were no brackets on the scaffold, as did one other of his witnesses, as both testify that it was the inside plank on the main platform that gave way. Other witnesses testify as to the existence of the brackets.

Were planks placed upon the brackets? Speedway's construction man testified as a witness for both Baer and Speedway. He testified that he placed one row of planks on the brackets, and *"about centered"* on the brackets. The plank so centered was either 10 or 12 inches wide. So that if only 10 inches wide the planks so placed by Speedway left an opening on either side of not to exceed 7 inches, or as stated by the witness, "a small opening." Baer's witness testified that the plank which upended was 2 inches by 10 inches.

Were there other planks placed on the brackets? Parsons' construction superintendent testified that he placed a string of planks on the brackets "to hold the plywood." At one point he described them as 2 inches by 10 inches. At another point he says 2 inches by 8 inches. That evidence is undisputed. Parsons' man says it did not "change the structure" of the scaffold. But if Parsons put this row of planks there then it has to follow that the Speedway row of planks was moved over and

to the inner or outer side of the brackets to make room for it. The construction of the scaffold had to be changed by Parsons after Speedway had delivered it to them.

This conclusion is arrived at also by another bit of undisputed evidence.

A plywood apron 2 feet wide was placed on the brackets and against the building. The entire platform and plywood apron was then covered by canvas. Baer testified that the plywood was notched so as to fit over the posts of the scaffold. Otherwise brackets being absent, according to his testimony, the plywood would have no support. Parsons' man testified that he rested the plywood on the row of planks and that it then came to 1½ or 2 inches from the planks on the inside of the uprights. It follows that if he nailed the plywood to planks it was not those placed there by Speedway unless the Speedway planks had been moved after Parsons accepted complete control of the scaffold.

The canvas and plywood were removed by Parsons either the day of or the day before the accident. Baer assisted in the removal. The evidence is important here because it shows that there were neither "days" nor "weeks" that employees were using the exposed planks so as to cause them to "work." The evidence is that the plywood was nailed to the planks. There is no evidence nor contention that the plywood "worked" either way, hence it would necessarily follow that any "working" of the plank had to occur after the plywood was removed.

Which plank fell? All witnesses agree that it was the one nearest the building. It struck the building, lodged in one of the brackets, and nearly struck a fellow workman looking over the edge of the roof.

Baer and one of his witnesses testified it was the inside plank of the scaffold proper. He now recedes from that evidence. If it was the plank nearest the

building and on the brackets it could be or could not be a plank put there by Speedway.

There is no identification of it as such as a plank put there by Speedway. We are not unmindful of one bit of evidence in this regard. Parsons' man testified that the plank was a Parsons' plank. On rebuttal a claim adjuster for Parsons' insurance carrier was called as a witness. He testified that he and Parsons' superintendent had talked about who had erected or constructed the scaffolding and that Parsons' man said Speedway had installed the plank that fell. This was admitted over objection for purposes of impeachment. The court so stated and counsel for Baer replied that that was correct.

The rule is that while evidence admitted generally is in the case for any legitimate purpose, evidence which is offered and admitted for a limited purpose cannot be used for another and totally different purpose. Where, by express ruling, it is limited to one purpose, without exception, it cannot be used for another purpose. Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

It is said here that the jury was justified in disregarding the testimony of Parsons' superintendent because he testified that it was a Parsons' plank that upended and a witness testified that the superintendent had earlier said it was a Speedway plank.

If we are to put aside all of the testimony of this witness as to that subject matter as untrue, it leaves testimony of witnesses for Baer, including himself, in hopeless confusion.

Baer and one of his witnesses testified that there were no brackets on this scaffold. The undisputed testimony otherwise is that there were brackets. It was conceded at the bar here that there were brackets. The falling plank lodged in the brackets and did not reach the ground. Baer testified that there were planks put on the principal scaffold only. The evidence shows and it is admitted at the bar here that there were six rows of

planks (one on the brackets), as testified to by Speedway's construction man, a witness for Baer. Baer testified that the plank that upended was the one nearest the building. If his testimony is accepted, Baer was working that afternoon when the accident occurred at a height of 40 feet, washing down the wall with an open space of approximately 2 feet between him and the building. This presents a rather improbable situation.

However, it is undisputed also that the plank that fell struck a slight projection on the building and that in its partial revolution, with the crossarm or bracket as a pivot, it nearly hit a witness for Baer looking over the roof. There would have been no lodging in the nonexistent bracket under those circumstances.

No matter whether this record is read from the viewpoint of the evidence that went to the jury, or from the viewpoint of Baer's evidence, excluding Speedway's witness (Parsons' superintendent), the result is one of hopeless confusion out of which an answer can be drawn only by confused speculation.

These rules, then, become applicable: " 'When a witness gives testimony which as to material facts is in such obvious and irreconcilable conflict that, if part of it be true the rest must be false, it cannot be accepted as the basis of a judicial conclusion.' " Butler v. Reed-Avery Co., 186 Md. 686, 48 A. 2d 436. See, also, Kaufman v. Baltimore Transit Co., 197 Md. 141, 78 A. 2d 464; Hegarty v. Berger, 304 Pa. 221, 155 A. 484; Campbell v. State, 203 Md. 338, 100 A. 2d 798.

"Where there are two or more possible causes of injury, for one or more of which defendant is not responsible, plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as of the other, plaintiff cannot recover." 86 C. J. S., Torts, § 59, p. 984.

"* * * the causal connection between defendant's act or

omission and the injury must not be left a matter of surmise or conjecture, and cannot be established by evidence which is merely consistent with or indicates a mere possibility or probability thereof, as by evidence which merely shows two or more possible causes of the injury, for not all of which defendant is responsible; or which leaves it a matter of speculation or conjecture as between such causes; or which is equally consistent with the theory that the injury resulted from a cause for which defendant is not responsible; * * *." 65 C. J. S., Negligence, § 244, p. 1092.

Here, as we read this evidence, the answer to the question of "was it a Speedway plank that upended" is a matter of speculation and conjecture. Baer's evidence shows that it could have been and could not have been. That is not enough.

A restudy of this evidence causes us to apply the rule that the burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured. Mimick v. Beatrice Foods Co., 167 Neb. 470, 93 N. W. 2d 627.

We also apply the rule 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. Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

Here the evidence as to who placed the upending plank in the platform is purely circumstantial. We apply the rule that where several inferences are deducible from facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiff does not sustain his position by a reliance alone on the inference which would entitle him to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N. W. 2d 728.

At the conclusion of Baer's evidence and again at the conclusion of all of the evidence, Speedway moved for a directed verdict. Speedway later moved for judgment notwithstanding the verdict. These motions were overruled.

The situation calls for the application of the rule that in a case where a motion has been made at the close of all of the evidence for a directed verdict, which motion should have been sustained but was overruled and the case was submitted to a jury which returned a verdict contrary to the motion, and a motion for judgment notwithstanding the verdict is duly filed, it is the duty of the court to sustain the motion and render judgment in accordance with the motion for a directed verdict. Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144.

The judgment of the trial court is reversed and the cause remanded with directions to sustain the motion for a directed verdict.

REVERSED AND REMANDED WITH DIRECTIONS.

WENKE, J., dissenting.

I disagree with the present opinion of this court, which sets aside our former opinion herein upon the ground that the evidence is not sufficient to justify submitting the cause to a jury. In my opinion the evidence adduced at the trial was sufficient to justify the trial court's submitting the issue of appellant's liability to the jury.

In view of the fact that the author of the court's present opinion, when referring to the evidence, uses such expressions as "undisputed," "undisputed except by argument," "without dispute," "no inference can arise," "conceded," "witnesses agree," "hopeless confusion," and "a rather improbable situation," I call attention to the fact that this is a law action in which a verdict has been rendered and that the record on appeal is not before us for review de novo.

We have frequently held, in such cases, that it is not

the province of this court, in reviewing the record in an action at law when a verdict has been rendered, to resolve conflicts in or weigh the evidence. In testing the sufficiency of the evidence to sustain such verdict admissible testimony tending to support the case of the successful party should be accepted as the truth. See, Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315; Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557; Harris v. Pullen, 169 Neb. 298, 99 N. W. 2d 238. It is the same rule, in principle, as applies to a ruling on a motion for a directed verdict or for a judgment notwithstanding the verdict. See, Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59; Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238. As stated in Anderson v. Evans, *supra:* "In determining the question of whether or not a motion of a defendant for a directed verdict or for judgment notwithstanding the verdict should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he should have the benefit of every inference that can reasonably be deduced therefrom."

In view of certain principles stated in this court's present opinion, I call attention to the following holdings of this court:

"In an action for damages for negligence the burden is on the plaintiff to show by direct or circumstantial evidence that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." Weston v. Gold & Co., 167 Neb. 692, 94 N. W. 2d 380.

"Negligence is a question of fact and may be proved by circumstantial evidence. All that the law requires is that the facts and circumstances proved, together with the inferences that may be legitimately drawn from them, shall indicate, with reasonable certainty, the neg-

ligent act complained of." Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

I shall review the record for the purpose of disclosing why I think the evidence adduced justified the trial court submitting this cause to the jury.

Parsons Construction Company, to which I shall hereinafter refer as Parsons, had a contract to tear down the cornicing along the top of the north and west walls of the three-story Patterson Building located at the southeast corner of Seventeenth and Farnam Streets in Omaha, Nebraska, and to replace it with a brick firewall to be capped with stone. To carry out this contract Parsons entered into an oral lease agreement with Otto Schaap, doing business as Speedway Scaffold Company and hereinafter referred to as Speedway, to build a suitable scaffold on the north and west sides of this building for the use of Parsons' employees in performing this contract. Speedway constructed a metal frame scaffold with a wooden platform for this purpose and on August 23, 1954, turned it over to Parsons. This wooden platform consisted of two parts, that inside the frame structure of the scaffold itself and that on brackets, whenever used. Parsons' employees thereafter used this scaffold in performing the contract. On September 14, 1954, about 2 p.m., appellee Willis Baer, an employee of Parsons, fell from the platform of the scaffold to the concrete sidewalk below, a distance of some 35 to 40 feet, seriously injuring himself.

Before discussing the details of the situation I think it would be best to introduce the witnesses and how they fit into the picture. Edward Connolly, to whom I shall refer as Connolly, was and is a salesman for Speedway. However, he supervised and actually performed the major part of the work of installing the scaffold. Henry Chris Sorenson, to whom I shall refer as Sorenson, was employed by Parsons as its general construction superintendent to oversee the work of all its smaller jobs, then six in number, which, on September 14, 1954,

included the Patterson Building job. Appellee Willis Baer, to whom I shall refer as Baer, was an employee of Parsons and, on the Patterson Building job, foreman of the brick work, being a bricklayer by trade. Dale Gosch, to whom I shall refer as Gosch, worked as a laborer for Parsons on the Patterson Building job and actually saw Baer fall, being on the roof of the Patterson Building at the time of the accident and only about 3 feet from Baer when he fell. Charles LeRoy Cato, to whom I shall refer as Cato, also worked as a laborer for Parsons on this job and was on the roof of the Patterson Building when the accident occurred. He did not see the accident. However, he did see Baer on the sidewalk immediately after it happened and removed the plank that upended from where it had lodged in the scaffold. E. F. Morgan, to whom I shall refer as Morgan, was employed by the Fidelity Casualty Company of New York as a claim adjuster and, in behalf of Parsons, interviewed Sorenson about the accident on both October 12 and November 25 or 26, 1954, in connection with workmen's compensation liability.

Connolly testified that in building the platform for the scaffold they used both 2 x 10- and 2 x 12-inch planks of which some 35 were 14 feet long and 40 were 16 feet long. He further testified that on the main deck of the scaffold, between the upright posts, he installed a platform five planks in width and that on the brackets he installed a platform one plank in width, using either 2 x 10- or 2 x 12-inch planks on the brackets, and that he centered the planks installed on the brackets. Brackets were used on the north side where Baer fell.

That a jury could find there was negligence in the construction of the scaffold used by Parsons is evidenced by the following: Connolly testified whenever a scaffold was to be heavily used over a period of time, such as was here contemplated and done, the planks used in building any platform thereon should be nailed to prevent the planks from sliding or working; that he

did the nailing; that he checked to be sure that all planks used in the platform floor were securely nailed; and that he knew of no plank included in the flooring of the scaffold which hadn't been so nailed. However, Sorenson testified that before he let employees of Parsons use the scaffold, after it was turned over to him by Speedway on August 23, 1954, he inspected the scaffold in detail; that he found Speedway had nailed only about 90 to 95 percent of the planks used in the floor of the scaffold; that from 5 to 10 percent had not been nailed; and that he nailed or put cleats on the 5 to 10 percent that had not been nailed to keep them from sliding or working. When I refer to planks used by Speedway in constructing the platform of the scaffold I include those placed on the brackets. When we bear in mind, as will hereinafter be brought out, that the plank that upended and let Baer fall had neither been nailed nor cleated, then it can be understood how a jury could find that whoever installed that plank in the platform of the scaffold did so negligently, and that such negligence caused the accident.

But, was there evidence from which a jury could find that the plank that upended was placed in the platform by Speedway?

Baer fell at a point on the north side of the building about midway thereof. At the time he was cleaning mortar stains from the face of the brick of the new firewall with a sponge. At that point the main scaffold had been placed some distance (probably about 22 inches) from the wall because the cornice on the building, which was later torn down, stuck out that far and prevented the upright posts of the scaffold from being placed any closer to the wall itself. To bridge this gap, so the workers using it could get closer to the building, brackets were attached to the upright posts of the scaffold, which brackets extended over to the wall and were some 22 inches in length and had a surface on which to place planks for a platform of some 21½ inches.

Connolly testified he placed only a one-plank width platform on these brackets, which he centered, before turning the scaffold over to Parsons because Sorenson advised him that a one-plank width on those brackets would be enough.

When the scaffold was turned over to Parsons, Sorenson said there was a gap of some 14 or more inches between the planks on the platform and the wall of the building so he took strips of ¾-inch plywood, 2 feet wide, laid them up against the wall, about a foot above the platform, and toe-nailed them to the platform planks; and that he then placed a canvas tarpaulin over the top edge of this plywood board and spread it clear across the platform of the scaffold in order to prevent the debris from the cornice, as it was being torn down, from falling down onto the sidewalk.

The canvas and plywood on the scaffold north of the building remained in place until the morning of September 14, 1954, when Baer caused it to be removed. The platform of the scaffold, after the canvas and plywood had been removed, was then back in the form in which it was when it was covered by the canvas, as Baer testified that nothing was taken from or added to the platform of the scaffold at the time this canvas and plywood were removed.

It is true that Sorenson testified that he had placed additional (2 x 8- or 2 x 10-inch) boards or planks in the platform on the brackets north of the building before putting up the plywood and placing the canvas thereon. However, the jury was not bound to believe this statement because Sorenson was thoroughly discredited and impeached on this and many other facts about which he testified in connection with the scaffold and the accident. Morgan testified that Sorenson told him, during the interviews he had with him shortly after the accident, that Parsons had never added any boards or planks to the platform of the scaffold constructed by Speedway. Connolly also testified that

Sorenson advised him that one plank was all that need be placed on the brackets. Sorenson testified he put up the plywood to cover a 14- to 18-inch gap between the plank on the bracket and the north wall, which would not be the situation if there had been two planks on these brackets. Baer also testified there was a 6- to 8-inch gap between the platform he was standing on at the time he fell and the wall, which would only be true if there had been but one plank on the bracket but not if there had been two. I think a jury could properly find that there was only a one-plank width on the bracket at the time that Baer fell; that it had been placed there by Speedway; and that the plank used, being only 14-feet long and neither nailed nor cleated, was negligently installed by Speedway for, by so installing it, the plank could work or slide when used and then upend whenever it had slid an inch or more and the overlap ceased to exist.

It is true that some of Baer's witnesses were mistaken in where the plank that upended was in the platform itself, but all of them correctly placed it as the one nearest the building. Cato testified he knew there were brackets there on which planks had been placed, however, he testified the plank that upended and fell constituted part of the main floor of the scaffold, being a plank inside the posts thereof. However, he also testified it was the inside plank, the one next to the building, that fell as that is where Baer was working. Gosch, who was on the roof of the Patterson Building and an eyewitness to the accident from only a few feet away, testified the plank that upended and let Baer fall to the sidewalk below was part of the main floor of the scaffold and inside the uprights. However, Cato was not certain whether there were brackets on the scaffold extending over toward the building, as he didn't pay any particular attention to that, but doesn't think there were although he wouldn't definitely say there weren't any. He does testify that Baer fell next to the building and

that the plank next to the building is the one that upended. Baer testified he fell straight down next to the building and that the plank next to the building, some 6 or 8 inches from it, was the one that gave way.

It would only seem logical for the jury to find that the plank that upended and let Baer fall was the one next to the building. Thus, it seems to me from the evidence I have discussed, a jury could properly find that Speedway placed the plank that fell on the brackets without nails or cleats and so short that it would only have about a 1-inch overlap, since the upright posts on which these brackets were placed are 7 feet apart.

That the jury could properly disbelieve anything Sorenson testified to is further evidenced by the following: Sorenson tried to identify the plank that fell as one he had selected from lumber in the Parsons' yard and used in connection with a derrick that Parsons had installed on top of the roof of the Patterson Building. This derrick was used to lift materials they needed in connection with the job up onto the roof, particularly the capping stones for the firewall which weighed some twelve hundred pounds each. Sorenson testified these stones had been lifted onto the roof some 10 days to 2 weeks before September 14, 1954, and immediately placed on the firewall as capping because, due to their weight, they couldn't be left on the roof. Just how or when any of these planks could have gotten into the platform on the brackets Sorenson did not try to explain.

The facts are, as testified to by other witnesses and clearly shown by one picture offered in evidence, that the capping had not been placed on the firewall on September 14, 1954, and that it was not lifted to the roof until shortly before November 1, 1954, when it was placed as capping on the firewall.

Sorenson identified the planks he selected from the yard of Parsons as 4 planks, some 12 or 13 feet in length and 2 x 12 inches in dimension. The plank that fell was 14 feet long and 2 x 10 inches in dimension.

Finally Sorenson admitted that he told Morgan in the interviews had with him shortly after the accident that Speedway had installed the plank that fell from the platform and Morgan corroborated the fact that Sorenson had so advised him.

I bring out the foregoing for the reason that Sorenson is the only witness that I can find who testified to the fact that Parsons had added any plank to the platform of the scaffold after the scaffold had been turned over to it by Speedway. The jury, in my opinion, was completely justified in not believing Sorenson in this respect for the reason that I have already stated. If it did not believe him in this respect then all the planks that were on the platform at the time Baer fell had been placed there by Speedway and if it so found, as I think it had a perfect right to do, based on the record before us, then the jury also had a right to find from the evidence adduced that the manner in which it was placed there by Speedway was negligent and that such negligence was the proximate cause of its upending and letting Baer fall to the sidewalk below, some 35 to 40 feet, and causing the injuries for which the jury had given him financial relief.

In my opinion the record presents a jury question.

CHAPPELL, J., joins in this dissent.

MESSMORE, J., concurs in this dissent for reasons set forth in the court's original opinion.

THELMA HERMILLA, APPELLEE, V. EVERETT E. PETERSON, APPELLANT.

106 N. W. 2d 507

Filed December 9, 1960. No. 34793.

1. **Damages. The future pain and suffering which a jury may consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person.**

2. ———. Damages for permanent injury cannot be based upon speculation, probability, or uncertainty but must have as a basis therefor evidence that permanent damages clearly shown are reasonably certain as a proximate result of the injury.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and remanded.*

Healey, Wilson & Barlow, for appellant.

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellee.

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

BOSLAUGH, J.

There was a collision at about 3 o'clock on the afternoon of March 2, 1958, at the intersection of South and Twenty-fourth Streets in Lincoln, of two automobiles, one driven by Noble Leroy Hohl, hereafter called Hohl, and the other by appellant. The former was traveling west on South Street and was making a left turn to go south on Twenty-fourth Street. Appellant was at the same time operating his automobile towards the west on South Street and in attempting to pass the automobile of Hohl, collided with the left side of it because it was turned left into the path of the automobile of appellant. Appellee, an employee of Hohl and his wife in their nursing home operations, occupied the right side of the front seat of the Hohl automobile at the time of the collision. In this action for the recovery of damages she claims to have sustained because of the collision of the automobiles, she alleged she suffered a sprained back which caused her constant pain in her neck and lower back region; that thereby she became emotionally disturbed and suffered from headaches, nervousness, loss of sleep, weakness, and pain; that her condition would continue for an indefinite time in the future; that appellee sustained permanent impairments to the physical structure of her body in that the nerves and soft tissue

of the neck and back were damaged and irritated and thereby she had permanent impairment and loss of her bodily strength and functions; and that the injury and damage suffered by appellee were the direct result of the negligence of appellant.

The substance of the defense of appellant was a denial of the claims of appellee, an assertion of ordinance provisions of the city of Lincoln, and a plea of contributory negligence more than slight of appellee. A trial of the issues resulted in a verdict in favor of appellee and the rendition of a judgment in accordance with the verdict. The motion of appellant for a new trial was denied and this appeal is from that action of the trial court.

The substance of the assignments of appellant in this court is that the trial court committed error in submitting to the jury the issues of damages for permanent injury and future pain and suffering because there was no evidence that permanent injury or future pain and suffering were reasonably certain as a proximate result of the accident, and that the verdict of the jury was excessive.

Appellant at the close of all the evidence by motions asked the trial court to withdraw from the consideration of the jury the issue of permanent injury because of the absence of proof that a permanent injury to appellee was caused by the collision and to withdraw from the consideration of the jury the issue of future pain and suffering because it was not sustained by proof. The motions were denied and these issues were submitted by the trial court to the jury for its consideration. The verdict is substantial and it cannot be assumed or known that the amount thereof was not the result of a finding of permanent injury to and future pain and suffering by appellee.

The place of the collision was described as 5 feet east and 9 feet south of the center of the intersection. The width of the intersection from east to west was

25 feet. There were tire skid marks 15 feet long made by the automobile of appellant extending east from the place of the collision. At that time the speed of the automobile of appellant was not more than 15 miles per hour. The automobiles were each facing in a westerly direction at the time of the collision. The Hohl automobile had not completed the right angle turn into Twenty-fourth Street and appellant had turned his automobile to the left in an attempt to avoid an accident. The impact was a glancing or oblique blow and not a broadside contact of the automobiles. The right end of the front bumper and the front end of the right fender of the automobile of appellant contacted the left side of the Hohl automobile and made a considerable dent in the left door. The right headlight of the automobile of appellant was not injured. It was serviceable after the collision and needed no repair. Each of the automobiles was driven from the scene of the accident and was continued in use.

Appellant at the time of the impact experienced no jolt, bumps, or shock. His hands remained on the steering wheel and his foot continued on the brake pedal. His wife and their young son were in the front seat with appellant. They or any of them were not forced out of the normal position in the seat. There was no injury or soreness experienced by any of them because of the collision. Hohl was driving his automobile and at the time of the collision his hands were not forced off the steering wheel or his foot off the brake pedal nor was he thrown against the steering wheel.

Appellee was seated to the right of Hohl in the front seat and he did not see her position change before or at the time of the impact. Appellee testified that at the time of the collision she was sitting on the seat of the automobile and "scooted down in my seat. * * * I mean I just scooted back." She said she was not entirely knocked out of the seat. She was still sitting in it and

then she scooted back. She was not thrown against the body of the automobile. She was asked if she had any aches or pains soon after the accident and she said she could not remember any. She got out of the automobile at once after the collision and she and Hohl remained at the place of the accident for about an hour and then they got in the Hohl automobile and went to his home. Hohl said appellee while they were at the place of the accident acted normally and she made no complaint on the trip from there to the Hohl home. She told Hohl that evening she was not injured.

A police officer was at the place of the accident a few minutes after it happened. He said he made an investigation to ascertain if anyone was injured and that the persons there told him they were not injured. He said appellee did not appear unusual in any way.

Appellee said she was nauseated twice after the accident, the first time in the restroom of a filling station which she could not locate and the other time in the bathroom of the Hohl home. She was at the Hohl home about half an hour after she reached there from the place of the accident and she then accompanied Mrs. Ruth Hohl on an automobile trip to College View and back to the Hohl home. Appellee did not complain of injury or illness during that trip nor did she exhibit any symptoms of any such condition. She remained at the Hohl home until she left to engage in the duties of her employment. She worked from 11 p. m., March 2, 1958, to 7 a. m., March 3, 1958, the usual hours of her employment at the nursing home. That night she said she noticed a pain in her back and her neck was stiff. She worked the night shift at the nursing home the month of March 1958 a total of 250⅔ hours. Appellee left on a trip to Ozark, Missouri, by bus on March 3, 1958. The continuous time required to make the trip was about 18 hours. She had not sought or had medical attention since the accident until she left on that trip. She spoke of Dr. Roper of Ozark, Missouri, as her family

doctor, but she did not consult him when she reached that city. She returned to Lincoln by bus, making a continuous trip. She was away from Lincoln March 3, 4, and 5, 1958. She was not away from her employment any other time during that month. The night she returned, probably March 6, 1958, she performed the duties of her employment in the nursing home.

The first doctor appellee consulted after the accident was Dr. Norman of Lincoln on March 7, 1958. He was not a witness on the trial of the case but notes made by him and produced by an associate of his indicated that appellee told Dr. Norman of the accident, that she said she had pain over the lower spine, and that the left side of her neck was painful. She had no indication of pain down in the legs. There is no proof that Dr. Norman made any diagnosis of any condition of appellee but he did prescribe ultrasonic treatment to which she submitted. She continued doing the work at the nursing home after she saw Dr. Norman but with some difficulty. When she would bend over she said it was painful and it was difficult for her to straighten up. She said the pain in the small of her back was constant and the stiffness in her neck continued for about 3 weeks and it then improved.

Appellee consulted Dr. Ochs of Lincoln, an associate of Dr. Norman, on March 25, 1958, because of a cold and sore throat condition she had and not because of anything concerning the accident. A few days later she told Dr. Ochs of the accident. He testified that after he had seen her awhile and became familiar with her problems, "* * * I had my own feelings as to what her trouble was." He called it "a whiplash injury to the cervical spine." The treatment he prescribed was ultrasonic sound treatment, diathermy, manual massage, and a few arthritic-type medication tablets. He saw her several additional times until June 6, 1958, when he directed her to Dr. Getscher of Lincoln "Because we were not satisfied with the progress that was being

made with her complaints." Dr. Ochs saw appellee and gave her a couple of treatments after she had consulted Dr. Getscher of the same character he had given her before. Dr. Ochs last saw appellee June 20, 1958, about 11 months before the trial in which he testified.

The record made by Dr. Norman does not mention a finding of limited motion of the back of appellee, evidence of muscle spasm, or any bruise, contusion, or injury on the body of appellee. When Dr. Ochs saw appellee on March 25, 1958, he made no mention in his record of any injury she claimed to have suffered and no notation of any objective finding concerning an injury. There were X-rays taken while appellee was a patient of Dr. Ochs and they showed five or six of the vertebral bodies at the lower part of the spine which exhibited a perfectly normal lumbar spine without any disturbance with the alignment of the bodies of the bony structures thereof. They also showed the upper three lumbar vertebrae, which would be the first, second, third, and two below that, and the twelfth, eleventh, and part of the tenth thoracic vertebrae were a normal structure. Appellee on April 14, 1958, complained of a tenderness in the occipital area. Dr. Ochs believed in her case that this was the result of nervous tension rather than injury. The next day she felt relaxed but her back was still sore. There was not in the record made by Dr. Ochs any mention of appellee experiencing muscle spasms at any time or that the doctor found loss of motion in any part of the body of appellee. He found no evidence of a torn muscle or of a herniated disc in the neck or back of appellee.

Dr. Getscher, an orthopedic surgeon of Lincoln, testified he examined appellee and found she had full range of motion in the lumbosacral spine and in the joints of the lower extremities, and that all leg tests were considered to be normal. He found no evidence of muscle spasms. He resorted to other tests usual in the practice of an orthopedist and they disclosed no nerve or muscle

injury and nothing abnormal in the condition of appellee. There was no evidence of limited motion in the cervical spine or neck or a muscle spasm either in the lower back or in the neck. A neurological examination in both the upper and lower extremities was completely within normal limits, indicating the function of the nerves was normal. Dr. Getscher made a positive finding of moderate obesity and moderately poor posture of appellee. Poor posture and obesity create a problem of strain. Excessive weight on a spine that is intended to carry much less weight may very well lead to soreness of muscles and complaints of pain anywhere in the back, dependent upon the type of postural deficit and the degree of obesity. The doctor said appellee in his opinion had a problem so far as obesity and posture were concerned. Dr. Getscher found no evidence of loss of use of either of the arms or legs, of the spine, neck, low back, or in any area of the back of appellee. He said if a person sustains an injury which will eventually result in permanent damage, there would be an objective finding in the sense that a doctor could find some symptom, some disability, within 3 months of the occurrence of the accident. If there were a tearing or strain of a ligament, the healing would be by the production of scar tissue in the area of the injury and this would manifest itself so that it could be determined because scarring leads to the shortening of the muscle and would be demonstrated by range of motion or excursion of the muscle. Scarring in a ligament would likewise result in limited motion in the joints that it crossed. The fact that the examination demonstrated no limitation of motion indicates that there were no residuals evidencing that the tearing and straining of any ligament or muscle could be considered significant and probably result in permanent disability or restriction of activity.

Dr. Getscher was asked if it were possible for an individual to have sustained functional injury in that he

would experience pain and have certain limitations without there having been an organic injury. His answer was in substance that injury might be produced in an individual which results in functional loss but functions cannot be injured without injuring organic structure. Appellee demonstrated at the time of the examination witness made of her no evidence of injury in using the accepted method of examination. She did give subjective loss of functions based on subjective findings which might be the result of minor organic injury that did not show up in the type of examination that is considered necessary for the condition of this type or is considered the usual accepted procedure of examination. An individual who has a muscle that has been contused on March 2, 1958, may not demonstrate any objective findings in an examination on June 10, 1958, but still lead to complaints of pain by the individual, conditions within that muscle which are considered a normal result of an injury that far after an injury, and still provide no basis for accepting that a permanent disability will result. He said it was his opinion that appellee may be having discomfort as related by the so-called history she gave, that she may find certain duties aggravate this discomfort, and that the discomfort may be a real and distressing circumstance for her subjectively; but he said unless he could demonstrate to his satisfaction there had been significant injury which would reflect or show in an examination of the type commonly accepted among orthopedic surgeons in demonstrating post-injury conditions, he would be compelled to assume that the discomfort exists in an effort to improve her subjective condition but he would still have to reserve the right to testify that he was unable to demonstrate those significant changes that would necessarily form the basis for judging and concluding that disability is present or would result, leading to the conclusion that some minor injury cannot be adequately proven to exist at a time of examination, even though the examiner

accepts that injury and its ramifications may have existed prior thereto, and may still exist in a very minor way at the time of the examination. Dr. Getscher said he was of the opinion that the patient received strain to the neck and lower back and that she had a rather slow and incomplete recovery; that there were no objective findings of any significant organic injury at the time of the examination; that there was evidence that she was extremely disturbed emotionally; and it was thought she did have a delayed recovery complicated by moderate obesity and moderately poor posture.

Appellee consulted Dr. Roper of Ozark, Missouri, July 7, 1958. He said she told him of the accident of March 2, 1958, and that she had suffered with a pain in the lumbar region of her back since that date; that she then immediately became ill, was nauseated, and experienced pain in the lower back and in the left side of her neck; and that her back was severely twisted in the accident. Dr. Roper had a report from Dr. Ochs, including the information that X-rays of the lumbar spine and cervical spine showed that both locations were negative. Appellee told Dr. Roper that she had occasional headaches and she was nervous. Otherwise the systemic review was essentially normal. The result of a physical examination by Dr. Roper made of appellee was that she was essentially normal except she was obese and she was somewhat apprehensive. Her back and neck were normal and she had good range of motion. She said she had, and the doctor thought she had, moderate tenderness over the posterior spinous processes of lumbar vertebrae 2, 3, and 4 and a small amount laterally on the left side thereof. Her lower extremities were normal and the remaining part of the physical examination developed no abnormality in appellee. Dr. Roper testified he thought that probably she had a whiplash injury of the neck: "That's per Dr. Ochs, which responded to treatment." He was obviously referring to the report of Dr. Ochs which was

sent to Dr. Roper before appellee consulted him on July 7, 1958. Dr. Roper said concerning the supposed whiplash injury, "Oh, it's a neck injury, but that is apparently alleviated." Dr. Roper said that appellee told him when she first consulted him that the pain she suffered in her neck had been alleviated and that she had no more pain there. He said she made no complaint to him thereafter of pain in her neck. Dr. Roper prescribed diathermy and ultrasonic treatment for appellee which she accepted. Later she was treated with the Medco-Sonlator machine. There was some benefit from these treatments but she continued to complain of low back pain. On the advice of Dr. Roper appellee consulted Dr. Yancey, an orthopedic surgeon of Springfield, Missouri. In the report of Dr. Yancey to Dr. Roper of his examination of appellee he stated that he found the neck of appellee normal, no edema, no tenderness, no muscle spasm, vertebrae were in good normal alignment, no list, and normal range of motion. He put appellee on a reducing diet and recommended conservative treatment and more physiotherapy. Dr. Yancey reported to Dr. Roper that he did not believe appellee sustained a serious injury. Dr. Roper said that he found no evidence of muscle spasm, torn ligaments, or torn muscles in the back of appellee, no swelling, scar tissue, or tightness of muscles in any examination he made of appellee. Dr. Roper saw appellee at his office numerous times during the period from July 7, 1958, to and including April 22, 1959. When he last saw her she said that the pain she had was then intermittent, sometimes it was present and sometimes it was entirely absent. The conclusion of Dr. Roper was that he did not know at the time he was testifying how permanent the effects of any injury appellee sustained would be; that he did not know the permanency of disability of any injury she sustained; that he did not believe anyone could make that statement; and that he

did not know whether she would suffer pain in the future.

Dr. Carveth of Lincoln saw appellee May 18, 1959. Her complaints to the doctor were constant pain in the small of her back; intermittent pain in her neck but this condition was much improved; inability to sit for long periods; and some discomfort in the area below the skull on the left side of her neck, extending downward. Dr. Carveth gave appellee a complete physical examination. He found that her heart, blood pressure, lungs, breasts, eyes, ears, nose, and throat were all negative. Her reflexes were equally normal on both sides and this indicated that her spinal cord was normal. She claimed that when the doctor examined the small of her back by deep palpation, she had pain which extended lateralwards in that area for about 3 inches. The doctor subjected appellee to proper test to ascertain the condition of the muscles and ligaments in the small of her back. This demonstrated that she had good tone or strength and the absence of any weakness in that area. The strength of the small of the back of appellee was indicated by the absence of any reaction of the muscles, ligaments, and nerves relating thereto. She did not complain of pain occasioned by the test. The back of appellee was straight. She had normal curve and she bent laterally to the right and to the left. She was asked to bend over and touch the floor with her hands and she came within about a foot of it. There was no evidence of rigidity or spasms of the muscles of the back during this procedure and this demonstrated the absence of much disability in that area. She could turn her head and rotate it. There was no rigidity in the muscles of the neck or back. The doctor found there was no numbness or pain in her arms and no atrophy of the muscles and ligaments in the arms of appellee, and she stated to the doctor that this was true of her legs. The doctor found no swelling in her legs and she had normal range of motion of the legs. The pelvic

examination of appellee was negative. Laboratory examination showed blood count, both red and white, as normal and a normal sedimentation rate. There were X-rays taken and studied of the cervical spine, the area of the neck and back, and the low back area. There was no evidence in these of the effects of any injury to appellee. They were substantially normal. There was no indication of the presence of arthritis or pinching of the nerves. Any significant tearing or stretching of a ligament or muscle causes severe immediate pain to the subject and the injury can be determined upon examination because of resulting limitation of motion, spasm, and rigidity. Any significant injury of that kind to the low back would produce immediate pain and disability. Dr. Carveth said he found no evidence of any disability in appellee.

Appellee made a trip by bus from Lincoln to Ozark, Missouri, and return in April 1958 and in May 1958 and week-end trips to Kansas City, Missouri, the number or dates of which she could not state but all these were after the accident and before July 1, 1958. She could not testify how many hours she worked at the nursing home of Hohl in Lincoln during the period from March 2, 1958, the date of the accident, until June 29, 1958, the date she discontinued her services permanently at the nursing home. The evidence shows she worked in the course of her employment as follows: During the month of March 1958, 250⅔ hours and she was away 3 days that month on a trip; during the month of April 1958 she worked 200⅓ hours and was away on a trip 4 days that month; during the month of May 1958 she worked 128 hours and she was away on a trip to Kansas City May 5 and 6 and was away from her employment from May 19, 1958, for the balance of the month because of the illness of her father; during the month of June 1958 she worked 228½ hours and she was away 3 days that month. She discontinued her employment at the nursing home on June 29, 1958. The reason she

gave for quitting her employment was not because of health or disability conditions but because she wanted to go home and be near her little boy and her father who was ill.

Appellee continued the services of Dr. Roper until about 2 weeks before the trial of this case which commenced on May 18, 1959. She claimed she suffered pain in her back and leg and that her disability continued until and existed at the time of the trial.

The trial court in advising the jury the substance of the petition of appellee stated that she alleged that as a result of injuries caused her by the accident, her training as a nurse was terminated; that she sustained permanent impairments to her body; and that thereby she had been damaged in a substantial amount. In another part of the charge to the jury the trial court advised it that: "In fixing the amount of such damages you will take into consideration the character and extent of her injuries and disability, that is, whether the same are temporary or permanent in nature, the pain and suffering which she has already suffered, and the pain and suffering, if any, which she will undergo in the future; and you will take into consideration and allow therefor any medical expenses necessarily incurred in the treatment of her injuries, together with all future disability * * *." The applicable doctrine in this state is that the future pain and suffering which a jury may consider in determining damages are such as evidence shows with reasonable certainty will be experienced by the injured litigant as a proximate result of injury inflicted upon him and that a prerequisite to a recovery of damages for permanent injury is that the future effect of the injury on the claimant must be shown with reasonable certainty.

In McGowan v. Dresher Bros., 106 Neb. 374, 183 N. W. 560, the court observed: "A party is not required to prove permanent injury with absolute certainty, yet a mere conjecture or probability is not sufficient. The

burden of proof was on plaintiff, and the testimony must show such permanent injury with reasonable certainty. * * * Furthermore, there was no attempt to prove the degree of the future impairment in the use of the members or in the loss of earning power."

In Bresley v. O'Connor, Inc., 163 Neb. 565, 80 N. W. 2d 711, this court, in approving an instruction concerning future pain, said: "According to the medical testimony, the plaintiff would continue to suffer pain in the future for an undeterminable period. The court, by giving such instruction, did nothing more than permit the jury to make allowance for such future pain and suffering of plaintiff as might be established by the evidence with reasonable certainty, contingent upon the evidence also showing with reasonable certainty how long such future pain and suffering might continue * * *."

Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, declares: "The future pain and suffering which a jury is entitled to consider in the assessment of damages are such as the evidence shows with reasonable certainty will be experienced by the injured person."

Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254, says: "Damage for permanent injury may not be based upon speculation, probability, or uncertainty but it must be shown by competent evidence that such damage is reasonably certain as a proximate result of the pleaded injury." See, also, Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643; Welstead v. Ryan Constr. Co., 160 Neb. 87, 69 N. W. 2d 308.

The record yields no evidence of the quality required to show with reasonable certainty that appellee suffered a permanent injury as a proximate result of the collision of the automobiles or that damage is reasonably certain to occur as a result of the injuries pleaded by appellee. Likewise, evidence is wholly lacking to establish with reasonable certainty that future pain and suffering will be experienced by appellee as the result of any injury inflicted on her by the accident. The in-

structions described above were prejudicially erroneous.

The judgment should be and it is reversed and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

MADELINE V. PODEWITZ ET AL., APPELLANTS, V. GERING NATIONAL BANK ET AL., APPELLEES, E. L. FUNDINGSLAND, INTERVENER-APPELLEE.

106 N. W. 2d 497

Filed December 9, 1960. No. 34807.

1. **Contracts.** Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it.
2. ———. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view.
3. ———. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.
4. ———. The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction.
5. **Vendor and Purchaser.** A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser.

6. **Deeds.** A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether if sufficient remain from which the intention of the parties can be ascertained.

7. **Taxation: Deeds.** A tax deed issued under section 77-1839, R. R. S. 1943, is not required to state that the land has been offered at public sale. All that it requires is a statement therein as to whether the sale, pursuant to which it is being issued, was public or private. Insofar as our holding in Sherlock v. Gillis, 108 Neb. 72, 187 N. W. 812, is in conflict with the foregoing the same is overruled.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Reversed and remanded.*

Halcomb, O'Brien, Knapp & Everson, for appellants.

Lyman & Winner and *Willard F. McGriff,* for appellees.

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

WENKE, J.

On September 4, 1958, John Podewitz and Madeline V. Podewitz brought this action in the district court for Scotts Bluff County against the Gering National Bank and Douglas E. Jones. E. L. Fundingsland was authorized to and did intervene. The purpose of the action is to recover the sum of $1,000 placed in escrow with the Gering National Bank under and pursuant to the terms and provisions of an escrow agreement entered into between the plaintiffs and defendant Douglas E. Jones. The Gering National Bank was directed by the court to deposit the $1,000 it held in connection with the escrow agreement, together with all instruments held in connection therewith, with the clerk of the district court. This it did and by doing so, was, by order of the court, released from any further liability that might arise thereunder by reason of any and all claims by all other parties to the action. A jury was waived and, upon the issues raised and tried, the trial court found for the defend-

ant Douglas E. Jones and intervener E. L. Fundingsland and against the plaintiffs; found that plaintiffs' title to the premises involved was not merchantable so as to permit drilling operations on or before June 28, 1955; and that such requirement was not waived by defendant Douglas E. Jones or intervener E. L. Fundingsland. Based upon such findings the trial court dismissed plaintiffs' petition and rendered a judgment in favor of defendant Douglas E. Jones and intervener E. L. Fundingsland, holding them to be entitled to the $1,000 placed in escrow with the Gering National Bank, together with interest thereon at 6 percent from June 28, 1955, and costs. Plaintiffs filed a motion for new trial, which was overruled. This appeal was taken therefrom.

For convenience we shall herein refer to John Podewitz and Madeline V. Podewitz, husband and wife, as appellants; to appellee Douglas E. Jones as Jones; to appellee-intervener E. L. Fundingsland as Fundingsland; and to Jones and Fundingsland jointly as appellees. Jury having been waived we shall consider the trial court's findings accordingly insofar as the evidence adduced is concerned. See Garbark v. Newman, 155 Neb. 188, 51 N. W. 2d 315, for the principles here controlling in that respect. However, as to the real questions involved the evidence is not in dispute and they present simply questions of law.

The appellants are and, at all times herein material, were the owners and in possession of Lots 23 to 34, inclusive, Park Row, of the Original Town of Harrisburg, Banner County, Nebraska, occupying it as their homestead. On March 28, 1955, they entered into an "Escrow Agreement" with Jones which, insofar as here material, provides as follows: "This escrow agreement is contingent upon the lessors furnishing merchantable title of said premises unto the lessee so as to permit drilling operation within the time hereinafter specified, otherwise in full force and effect.

"It is hereby stipulated and agreed that the afore-

said oil and gas mining lease together with the sum of $1,000.00, payable to lessors and duly signed copy of this agreement shall be placed in the Gering National Bank of Gering, Nebraska, to be held in escrow and disposed of by said bank upon the following terms and conditions:

"(1) If the lessee or his assigns shall commence for the drilling of a test well for oil and/or gas at some location upon the above described premises on or before the 28th day of June, 1955, the said bank is hereby authorized and directed to deliver forthwith the said lease and the aforesaid sum of $1,000.00 to the said lessee or his assigns.

"(3) If, however, the lessee or his assigns shall fail to comply with provision (1) mentioned above on or before the 28th day of June, 1955, the said bank is hereby authorized and directed to return said oil and gas lease to the said lessor and this agreement shall terminate and all rights, obligations and liabilities thereunder shall forthwith cease, determine and be forever at an end as to all parties. The $1,000.00 aforesaid shall also be paid by escrow agent unto lessors herein. * * * No abstracting costs shall be chargeable to lessors herein."

On the day of its execution the escrow agreement, together with the $1,000 and the oil and gas lease therein referred to, executed in triplicate, were deposited with the Gering National Bank. Jones subsequently sold all his rights in and to this escrow agreement to Fundingsland. Neither Jones, Fundingsland, nor anyone in their behalf, has ever commenced any operations on the above-described premises for the drilling of a test well for oil or gas.

Jones, for a valuable consideration, sold his rights in and to the escrow agreement to Fundingsland on May 31, 1955, making a written assignment thereof to Fundingsland dated October 20, 1958. Raymond Grant, who helped negotiate the escrow agreement for Jones, has

disclaimed any right or interest therein. Jones and Fundingsland both pleaded that appellants failed to furnish a merchantable title to said premises so as to permit drilling operations thereon on or before June 28, 1955, for the specific reasons set out in two title opinions submitted by Fundingsland to appellants and that their failure to drill a test well on the premises was because of appellants' failure to furnish a merchantable title thereto.

C. F. Fundingsland, Fundingsland's brother, a practicing attorney at Burlington, Colorado, examined the record title to appellants' property, as disclosed by an abstract of title thereto last certified to by a bonded abstracter on April 15, 1955, and made certain specific objections thereto. Thereafter, on June 20, 1955, Ernest S. Baker, an attorney practicing in Denver, Colorado, examined the same abstract and made certain observations as to why, in his opinion, the appellants could not deliver merchantable title to the premises so as to permit drilling operations thereon within the meaning of the escrow agreement. At the time of trial Jones and Fundingsland were, over objections, permitted to amend their pleadings, by interlineation, to raise two specific objections to appellants' title which were not contained in the two title opinions. These title opinions were not delivered to either of the appellants prior to June 23, 1955, when Fundingsland handed them to appellant John Podewitz although, on June 22, 1955, Fundingsland had advised appellant Madeline V. Podewitz that their title had been found defective.

Appellants contend the provision in the escrow agreement, which was prepared by counsel for Jones, that they furnish a merchantable title of the premises to the lessee is, by the language thereof, a condition precedent to the agreement becoming effective and was waived by Jones when he deposited the sum of $1,000 with the bank on March 28, 1955. The rules governing the construction of contracts, which would also apply

to the construction of an escrow agreement where one of the parties thereto has had it prepared, have been recently restated by the court in Valentine Oil Co. v. Powers, 157 Neb. 71, 59 N. W. 2d 150; Long v. Magnolia Petroleum Co., 166 Neb. 410, 89 N. W. 2d 245; and General Credit Corp. v. Imperial Cas. & Indemnity Co., 167 Neb. 833, 95 N. W. 2d 145. Here the provision in the escrow agreement, as to furnishing merchantable title to the premises, is somewhat ambiguous. The rule relating thereto is also stated in Long v. Magnolia Petroleum Co., *supra;* and General Credit Co. v. Imperial Cas. & Indemnity Co., *supra.* As stated in Long v. Magnolia Petroleum Co., *supra:* "Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it."

There are, however, three other rules which, in view of the record, we think are here applicable. As held in Clough v. Standard Oil Co., 130 Neb. 136, 264 N. W. 170, by quoting from Nebraska Hardware Co. v. Humphrey Hardware Co., 81 Neb. 693, 116 N. W. 659: " 'In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the contract. The court will, so far as possible, put itself in the place of the parties and interpret the contract in the light of the circumstances surrounding them at the time it was made and the object which they had in view.' " See, also, Lowman v. Shotkoski, 106 Neb. 540, 184 N. W. 107; Wilderman v. Watters, 149 Neb. 102, 30 N. W. 2d 301; O. C. Hirsch Constr. Co. v. Peterson, 167 Neb. 295, 92 N. W. 2d 694. As stated in Wilderman v. Watters, *supra:* "It is well established, in the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine

their meaning and intention, but not to vary or contradict the plain terms of the instrument."

In Flory v. Supreme Tribe of Ben Hur, 98 Neb. 160, 152 N. W. 295, we said: "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it." See, also, Ericson v. Nebraska-Iowa Farm Investment Co., 134 Neb. 391, 278 N. W. 841.

The other rule applicable is stated in Edwards v. Hastings Distributing Co., 107 Neb. 621, 186 N. W. 980, by quoting from Cady v. Travelers Ins. Co., 93 Neb. 634, 142 N. W. 107: " 'The practical interpretation given their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction.' " See, also, Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311; Williams v. Williams, 168 Neb. 135, 95 N. W. 2d 205.

The purpose of the escrow agreement was to give Jones, or his assigns, the right to explore for gas and oil on the appellants' premises. The drilling of a well for that purpose is expensive and a requirement to make sure that appellants had a merchantable title to the premises, in order to protect such an investment, seems only to be a reasonable requirement of the escrow agreement. That Jones had an abstract prepared for that purpose evidences his understanding of what the agreement meant. That appellants understood their obligation in this respect is evidenced by the terms of the oil and gas lease they executed and deposited in escrow wherein they warranted the title to the premises therein described. We do not think the requirement in the escrow agreement to furnish merchantable title was a condition precedent to the agreement becoming ef-

fective, but rather a provision thereof to be performed by appellants in order to protect and to secure to Jones, or his assigns, any investment made in drilling a test well thereon for the purpose of exploring for gas or oil.

Under the provisions of the escrow agreement appellants were not obligated to furnish an abstract of title to their property. In fact, the agreement provides that "No abstracting costs shall be chargeable to lessors herein." As stated in Easton v. Montgomery, 90 Cal. 307, 27 P. 280, 25 Am. S. R. 123: "The agreement being silent upon this point, it was incumbent upon the plaintiff (here Jones or his assigns) to provide the abstract, and to satisfy himself as to the condition of the title." See, also, Boekelheide v. Snyder, 71 S. D. 470, 26 N. W. 2d 74; Budwit v. Herr, 339 Mich. 265, 63 N. W. 2d 841.

Under the escrow agreement it was appellants' duty to furnish a merchantable title to their premises. In view of that fact it was their duty to cure or correct any defects therein within a reasonable time after such defects, if valid, were called to their attention. That is, furnishing a merchantable title thereto means to have such title and to comply with any reasonable request by Jones, or his assigns, with reference to the proof thereof so as to permit the commencing of drilling operations thereon with safety. On the other hand it was the duty of Jones, or his assigns, to have the title thereto examined within a reasonable time after the escrow agreement was entered into and, if they had any objections thereto, to inform the appellants thereof as soon as possible so they could, if they thought such objections valid, attempt to cure or correct them and thus permit the escrow agreement to be performed within the time therein specified. However, no affirmative duty rested upon the appellants in this respect under the provisions of the escrow agreement until some specific complaint was made to them as to why their title was not merchantable. See, Justice v. Button, 89 Neb.

367, 131 N. W. 736, 38 L. R. A. N. S. 1; Easton v. Montgomery, *supra;* Chandler v. Gault, 181 Wis. 5, 194 N. W. 33.

In view of the fact that the escrow agreement provided only 3 months (92 days) to commence drilling a test well for oil and gas it was Jones', or his assigns', duty to obtain an abstract, have it examined, and advise appellants of defects therein, if any, within a reasonable time. See, Easton v. Montgomery, *supra;* John v. Timm, 153 Minn. 401, 190 N. W. 890; McKay v. Ryan, 204 Minn. 480, 284 N. W. 57. Jones secured an abstract to the premises certified to by a bonded abstracter as of April 15, 1955. Fundingsland had the abstract examined by his brother who, by an opinion dated May 20, 1955, found the title defective as did Ernest S. Baker in his opinion dated June 20, 1955. Fundingsland notified the appellants of this fact not earlier than June 22, 1955, or some 6 days before the time to commence drilling would expire and some 85 days after the escrow agreement was entered into. Appellants contend that by doing so appellees waived any right to object to the quality of appellants' title, which they might otherwise have had. In view of the provisions of the escrow agreement Fundingsland, by making the objections as late as he did, did not thereby waive the right to make them but did waive any right to a performance thereof by appellants within the period of time fixed by the escrow agreement therefor and thereby gave appellants a reasonable time to cure or correct any claimed defects, even though doing so would extend performance on their part beyond June 28, 1955, and that right would include curing such defects by an action based on adverse possession. See, Miller v. Ruzicka, 109 Neb. 152, 190 N. W. 216; Gilmore v. Cover, 134 Neb. 559, 279 N. W. 177; Klapka v. Schrauger, 135 Neb. 354, 281 N. W. 612; Easton v. Montgomery, *supra;* 55 Am. Jur., Vendor and Purchaser, § 273, p. 719, § 274, p. 720. But if the owners, as appellants did here, decide to stand

on the title they have and it is actually defective in the manner contended for, they, of course, lose their rights under the parties' agreement but, on the other hand, if the objections made are without merit and the title is good the reverse would be true. See, White v. Evans, 120 Colo. 200, 208 P. 2d 922; 55 Am. Jur., Vendor and Purchaser, § 275, p. 720.

A merchantable title has been defined by this court in Northouse v. Torstenson, 146 Neb. 187, 19 N. W. 2d 34, as: "A merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser." See, also, Perry v. Ritze, 110 Neb. 286, 193 N. W. 758; Shonsey v. Clayton, 107 Neb. 695, 187 N. W. 113; Justice v. Button, *supra;* Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790. As stated in Shonsey v. Clayton, *supra:* "* * * a title to be good or marketable must be free from reasonable doubt either in law or fact."

In Baker's opinion of June 20, 1955, he objected to the title furnished not being merchantable so as to permit the lessee, or his assigns, to begin drilling operations thereon on the fact that the tract did not contain 10 acres. It is apparent, from a letter of the State Geologist dated June 8, 1955, that he had not and would not, under the rules and regulations he had promulgated, approve an application to drill a well for the purpose of discovering gas or oil on a tract of less than 10 acres. Appellants' lots had an area of about 7 acres. The record discloses that Jones, a consulting petroleum engineer, while he and Raymond Grant were negotiating with appellants for a lease at the latter's home in Harrisburg on March 27, 1955, was informed by appellant John Podewitz that these premises contained only about 7 acres and that, because of that fact, he didn't think a permit could be obtained to drill a well thereon for gas or oil. When so informed Jones replied they didn't need 10 acres for that purpose. Fundingsland was aware

of the fact that the tract contained less than 10 acres when he handed Baker's opinion to appellant John Podewitz on June 23, 1955, for Fundingsland then told him he needed a few more acres to make a 10-acre tract and would need an extension of time and cash to obtain it. While Jones and Fundingsland pleaded this opinion of Baker as one of the reasons why appellants did not have a merchantable title within the meaning and intent of the escrow agreement, and offered the opinion and supporting data as evidence in support thereof, we do not think, in view of certain principles hereinbefore set forth, that the parties, when they negotiated the escrow agreement, considered the acreage in the tract as any requirement insofar as appellants were required to furnish a merchantable title thereunder. We do not think this objection to appellants' title has any merit and, on appeal, appellees do not contend that it does.

As to the objections to the title of appellants raised by the opinion of C. F. Fundingsland, which were pleaded as a reason why appellants did not have a merchantable title, all are abandoned on appeal except one. We have examined all of the objections to the title raised by that opinion and find them to be without merit, including that raised on appeal which relates to a tax deed from the treasurer of Banner County to J. M. Wilson, dated February 3, 1915, which describes the property conveyed as "Lots 23, 24 & 25 in Block 33, Park Row, Town of Harrisburg, State of Nebraska." Appellees contend the description is ambiguous because the conveyance included "Block 33." The plat of Harrisburg, which is part of the abstract of title which C. F. Fundingsland examined, shows that the original town of Harrisburg does contain a Block 33, however said Block 33 does not contain any Lots numbered 23, 24, or 25. There is, however, a Park Row containing such lots although it does not contain a "Block 33." Under this situation we think what was said in Hart v. Murdock, 80 Neb. 274, 114 N. W. 268, has application here. There-

in we said: "A description in a deed must be construed like any other document. If some part is inconsistent with the other parts, that which is repugnant may be rejected altogether, if sufficient remain from which the intention of the parties can be ascertained." The same is true of the county treasurer's tax deed to Ruby Wilson, dated January 15, 1917, which conveys to her Lots 26, 27, 28, 29, 30, 31, 32, 33, and 34, "Park Row, (Blk 33) in the Village of Harrisburg, Banner County, Nebraska." We think the inclusion of Block 33 in both conveyances is mere surplusage.

At the time of trial, which commenced on November 19, 1959, appellees were, over objection, permitted to raise two additional objections to appellants' title. Appellants contend that the trial court erred in so doing. This contention is not without merit. See, Brown v. Security Mutual Life Ins. Co., 150 Neb. 811, 36 N. W. 2d 251; Ballou v. Sherwood, *supra;* Easton v. Montgomery, *supra;* Vangsness v. Bovill, 58 S. D. 228, 235 N. W. 601; Durband v. Ney, 196 Iowa 574, 191 N. W. 385; John v. Timm, *supra;* Condit v. Johnson, 158 Iowa 209, 139 N. W. 477. However, we shall consider these two objections on their merit for reasons which will hereinafter become apparent.

Appellees contend appellants' title to the premises in question is defective because of the doubtful situation surrounding the delivery of the deed from John M. Wilson and Ruby Wilson to Irene L. Podewitz and John Podewitz, Jr., dated April 15, 1942, and recorded on June 19, 1945, in the county clerk's office of Banner County in book 12, deed records, at page 333. It is, of course, essential to the validity of a deed that there be a delivery thereof in the lifetime of the grantor. Lewis v. Marker, 145 Neb. 763, 18 N. W. 2d 210; Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182. This deed was executed by both John M. Wilson and Ruby Wilson on April 15, 1942, but was not acknowledged until May 25, 1945, after John M. Wilson had died. The acknowl-

ment was made upon the affidavit of J. G. Shaul, a witness thereto, under and pursuant to the authority and procedure provided for doing so by section 76-228, R. R. S. 1943. Ruby Wilson also filed an affidavit stating the deed was executed and delivered to the grantees. Within the intent and meaning of this statute, as evidenced by our opinion in Wilson v. Wilson, 83 Neb. 562, 120 N. W. 147, when section 76-228, R. R. S. 1943, has been fully complied with, the question of the execution and delivery of this deed is established.

Appellees also contend the tax deed from the treasurer of Banner County to J. M. Wilson, dated February 3, 1915, did not meet the statutory requirement as to a recital of a public sale prior to the private sale and therefore absolutely void. That such was the law prior to 1903 is evidenced by our holding in Ludden v. Hansen, 17 Neb. 354, 22 N. W. 766, wherein we said: "A tax deed purporting to have been issued on a private sale must contain a recital that the land had been previously offered for sale for such taxes at public sale, and not sold for want of bidders." However, in 1903, the Legislature passed an act to provide a system of public revenue and repealed the old laws relating thereto. See Laws 1903, c. 73, p. 389. In Opp v. Smith, on rehearing, 102 Neb. 155, 169 N. W. 716, we said: "That act (Laws 1903, c. 73) does not require that the deed contain a statement that the land had first been offered at public sale." See, also, § 77-1839, R. R. S. 1943. Such is now required to be contained in the tax sale certificate when the land is sold for taxes at private sale. See § 77-1814, R. R. S. 1943. However, the act of 1903 contained a saving clause, section 242, which saved to the parties purchasing land at tax sales held prior to the passage thereof all rights, vested or otherwise, extended to them by the statute in force when the purchase was made. See, Laws 1903, c. 73, § 242, p. 479; Whiffin v. Higginbotham, 80 Neb. 468, 114 N. W. 599. That was the principle controlling of the facts in Wells v. Bloom,

96 Neb. 430, 147 N. W. 1112, and Opp v. Smith, *supra*. However, in Sherlock v. Gillis, 108 Neb. 72, 187 N. W. 812, although the tax sales therein involved were executed long after the act passed by the 1903 Legislature had become effective, we continued to follow our holding in Ludden v. Hansen, *supra*. In doing so we think the court was in error and our holding therein to that effect is overruled. The correct holding is that section 77-1839, R. R. S. 1943, does not require that a tax deed contain a statement that the land has been offered at public sale. All it requires is a statement in the deed as to whether the sale has been public or private.

Under the record before us the appellants would be entitled to a judgment notwithstanding the verdict (here the court's decision, jury having been waived) if proper procedures had been followed in the trial court for that purpose. However, only a motion for new trial was filed by appellants and our authority is limited accordingly. See Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367. We therefore reverse the judgment of the trial court and remand the cause to it with directions that appellants be granted a new trial.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

IN RE ASSESSMENT OF THE PERSONAL PROPERTY OF L. J. MESSER COMPANY, A CORPORATION.

L. J. MESSER COMPANY, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF JEFFERSON COUNTY, NEBRASKA, ET AL., APPELLEES.

106 N. W. 2d 478

Filed December 9, 1960. No. 34822.

1. **Appeal and Error.** An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court, it is tried de novo.

2. **Taxation.** The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value.
3. ———. The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action. However, the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuations fixed by the board becomes one of fact based upon evidence unaided by presumption.
4. ———. Section 77-1231.01, R. R. S. 1943, requires the taxpayer to furnish information as to his federal income tax return. This section does not stipulate that the information so furnished shall constitute the conclusive actual value of the property to be taxed.
5. ———. Section 77-112, R. R. S. 1943, sets forth a formula to be followed by the taxing authorities in taxing property. Such section is applicable to personal property as well as real estate, and should be considered by the taxing authorities in taxing either real or personal property.

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

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha*, for appellant.

Melvin Moss, for appellees.

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

MESSMORE, J.

This is an appeal taken by the L. J. Messer Company, a corporation, plaintiff, from the finding made by the County Board of Equalization of Jefferson County, defendant, to the district court for Jefferson County as provided for in section 77-1510, R. R. S. 1943. After hearing before the trial court, judgment was rendered in favor of the defendants, and the plaintiff's petition

was dismissed. The plaintiff filed its motion for new trial which was overruled by the trial court. The plaintiff perfected appeal to this court.

For convenience we will refer to the L. J. Messer Company, a corporation, as the plaintiff, and to the County Board of Equalization of Jefferson County as the board.

This appeal contests the correctness of an adjudication made by the district court for Jefferson County in sustaining the conclusion of the board which determined the valuation of the tangible personal property of the plaintiff for taxation purposes to be $31,165.

The petition of the plaintiff on appeal, insofar as necessary to consider, alleged that the plaintiff is and was the owner of a stock of merchandise located at 520-524 Fourth Street, Fairbury, Nebraska; that on March 1, 1958, the actual value of said stock of merchandise and inventory of said store did not exceed $25,666; that the plaintiff returned the actual value of said inventory upon its business schedule for the year of 1958, as required by law; and that on May 20, 1958, the board notified the plaintiff it had changed the actual value of said inventory as shown on the schedule from $25,666 to $31,165. The plaintiff further alleged that a transcript of the proceedings before said board was filed with the petition on appeal and made a part thereof; and that notice of appeal and bond were given as required by law for appeal from the ruling of said board. The plaintiff further alleged that the order and finding of said board was unjust, arbitrary, discriminatory, and in violation of law, and fixed the valuation in excess of the actual value of said property. The plaintiff further alleged that the value so fixed by the board was not based upon any evidence or information properly known to the board and without any consideration of the evidence; that the valuation made by the board was based wholly upon plaintiff's income tax return to the United State government; that the valuation shown upon said

income tax return was not the actual value of said stock of merchandise; that although the statute of the State of Nebraska required a copy of the income tax return to be filed, which was done by the plaintiff, the statute in no manner required that the copy of such return so furnished should constitute conclusive evidence of the actual value of the property for assessment purposes; and that the actual value of said property did not exceed the sum of $25,666. Plaintiff prayed that the valuation fixed by the said board be declared erroneous and illegal.

The defendants' answer to the plaintiff's petition on appeal admitted that the plaintiff was a corporation and the owner of stock and inventory of merchandise as alleged in the plaintiff's petition; that the plaintiff made a return of the stock of merchandise and inventory in the sum of $25,666; and that after due notice the board changed the assessment of said inventory from $25,666 to its actual value of $31,165. The defendants' answer denied that the finding of the board was unjust, arbitrary, discriminatory, and in violation of law, and alleged that the valuation assessed by the board was fair and reasonable. The defendants' answer denied every other allegation of the plaintiff's petition not specifically admitted, and prayed that the plaintiff's petition be dismissed.

The pertinent assignments of error set forth by the plaintiff are as follows: The trial court erred in failing and refusing to find that the valuation fixed by the board was contrary to the law and to the evidence; and the trial court erred in failing and refusing to find that section 77-1231.01, R. R. S. 1943, does not conclusively make the taxpayer's income tax inventory report figures the actual value thereof for tax purposes.

An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court, it is tried de novo. See, LeDioyt v. County of Keith, 161 Neb. 615, 74 N.

W. 2d 455; Weller v. Valley County, 141 Neb. 69, 2 N. W. 2d 606; Collier v. County of Logan, 169 Neb. 1, 97 N. W. 2d 879.

The burden of proof is upon the taxpayer to establish his contention that the value of his property has been arbitrarily or unlawfully fixed by the county board of equalization at an amount greater than its actual value. See, LeDioyt v. County of Keith, *supra;* Chicago, R. I. & P. Ry. Co. v. State, 112 Neb. 727, 200 N. W. 996.

In Collier v. County of Logan, *supra,* this court held: "The presumption obtains that a board of equalization has faithfully performed its official duties, and in making an assessment it acted upon sufficient competent evidence to justify its action. * * * However, the presumption that a board of equalization in making an assessment acted upon sufficient competent evidence to justify its action disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such values to be unreasonable resting upon the party complaining."

Section 77-1231.01, R. R. S. 1943, provides in part: "As part of the return of the business schedule, for taxation, there shall be attached thereto a certified statement of the dollar amount of the inventory at the end of the fiscal year as set out in the taxpayer's latest federal income tax return, * * *. The taxpayer shall also report in his business schedule the method of determining the inventory value in the certified statement attached thereto which he reported to the Director of Internal Revenue and the date of latest physical inventory." The statute then provides a penalty for failure to comply with the provisions thereof.

Section 77-1236, R. R. S. 1943, which was enacted in 1903, provides: "For the purpose of determining the true value of the stock of any merchant or manufacturer, the assessor shall have the right to demand of such

merchant or manufacturer an inspection of his inventories and all books of accounts for the preceding year, including the annual invoice and inventory of stock made by such merchant or manufacturer last preceding such assessment and the policies of insurance carried by such merchant or manufacturer on his stock for the year next preceding his assessment."

Section 77-201, R. R. S. 1943, provides in part: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value * * *."

Section 77-112, R. R. S. 1943, provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; and (6) market value in the ordinary course of trade."

The above authorities and cited statutes are applicable to the instant case.

This brings us to a summary of the evidence.

The record discloses that the plaintiff filed with the county assessor of Jefferson County form 2a for tax assessment purposes, showing inventory values on its federal income tax return in the amount of $34,214.64, and after making adjustments for purchases and sales from December 31, 1957, to March 1, 1958, the book value of plaintiff's stock of merchandise was shown as $36,666.94. The dollar amount shown by plaintiff's inventory at the end of the fiscal year was as above stated, $34,214.64. The date of the latest physical inventory was shown as November 30, 1957. The method used in determining the book value of the closing inventory was "Cost or Market" which will hereinafter be explained more fully by other evidence. The plaintiff claimed for obsolescence and depreciation 30 percent, or $11,000.08,

making the actual value of the inventory of the plaintiff's stock of merchandise $25,666.86. This value was changed by the assessor to $31,165, and the assessor stated in a letter to the plaintiff that 30 percent obsolescence was double what it should be, and allowed 15 percent to the plaintiff for obsolescence.

A witness who was the automotive purchasing agent for the plaintiff and had been since 1931, testified that he supervised the buying in the various stores of the Messer corporation, 15 in number, supervised the inventories, and had control of the equipment and various other matters that were incident to the inventories; that he was familiar with the manufacturers of the type of merchandise purchased by the plaintiff and the value of the same; that the Messer Company handled all automotive parts such as pistons, rings, valves, transmissions, differentials, axles, body repairs, and other items; and that it was the policy of the plaintiff to try to carry parts to cover every automobile, and to stock all commodities with reference thereto when service would be needed on such automobiles or other vehicles. This witness further testified that in addition to carrying merchandise for older models of automobiles, the plaintiff was required to purchase parts for new automobiles without being able to tell whether or not such parts would be salable. This witness also testified that when new automobiles were put on the market the plaintiff endeavored to obtain information on the same for services that might be rendered by it, and without knowing what such automobiles might require, the plaintiff bought, at a minimum, 30 percent of items that would never be salable. This witness further testified that because of the number of inventories the plaintiff was required to take in its 15 stores, a crew of men was used for this purpose. An inventory was taken of the plaintiff's Fairbury store on November 30, 1957, and from November 30, 1957, to December 31, 1957, there would be merchandise added to the stock, minus the sales of merchandise up to Decem-

ber 31, 1957. That is how the final figure of the inventories is arrived at. There are roughly 32,000 items, and each item is counted. This witness testified that it would be physically impossible to examine each item, but this witness checks the items as the same appear on the shelves in the store; and that no attempt is made at that time to evaluate the merchandise as to whether it is salable merchandise, because that would be impossible, due to the number of stores that must be inventoried and the fact that every item in each store is counted. This witness further testified that there were a large number of obsolete items such as fan belts, tractor valves, piston rings, axle shafts, car springs, shock knees, transmission gears, connecting rod bearings, etc., which are considered to be obsolete. This witness further testified that there was no inventory that was worth more than 50 percent of the book value of the merchandise; and that insofar as the plaintiff's operations were concerned, there was no way of taking the plaintiff's inventory to allow for the age of all the products or items that were on the shelves, and while such items were carried in the inventory at cost, they were actually decreased in value from 30 to 40 percent after the first year they were carried in stock. This witness further testified that in his opinion the actual value of the stock in the plaintiff's store in Fairbury as of March 1, 1958, was not more than $18,000; that jobbers constantly offer stocks of this type of merchandise for sale at discounts of from 30 to 50 percent below cost; and that all jobbers do not count their merchandise or items of stock on the shelves.

L. J. Messer testified that he had been engaged in the business of automotive parts, motor rebuilding, and machine shop operation since 1920; that there were different methods of taking inventories of automotive parts, and not all concerns take their inventories in the same way; that generally a stock of merchandise will sell at from 30 to 50 percent of the jobber's cost; that stocks

of merchandise have different values in different locations; that plaintiff specializes in "hard parts" for automobiles and tractors; and that the automotive parts business is different from other distributing businesses in that it does not lend itself to the use of sales and is confronted with a heavy obsolescence problem.

The county assessor testified that the valuation placed by him was based entirely upon the income tax figures of inventories as shown on form 2a; and that no method of ascertaining how the respective federal income tax inventory figures were arrived at by the individual taxpayer was used or known to the assessor or the board. The assessor further testified that the sale price of merchandise was not accepted as the value of same for tax purposes, and the cost price did not necessarily determine the actual value of merchandise; that the taxpayer was not required to bring in his income tax return to show whether the figure shown on the form 2a was correct or not, and no check was made to ascertain the manner in which the taxpayer arrived at the figures thereon, that is, whether the taxpayer had taken off any depreciation before making the federal income tax return; that whatever the merchant reported on his income tax return was accepted; and that this was the way the board assessed for the year 1958. The assessor further testified that in his opinion section 77-112, R. R. S. 1943, was more applicable to real estate than anything else and it was not applied to personal property because it was not applicable; and that the sole and only factor used by the board in arriving at the valuation of the inventory was the income tax figure, and this was uniformly applied by the board to all businesses in the county.

A certified public accountant, a partner of Peat, Marwick, Mitchell & Company, a large accounting firm in the United States, testified that he had been the auditor for the plaintiff corporation since 1930, and in addition had done a great deal of work in the field of wholesale and retail operations and was familiar with the methods

of accounting used therein. This witness further testified that he was familiar with the preparation of balance sheets and the examination and interpretation of such operations, including the balance sheet used in the preparation of federal income tax returns. This witness testified that the plaintiff's income tax returns for the years it had been in business had been taken on the same consistent basis, designated as "last in, first out"; that in addition to the "last in, first out" method of taking inventory there is another known as the "first in, first out" method; that the results of the two methods are not the same and do not show the same book value for the same physical inventory; that the "last in, first out" method of inventory is that in which the most recent purchases are charged to expense instead of the first or original purchases, whereas the "first in, first out" type of inventory would result in a valuation on a rising market of about 50 percent less than the amount shown by the "last in, first out" method; and that taking the same number of items, and depending upon the particular method used, you would arrive at different results as to book value. This witness further testified that the value of the stock of merchandise shown upon the balance sheet does not represent in fact the actual value of such inventory; that the inventory as shown upon the balance sheet for income tax purposes is not intended or desired to reflect the actual value of the merchandise; that the only way that the actual value of a stock of merchandise could be determined is by an investigation and examination by experts of the actual stock in question; that the balance sheet figures are generally not acceptable as the true indication of the actual value; and that the figures shown on the income tax return had no bearing on the actual value of the taxpayer's merchandise. This witness further testified that there are always items of obsolescence in any stock of merchandise that cannot be ascertained until the merchandise is actually sold or until the business is liquidated; that every business gath-

ers up unrealized losses in its inventory, being items of the inventory which will require a long period to sell or which may not be salable at all; that the slow-moving or obsolete items do not show up on the income tax return figures; and that the plaintiff was engaged in a peculiar type of business wherein price reductions would not assist in moving unsalable merchandise. This witness further testified that he was familiar with the fact that in case of the sale of a business, generally most sales end up on the basis of a discount of the book value of the inventory running to from 40 to 60 percent of the inventory figure.

A partner in the Fairbury Auto Parts Company, called by the defendants, testified that the business he engaged in was in competition with the business carried on by the plaintiff. He testified that the property of the Fairbury Auto Parts Company was listed for assessment on March 1, 1958, and in listing such business for assessment the assessor was furnished a statement such as that furnished by the plaintiff for the year 1957. With reference to parts and equipment which are not readily movable and may be classed as obsolete, this witness testified that the government permits a part of it to be written off; that the government does not permit the use of a percentage figure on deducting the inventory, that is, that it must be shown at what the items actually cost or at market value; that in making the inventory when there was an item difficult to sell, or obsolete, this item was entered at a determined valuation irrespective of the cost, and might show up on the inventory as a zero figure or at some other depreciated figure below cost; and that the Fairbury Auto Parts Company wrote off the obsolescence before the final figure or inventory taken by the partnership. This witness also testified that the Fairbury Auto Parts Company did 40 percent of its business in electrical supplies, air conditioning, and farm supplies. The plaintiff does not handle this type of merchandise.

To show the corroboration of the plaintiff's evidence by this witness called by the defendants, attention is called to his testimony as follows: "Q. And you pay on the inventory basis as listed in your Federal tax return? A. Yes. Q. And as in that form? A. That's right, even though I knew it was too high. * * * Q. And when you took your inventory you adjusted in the inventory for the obsolete merchandise that was dead? A. Yes. * * * Q. Would you say that that inventory figure that you came up with, would this represent the fair market value of your stock of merchandise, * * *? A. No. Q. Would that be more or less than the fair market value of your merchandise? A. More. Q. In other words, the inventory that you showed was in your opinion, then, actually more than the fair market value of your stock of merchandise? A. Right. * * * Q. So you would have returned approximately about half of what Mr. Winslow (the county assessor) made you return? A. Yes, sir."

A representative of the plaintiff testified, when called by the defendants, to the effect that the plaintiff carried a type of fire insurance whereby it is required to report 100 percent actual value; and that this report figure is arrived at entirely from the books of the plaintiff and does not represent the actual value for the reason that it is impossible to ascertain the actual value of merchandise each month, whereas the policy required the figure to be sent in each month.

An exhibit in evidence discloses that the plaintiff reported its insurance value at 100 percent at $36,329.39, on February 28, 1958.

It is apparent that the only reason the county taxing authorities refused to accept the plaintiff's evidence, which is in no way disputed, was that they believed that section 77-1231.01, R. R. S. 1943, imposed a mandate that the value shown on the inventory for federal income tax purposes must be accepted as the actual value of the property.

Section 77-1231.01, R. R. S. 1943, does require that in-

formation as to the federal income tax return be furnished. However, it is evident from a reading and analysis of such section that it does not stipulate that the information so furnished shall constitute the conclusive actual value of the property.

Section 77-1236, R. R. S. 1943, provides for an inspection of inventories and books of account, including annual inventories and policies of insurance. This section of the statutes has been in existence and on the statute books since 1903, and stands on an identical footing with section 77-1231.01, R. R. S. 1943.

Both of said sections of the statutes require the information to be furnished for the benefit of the taxing authorities, and so that the information therein may be weighed in arriving at the determination of what is the actual value, but neither of these statutes ever was intended to provide that the book value must be conclusively taken to be the actual value.

It appears that in the instant case the evidence discloses that the book records did not constitute a record of the true actual value of the property for the reason that in making up such book records the plaintiff's bookkeeping system did not allow for the taking of depreciation and obsolescence. Consequently, the information called for by section 77-1231.01, R. R. S. 1943, and section 77-1236, R. R. S. 1943, does not furnish the criterion as to the actual value to be placed on the stock of merchandise in question.

The record shows that the county taxing authorities did not consider the provisions of section 77-112, R. R. S. 1943, in arriving at the value of the stock of merchandise in the plaintiff's store at Fairbury.

As we read section 77-112, R. R. S. 1943, it applies to personal property as well as real estate, because it requires that in arriving at the actual value of property there shall be considered, among other matters, desirability and functional use, reproduction cost less depreciation, comparison with other property, and market

value in the ordinary course of trade. Section 77-112, R. R. S. 1943, was amended at the same session of the Legislature as section 77-1231.01, R. R. S. 1943, was enacted, and is just as controlling upon the county taxing authorities as is section 77-1231.01.

As we view the record, the evidence of the plaintiff was clearly sufficient to overcome the presumption that the board, in making the assessment, acted upon sufficient competent evidence to justify its action. However, the defendants offered no competent evidence to overcome the evidence of the plaintiff.

In the light of the foregoing, the judgment of the district court should be reversed and the cause remanded with directions that judgment be rendered fixing the actual value of the plaintiff's stock of merchandise for taxing purposes at $25,666.

REVERSED AND REMANDED WITH DIRECTIONS.

SECURITIES ACCEPTANCE CORPORATION, A DELAWARE CORPORATION, ET AL., APPELLANTS, V. ROBERT M. BROWN, APPELLEE.

106 N. W. 2d 456

Filed December 9, 1960. No. 34832.

1. **Contracts.** At common law all contracts in restraint of trade were against public policy and void.
2. ———. A contract which imposes partial restraint upon the exercise of a trade, business, or occupation is not unreasonable when it is ancillary to an actual transaction involving property, business, or employment made in good faith and is necessary or appropriate to afford fair protection to the one in whose favor the restriction is made. Such a contract will be respected and enforced.
3. ———. The law does not look with favor upon restrictions against competition, and an agreement which limits the right of a person to engage in a business or occupation will be strictly construed and will not be extended by implication or construction beyond the fair or natural import of the language used.
4. ———. However, such contracts should 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.

5. **Estoppel.** The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.

6. **Injunction: Contracts.** Injunction should not be granted to enforce a negative agreement in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression.

7. **Contracts.** A contract of employment may constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of the employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business.

8. ———. There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.

9. **Appeal and Error.** The determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns.

10. **Injunction: Contracts.** Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services.

11. **Contracts.** If the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge

of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.

12. ———. A contract in restraint of trade, which is neither limited in time nor space, is against public policy and void.

13. ———. The general rule is that a contract in partial restraint of trade must be reasonable in its terms and limited in its extent, that is, limited as to both time and space.

14. ———. However, where the conditions therein appear to be reasonable in their terms and operation, contracts containing restrictive provisions may be enforced although they are only limited as to either time or space.

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

Matthews, Kelley & Stone and *Baskins & Baskins,* for appellants.

McGinley, Lane, Shanahan & McGinley, for appellee.

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

WENKE, J.

On August 26, 1959, Securities Acceptance Corporation, a Delaware corporation, brought this action in the district court for Lincoln County against Robert M. Brown, a former employee, for the purpose of enjoining him from breaching certain restrictive or non-competitive provisions of an employment contract which he had entered into with it. Subsequent thereto, and before trial, leave was granted to make Securities Acceptance Corporation of North Platte, a Nebraska corporation, a party plaintiff and that was done. On September 4, 1959, a hearing was held on plaintiffs' application for a temporary injunction and it was denied. Thereafter,

upon the issues raised and tried, the trial court found generally for the defendant and against the plaintiffs, held the restrictive provisions in the parties' employment contract to be void, and dismissed plaintiffs' petition. Plaintiffs thereupon filed a motion for new trial, which the trial court overruled. This appeal is from that order.

For convenience we shall herein refer to appellant Securities Acceptance Corporation, a Delaware corporation, as Securities Acceptance; to appellee Robert M. Brown as Brown; and to appellant Securities Acceptance Corporation of North Platte, Nebraska, a corporation, as Securities Acceptance Corporation of North Platte.

The action, which primarily seeks injunctive relief, is equitable in its character and, on review, will be considered de novo. See, Tarry v. Johnston, 114 Neb. 496, 208 N. W. 615; Personal Finance Co. v. Hynes, 130 Neb. 547, 265 N. W. 541; Adams v. Adams, 156 Neb. 778, 58 N. W. 2d 172; Gallagher v. Vogel, 157 Neb. 670, 61 N. W. 2d 245. In view of that fact we will reach an independent conclusion without referring to the findings of the district court.

Securities Acceptance is primarily engaged in the consumer loan and finance business although it also does some insurance business. Its home, or main office, is located in Omaha, Nebraska. It opened a branch office in North Platte, Nebraska, in 1947 and has continued to conduct such business there ever since. Some of the business in the North Platte office is done in the name of Securities Acceptance Corporation of North Platte, a wholly owned subsidiary of Securities Acceptance. However, Securities Acceptance directs all policies, conducts all activities, and hires and pays all employees in the North Platte office, including Brown while he worked therein.

Sometime prior to March 11, 1952, Securities Acceptance employed Brown to work in its North Platte office.

This contract of employment was entered into verbally. He began such employment as credit and collection manager on March 11, 1952, at a salary of $325 per month. Immediately prior thereto Brown had been working for Commercial Credit Corporation in Salina, Kansas. Commercial Credit Corporation is also engaged in the financing of loans and Brown had been working for it since December 1, 1949. On July 16, 1952, his salary was increased to $350 per month.

Sometime in August of 1952, Securities Acceptance sent Brown a written contract covering his future employment with it. This contract was in behalf of Securities Acceptance and its subsidiaries. Brown voluntarily signed this agreement and returned it to the Omaha office of Securities Acceptance. It was also executed by Securities Acceptance. It is dated August 28, 1952, and provides, insofar as here material, that:

"V. The Employee, unless especially instructed by the Employer to disclose the facts, in which event he will comply strictly with said instructions, will keep secret from every person the names of past, present and prospective borrowers, security holders, and all other business customers and associates of the Employer, together with all knowledge which he may at any time acquire during his employment as to such subjects and as to any loans, earnings, finances, and all other concerns of the Employer.

"VI. The employee will not furnish to any other person or retain or use any papers or information whatever concerning any of the subjects and matters referred to in paragraph V.

"VII. All the terms of paragraphs V and VI shall remain in full force and effect for three years after the termination of the employment provided for in this contract; and, during the whole of said period, the Employee will not make or permit to be made any public announcement that he was formerly connected with the Employer.

"VIII. For a period of eighteen months after the termination of his employment for any reason, provided such termination shall take place not less than six months after the date hereof, the Employee will not engage in any way directly or indirectly in any business competitive with the Employer's business, nor solicit or in any other way or manner work for or assist any competitive business in any city or the environs or trade territory thereof in which the Employee shall have been located or employed by the Employer."

After Brown signed this written contract of employment with Securities Acceptance, dated August 28, 1952, he continued on as credit and collection manager in its branch office at North Platte. Effective as of October 1, 1953, his salary was increased to $375 per month, and, as of July 15, 1954, to $390 per month. Thereafter, effective as of April 1, 1955, he was promoted to branch manager of the North Platte office. While his salary was reduced to $350 per month upon becoming branch manager he was thereafter, as a part of his pay, given a bonus, which was dependent upon profits. For the balance of that year his bonus was $947.96. He continued as branch manager of the North Platte office until June 1, 1959. During the interim his salary was raised on January 1, 1956, to $400 per month; on August 1, 1956, to $425 per month; on January 1, 1957, to $460 per month; on January 1, 1958, to $475 per month; and on January 1, 1959, to $500 per month. During this same period of time the bonus arrangement, based upon profits of the office, continued. In 1956 his bonus was $2,044.56; in 1957 it was $1,671.33; in 1958 it was $1,519.52; and up to June 1, 1959, it was $590.02. As branch manager of the North Platte office Brown had full control and was in complete charge of all operations therein. He operated it under Securities Acceptance policies and procedures and became fully acquainted therewith, as well as with the customers doing business with Securities Acceptance and its subsidiaries in and through that office.

Effective as of June 1, 1959, Brown was promoted to the position of a supervisor at a flat salary of $675 per month. This position required him to work out of the home office in Omaha. For this purpose he came to Omaha but did not bring his family with him, leaving them in North Platte. His family then consisted of himself, his wife, and three small children. During the time he continued in the employ of Securities Acceptance as a supervisor, which was up to July 15, 1959, he was not assigned any regular territory over which he was to act as a supervisor for he had to go through a training period to acquaint himself with the work of the position. This training consisted of going with one of the regular supervisors and learning the duties of a supervisor from him. It should here be mentioned that Securities Acceptance had some 89 branch offices in some 15 states to which 6 supervisors were assigned, each having supervision of a certain number of these branch offices for which they were responsible. During this period Brown spent a week in connection with the branch office at Norfolk, Nebraska, a week in connection with the branch office in Winner, South Dakota, and 2 weeks in connection with 1 of the 4 branch offices in Omaha. The balance of the time he spent in the home office. On July 13 and 14, 1959, Brown talked with certain officers of Securities Acceptance and told them he was going to quit as of July 15, 1959, and did so. He gave as a reason for doing so that the driving he would have to do in connection with his work as a supervisor would be more than his back could stand. However, he also told them he was going to work for the North Platte Loan and Finance Company in its office in North Platte, stating he had an opportunity to invest up to $35,000 therein, and asked if Securities Acceptance expected to enforce the restrictive provisions of his employment contract with it if he did so.

While operating out of the home office of Securities Acceptance during the 6-weeks' period Brown drove to

North Platte to be with his family on four or five different weekends. During the latter part of June, or forepart of July, Brown, while in North Platte over a weekend, called Mr. George Larkin of the North Platte Loan and Finance Company on his own volition. The purpose for calling Mr. Larkin was to discuss with him the possibility of being employed by the North Platte Loan and Finance Company in its North Platte office. It should here be stated that North Platte Loan and Finance Company is engaged in consumers loan and finance business and in insurance business in North Platte in competition with Securities Acceptance. As a result of Brown's call he had two visits with Larkin on two different weekends. One of these took place in Brown's home, the other in Larkin's. Not only was salary discussed at these meetings, but also the question of Brown buying into the company. Thereafter, on July 17, 1959, after Brown had quit his employment with Securities Acceptance, Brown and Larkin had a further discussion in North Platte which resulted in Brown being employed by North Platte Loan and Finance Company to work in its North Platte office at a salary of $600 per month. Brown commenced to work on this job on August 3, 1959, and has been so employed ever since. Since taking this employment Brown admits he has made changes in the manner of operating North Platte Loan and Finance Company, which changes, he admits, were based on knowledge he had gained while an employee of Securities Acceptance. He also admits he has called on and talked to former customers of Securities Acceptance but denies having solicited them for any business.

Cases of other jurisdictions dealing with the subject of this litigation are very numerous and, upon what appear to be similar situations, come to varying conclusions and results. This court has also dealt with the subject thereof on several occasions. Insofar as it has done so we see no good reason for now departing from

the principles therein announced except to say that each case must necessarily stand or fall on its own facts.

At common law all contracts in restraint of trade were against public policy and void. Kadis v. Britt, 224 N. C. 154, 29 S. E. 2d 543, 152 A. L. R. 405. However, while not favorites of the law, partial restraints are not deemed to be unenforcible when they are ancillary to a contract of employment and are apparently necessary to afford fair protection to the employer. Roberts v. Lemont, 73 Neb. 365, 102 N. W. 770; Dow v. Gotch, 113 Neb. 60, 201 N. W. 655; Personal Finance Co. v. Hynes, *supra*. The same would be true of a partial restraint of business competition in connection with a sale or purchase thereof. Downing v. Lewis, 56 Neb. 386, 76 N. W. 900; Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842; Swingle & Co. v. Reynolds, 140 Neb. 693, 1 N. W. 2d 307; Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N. W. 2d 841; Adams v. Adams, *supra*: Gallagher v. Vogel, *supra*. As stated in Adams v. Adams, *supra*: "A contract which imposes partial restraint upon the exercise of a trade, business, or occupation is not unreasonable when it is ancillary to an actual transaction involving property, business, or employment made in good faith and is necessary or appropriate to afford fair protection to the one in whose favor the restriction is made. Such a contract will be respected and enforced." The restrictive provisions here sought to be enforced are ancillary to the contract of employment between Securities Acceptance and Brown.

In Adams v. Adams, *supra*, we said: "* * * the law does not look with favor upon restrictions against competition, and an agreement which limits the right of a person to engage in a business or occupation will be strictly construed and will not be extended by implication or construction beyond the fair or natural import of the language used." However, in Gallagher v. Vogel, *supra*, we went on to say: "Contracts (such as here involved) 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." See, also, Tarry v. Johnston, *supra.*

Brown contends the written contract of employment dated August 28, 1952, is not enforcible because there was no new consideration involved when it was executed. The original oral agreement of employment between the parties was one at will, that is, either party could terminate it at any time. The written agreement provides, in this respect, "* * * that either party may terminate the employment * * * by fifteen days' notice to the other, and if the Employer shall so terminate it, the Employee shall be entitled to pay for said fifteen days, * * *." Thus additional benefits accrued to Brown by the terms of the written agreement which did not contractually exist prior thereto.

But Brown testified he understood, at the time he went into the office of Securities Acceptance at North Platte on March 11, 1952, that it had a policy, whenever it discharged an employee for any cause, of giving such employee 2-weeks' pay. Let us assume, but not decide, that by reason of such policy, if it existed, that the foregoing provision in the written agreement did not provide any additional benefits for Brown. After Brown voluntarily signed the agreement with Securities Acceptance he continued his employment with it for almost 7 years. During this time he was promoted to branch manager of the North Platte office and thereafter, as of June 1, 1959, to the position of supervisor. During the same period of time his salary was, at various times, increased, raising it from $350 up to $675 per month. During the period from April 1, 1955, to June 1, 1959, Brown received bonuses, based on profits, totaling $6,773.39. Then, on July 13, 1959, without good cause, he notified his employer he was quitting as of July 15, 1959, probably to take employment with another company in North Platte engaged in a similar business,

thus clearly breaching his contract of employment. Under similar or comparable situations other courts have enforced the restrictive provisions of an agreement in partial restraint of trade. See, Roessler v. Burwell, 119 Conn. 289, 176 A. 126; Ofsowitz v. Askin Stores (Tex. Civ. App.), 306 S. W. 2d 923; Krueger, Hutchinson & Overton Clinic v. Lewis (Tex. Civ. App.), 266 S. W. 2d 885, affirmed 153 Tex. 363, 269 S. W. 2d 798; McAnally v. Person (Tex. Civ. App.), 57 S. W. 2d 945. Having received the benefits accruing to him from his execution of the contract for almost 7 years, Brown is not now in a position, after his breach thereof, to ask a court of equity to find such agreement void because of want of consideration.

We also think Brown is estopped from doing so by the following principle, as stated in Brisbin v. E. L. Oliver Lodge No. 335, 134 Neb. 517, 279 N. W. 277: " 'The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced or of which he has accepted any benefit. * * * And so also the acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.' "

As we have already said, each case must, of necessity, depend upon its own facts and circumstances. In Smith Baking Co. v. Behrens, 125 Neb. 718, 251 N. W. 826, it was said: "Injunction should not be granted to enforce a negative agreement in a contract of employment, unless the court is satisfied that the enforcement will be just and equitable and will not work undue hardship or oppression." See, also, Mollyneaux v. Wittenberg, 39 Neb. 547, 58 N. W. 205; Downing v. Lewis, *supra;* Wittenberg v. Mollyneaux, *supra;* Roberts v. Lemont, *supra;* Dow v. Gotch, *supra;* Stanford Motor Co. v. Westman, *supra.* In Swingle & Co. v. Reynolds, *supra,* we held that: "A contract of employment may

constitute a valid consideration for an agreement that the employee will not compete with his employer during the term of the employment, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer's business."

There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee. See, Roberts v. Lemont, *supra;* Dow v. Gotch, *supra;* Personal Finance Co. v. Hynes, *supra;* Annotation 43 A. L. R. 2d, Employee-Restrictive Covenant-Area, § 19, p. 144.

As to the first two of the foregoing we have already decided, in Personal Finance Co. v. Hynes, *supra,* that a restriction on employment is not injurious to the public as it relates to a small loan business; that if properly limited as to time and space, it is no greater than is reasonably necessary to protect an employer engaged in such business; that an employee, within such time, is capable of doing irreparable damage; and that, under such circumstances, the remedy available at law is not adequate, thus giving rise to injunctive relief. But Brown contends our holdings in this regard in Personal Finance Co. v. Hynes, *supra,* are merely dicta since the case was actually disposed of on the basis of waiver. However, a careful consideration of the situation therein involved makes the following applicable to our holdings therein: "The determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns." Lancaster County v. McDonald, 73 Neb. 453, 103 N. W. 78. Discussion of what is dictum

may be found in Sedlacek v. Welpton Lumber Co., 111 Neb. 677, 197 N. W. 618. Therein we quoted with approval the following from Union P. R. R. Co. v. Mason City & Ft. D. R. R. Co., 199 U. S. 160, 26 S. Ct. 19, 50 L. Ed. 134: " 'Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no sense, be called mere dictum. * * * It cannot be said that a case is not authority on one point, because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.' "

Satisfactory proof is required of the one seeking injunctive relief to establish the necessity for and the reasonableness of covenants restraining the inherent right to labor in cases when the restraint deals with the performance of personal services. Roberts v. Lemont, *supra*.

The evidence shows that Brown, as branch manager of the North Platte office of Securities Acceptance for many years, became familiar with its policies, its procedures, its customers, and all the factors involving the operation thereof and, upon assuming his employment with the North Platte Loan and Finance Company, could use such knowledge for the benefit of that company. As stated in 9 A. L. R. in Part III, § b(1), p. 1468, under the Annotation of Restrictive Covenant in Employment Contract: "It is clear that if the nature of the employment is such as will bring the employee in personal contact with the patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair ad-

vantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business, either for himself or for another, providing the covenant does not offend against the rule that as to the time during which the restraint is imposed, or as to the territory it embraces, it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer." We think the foregoing has application to the situation here presented. See, also, Masden v. Travelers' Ins. Co., 52 F. 2d 75, 79 A. L. R. 469; Matthews v. Barnes, 155 Tenn. 110, 293 S. W. 993, 52 A. L. R. 1350; Briggs v. Butler, 140 Ohio St. 499, 45 N. E. 2d 757.

Brown contends the enforcement would be unduly harsh and oppressive upon him because of his physical condition and economic status. As to the first, the evidence shows that Brown, in connection with his services in the armed forces of his country, suffered a service-connected disability in the form of rheumatoid arthritis as a result of swimming in cold water in connection with his duties in under-water demolition. This condition was first classified by the Veterans Administration as 20 percent disabling but later, as of October 13, 1953, rated as 40 percent disability. Brown advised the officers of Securities Acceptance of his condition but never to the effect that it bothered him in any manner in performing his duties for it. During the time he was at North Platte, especially while branch manager, his duties required him to drive his car over the territory being served from that office. He drove it from 2,500 to 3,000 miles a month. He never complained that doing so bothered him and apparently it didn't. When he was transferred to Omaha and became a supervisor he knew that position involved traveling extensively in a car but he made no complaint of that fact when he accepted the position. In fact, during the short time he was in Omaha he drove to North Platte on either four or

five weekends. He also, at all times, did extensive driving for his and his family's pleasure. We do not think the evidence establishes that driving a car very seriously affected Brown's back. In fact, we think he used that as an excuse for breaching his contract at a time when he had already laid the ground work for employment with North Platte Loan and Finance Company. The latter was the real reason why he quit.

Brown was born on June 27, 1925. He was graduated from the Business Administration College of Kansas State University in 1949 with a B. S. degree, having majored in economics and mathematics. After graduation he sold life insurance for a short while but, as of December 1, 1949, took employment with Commercial Credit Corporation at Salina, Kansas. He was married on December 30, 1950. When, as of February 22, 1952, Brown made application for employment with Securities Acceptance, his financial situation seemed to be reasonably good for a man of his age. The extent of his income while working for Securities Acceptance has already been set forth. It shows he has ability in the field which he has chosen for his life's work. Employment in this field is available in any city of any size. Brown has been and is now apparently being paid disability benefit payments on the basis of his service-connected disability in his rank of lieutenant (j.g.) which he had at the time of his honorable discharge from the Navy. When Brown resigned he took a cut in salary. He then told the officers of Securities Acceptance that doing so was not of too much concern in view of both his and his wife's families' financial condition. In fact he told them that by going with North Platte Loan and Finance Company he had a chance to invest up to $35,000 therein. Considering all of these factors we do not think the restriction imposed, as such, was unduly harsh and oppressive. As we said in Dow v. Gotch, *supra:* "Times have changed since the day when an English court, upon being advised that a contract of

this nature had been entered into, declared that if he had the employer present he would impose a fine upon him to be paid to the king. In that early day men did not go from place to place as they do now. The habit of covering a wide territory had not become prevalent. A journeyman stayed where he had been raised and where he had learned his trade. A removal to a place 50 miles or more away was a great undertaking. People did not go away from home, they stayed where they were put. The situation is different here and today. A removal to another state is easy and comparatively inexpensive. Men and women of all employments go from one end of the country to another, and quickly find new places, and more advantageous places, in which to practice their vocations. With the development of railroad service and the automobile (and we might add air travel), people do not remain rooted to their native soil. Without danger to themselves and without detriment to the public, men and women may, and do, contract not to engage in particular work in a particular place. Modern living has extended the range of the individual." In this respect we have not overlooked Brown's service-connected disability but that does not appear to seriously affect his ability to work at his chosen vocation, plus the fact that he receives disability benefit payments by reason thereof. Nor have we overlooked the fact that Brown now has a family. That is only normal for a man of his age. His life's work is of such a nature that it can be carried on in almost any city and is not peculiarly adapted only to North Platte, except as he has an advantage in working there because of the knowledge he has gained and friends he has made while working for Securities Acceptance. We think what was said in Household Finance Co. v. Sutton, 130 W. Va. 277, 43 S. E. 2d 144, has application here: "As to a possible hardship upon the employee, it is to be remembered that in this instance the employee voluntarily terminated his own

employment or resigned. There is no imputation of bad faith on the part of the employer in that respect. If there were our holding on that phase of the matter could well be different. But in the case at bar we see no hardship brought upon the defendant Sutton unless it is that which resulted from his own lack of bona fides."

In connection with the question of whether or not the restriction is reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate interest and reasonable in the sense that it was not unduly harsh and oppressive on the employee the question of time and space is involved. A contract in restraint of trade, which is neither limited in time nor space, is against public policy and void. See Roberts v. Lemont, *supra*. As stated therein: "A contract in restraint of trade which is not limited either in time or space is against public policy and void." Where the conditions therein appear to be reasonable in their terms and operation, contracts containing restrictive provisions may be enforced, although they are limited as to either time or space. See, Roberts v. Lemont, *supra;* Farmers State Bank v. Petersburg State Bank, 108 Neb. 54, 187 N. W. 117; Dow v. Gotch, *supra*. However, the general rule is that a contract in partial restraint of trade must be reasonable in its terms and limited in its extent, that is, limited as to both time and space. See, Mollyneaux v. Wittenberg, *supra;* Downing v. Lewis, 59 Neb. 38, 80 N. W. 261; Roberts v. Lemont, *supra;* Engles v. Morgenstern, 85 Neb. 51, 122 N. W. 688; Buerstatte v. Swanson, 112 Neb. 30, 198 N. W. 174; Dow v. Gotch, *supra;* Swingle & Co. v. Reynolds, *supra*. As stated in Roberts v. Lemont, *supra:* "The general rule is that a contract in partial restraint of trade should be reasonable in its terms and limited in its extent, both as to time and space, * * *." We think the latter is applicable here.

With respect to the contract provision as to space

it provides the restriction shall apply "in any city or the environs or trade territory thereof in which the Employee shall have been located or employed by the Employer." The provision definitely limits the area to cities in which an employee has been located or employed or to the environs or trade territory thereof. That Brown fully understood that "trade territory," as contained in the contract, applied to the geographical area assigned to a branch office by Securities Acceptance is fully established by the record. That fact was fully evidenced when the "trade territory" serviced out of North Platte was decreased when a branch office was established at McCook. Brown is not now in a position to dispute that fact. We have held that such a limitation of area is an enforcible provision. Personal Finance Co. v. Hynes, *supra.*

There is a further factor involved in the area limitation provision. It is disjunctive in form. It permits restraint in any city in which the employee has been located or employed by his employer; to any such city and its environs; or to any such city, its environs and trade territory. The latter within the area as the use of "trade territory" in the agreement was understood by the parties. See, Whiting Milk Companies v. O'Connell, 277 Mass. 570, 179 N. E. 169; McAnally v. Person, *supra;* Household Finance Corp. v. Sutton, *supra.* As stated in Whiting Milk Companies v. O'Connell, *supra:* "A contract in restraint of trade in which the territory is unreasonably extensive may be divisible as to space and enforced in equity within a reasonable area."

We come then to the question of the limitation as to time. It is for a period of 18 months after the termination of Brown's employment with Securities Acceptance for any reason in any city in which he may have been located or employed and not 18 months from the last date he was located or employed in such city by the employer. And such is the manner in which Securities Acceptance construed it for it sought to enjoin

Brown for 18 months from July 15, 1959, the date he severed his employment with it, and not from May 31, 1959, the latter being the last day he was located at and employed in the office at North Platte. In other words, if Brown had been last located or employed in the office at North Platte some 20 years prior to leaving his employment with Securities Acceptance, the provision would still be effective to restrain him from seeking employment in North Platte in the field in which Securities Acceptance is engaged for 18 months thereafter. We do not think such provision is necessary to protect Securities Acceptance insofar as it is operating a loan business in North Platte, or any other city. We find it is unduly harsh and oppressive on Brown or any other of its employees coming within the provisions of similar agreements.

Having come to the conclusion that paragraph VIII of the parties' agreement is unreasonable insofar as it provides an unreasonable length of time during which an employee may be prevented from taking up his vocation in any city where he has been located or employed while in the employment of Securities Acceptance, we turn to the other restrictive provisions hereinbefore set forth.

Paragraphs V and VI thereof, insofar as they relate to Brown while he was in the service of Securities Acceptance, are reasonable and proper but with that viewpoint we are not here involved. Paragraph VII provides that they shall remain in full force and effect for 3 years after the termination of the employment, together with the restrictions contained in paragraph VII itself. We think paragraph VII is unenforcible because there is no limitation on area. Certainly it is not necessary, in order to reasonably protect Securities Acceptance's legitimate interests, to prevent a former employee covered thereby from doing all the things therein prohibited in all cities of the United States, and their trade territories, in which Securities Acceptance

has not been or is not now operating. But assuming such provisions are enforcible, we think there is a good reason why they should not be enforced in this action in view of the record before us. Within the intent and meaning of the contract, we do not think paragraphs V, VI, and VII applied to Brown after he obtained employment with North Platte Loan and Finance Company on August 3, 1959, for paragraph VIII relates to the limitations placed on such employee after he obtains, either directly or indirectly, reemployment in the same field. However, insofar as the restrictions contained in paragraphs V, VI, and VII, relate to paragraph VIII, they are controlled by our holding in regard thereto.

We have come to the conclusion that Securities Acceptance is not entitled to the injunctive relief herein sought and for that reason we affirm the action taken by the trial court.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF OAKDALE TELEPHONE COMPANY, OAKDALE, NEBRASKA, A CORPORATION.
OAKDALE TELEPHONE COMPANY, APPELLANT, V. HENRY WILGOCKI ET AL., APPELLEES.
106 N. W. 2d 486

Filed December 9, 1960. No. 34844.

1. Public Service Commissions. The Nebraska State Railway Commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that it be done.
2. Public Service Commissions: Appeal and Error. On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.
3. Public Utilities: Telecommunications. A public utility is en-

titled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience.

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

O'Hanlon & O'Hanlon, for appellant.

Charles W. Raymond, for appellees.

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

SIMMONS, C. J.

This is an appeal from the Nebraska State Railway Commission. It will hereinafter be called the commission. It involves an application for an increase of rates by the Oakdale Telephone Company of Oakdale, Nebraska. It will hereinafter be called the company. One of the appellees is Henry Wilgocki, one of two witnesses who testified for appellees at the hearing hereinafter referred to. They will where necessary be referred to as protestants or by name.

The commission denied the application. The company appeals. We reverse the order and remand the cause.

The company operates a magneto type service to some 287 customers in Oakdale and the area adjacent thereto. It has 15 rural lines. It received its last rate increase in March 1948. It keeps its books and records under the system prescribed by the commission for class "C" companies. It employs two operators of its switchboard. One received $65 per month with $5 deducted for house rent. The other received $60 per month. It asks for rates sufficient to increase the rate of pay of these operators to $105 and $100 per month, respectively. It has not had revenue sufficient to employ a lineman since the spring of 1959. The maintenance of its system has deteriorated since that time. It employs the services of a lineman of a neighboring

company when emergency service is required. It asks for rates sufficient to pay $250 per month for plant maintenance personnel.

It has had no regular bookkeeper since August 1959. It employs accounting service at the rate of $115 per month. It asks for a rate increase sufficient to pay an increased cost of $865 per year for that service.

The company claims a total investment as a rate base of $23,730.43. On that base it had a net earning of $41.09 for the year 1959. It asks for rates that would increase its earnings to $1,154.38 or a return of 4.94 percent on substantially the above rate base.

One of the witnesses was Joe Knievel, who testified that he was a director of a telephone company with offices in South Sioux City, which had been interested in acquiring the company—applicant here. He testified that the South Sioux City company "came up" with a value of approximately $15,000 for the Oakdale plant and franchise.

The applicant admits that the services it now renders are not of a commercial quality but offered testimony that if given the proposed rate increase it could restore its plant and give that quality of service.

The above facts are taken from the application of the company and the evidence at the hearing. They are recited as preliminary to the matters which we discuss.

It appears that controversy has arisen between stockholders about the election of officers and directors and that it has become a matter of litigation in the district court for Antelope County. At the opening of the hearing, later discussed herein, the attorney for the protestants moved for a continuance until that litigation was determined. He offered, but did not identify, the petition in the district court proceeding. The commissioner conducting the hearing said that the commission had decided it would take testimony concerning rates and charges only. The attorney for the protestants asked to preserve his objection and that the commission

consider it when it arrived at a decision. Nevertheless the protestants, as a part of their showing, later made formal offer of a certified copy of the petition and it was received over objection, although not "very pertinent."

The application in this case was filed February 1, 1960. Hearing thereon was set for March 10, 1960, at Neligh, Nebraska, and later continued to and had on April 6, 1960.

Rule 4.7 of the Rules of Practice and Procedure before the Nebraska State Railway Commission provides that: "The Commission may in its discretion assign any case before it to an Examiner for initial hearing. All Examiner's reports and recommendations shall be served upon the interested parties of record. Within ten days after the date of the mailing of the Examiner's report and recommendation, any party may file and serve exceptions thereto and reasons in support thereof. Exceptions to the Examiner's report with respect to statements of fact and matters of law must be specifically stated and numbered separately. If exceptions are taken to conclusions in the report, the points relied upon to support the exceptions must be stated and numbered separately. If no exceptions are filed within ten days after the mailing of the Examiner's report and recommendation, the Commission will consider same and render its decision."

Rule 6.1 of the Rules of Practice and Procedure before the Nebraska State Railway Commission provides that: "Ordinarily no oral argument will be permitted at the close of the hearing. However, the Commission or Examiner may request or permit such argument. The Commission will hear oral argument in all cases on exceptions to the Examiner's report and recommendation, and on motion for rehearing, where there is a prior request therefor in writing. Unless otherwise ordered by the Commission, oral argument will be limited to thirty minutes on each side."

The "initial hearing" here was conducted by one of the commissioners. Obviously he was acting in the capacity of and with the duties and responsibilities of an examiner. He made no report or recommendation to the commission and of necessity none was or could be served on "interested parties of record." There was accordingly no opportunity given to serve exceptions thereto and reasons in support thereof.

The hearing before the commissioner was concluded on April 6, 1960. One week later on April 13, 1960, it filed what is recited to be its "Opinion and Findings." It consists of one sentence: "The Commission, having considered the application, filings *and the evidence in the matter,* is of the opinion and finds that the application should be denied." (Emphasis supplied.) It ordered the application "denied."

The commission by the expedient of having a commissioner hear this cause sought to avoid compliance with the intent and purpose of rule 4.7 hereinbefore mentioned. There was no report and recommendation of the one commissioner for the commission to consider and upon which to "render its decision," save and unless the report and recommendation was made in secret. This conclusion is made clearly apparent when it is considered that the notice of appeal was filed herein on April 27, 1960. The bill of exceptions was prepared on May 2, 1960, and together with exhibits was filed with the commission on May 3, 1960. This was 3 weeks after the commission entered its formal recital on April 13, 1960, that it had "considered * * * the evidence in the matter" before denying the application.

There are in rule 5 on evidence several rules applicable to a commissioner or examiner holding hearings. One of them is: "When objection is made to the admissibility of evidence, the presiding Commissioner or Examiner may receive such evidence subject to later ruling by the Commission." Rules of Practice and Procedure before the Nebraska State Railway Commis-

sion, Rule 5.1. What was the ruling of the commission on the admissibility of the copy of the petition of the pending Antelope County action? This record reveals nothing in answer to that question nor to the question to what extent, if any, that pending action was the basis for the decision herein. The procedure followed by the commission here prevented the applicant from raising that question.

Rule 6.1 hereinbefore mentioned provides that the commission will hear oral argument in all cases on exceptions to the examiner's report and recommendations. By the expedient of having neither report nor recommendation in compliance with its rules, oral argument by the applicant was denied.

This record is replete with repeated avoidances of the commission's own rules and those rules which are in American justice designed to assure an applicant a fair hearing before the commission. Due process was denied the company. The applicant and this court are left facing the question unanswerable from the record: Why was the application denied?

The company on the evidence produced is denied a fair return on its invested capital, even on the value fixed by the protestants; it is denied the revenue to secure necessary employees to maintain and operate its plant; it is denied the opportunity to pay employees an adequate, reasonable wage; and it is denied the revenue necessary to put its plant in a condition to render reasonable service. The company's patrons are denied the service that public convenience and necessity entitles them to in this age. Parenthetically, it may be pointed out that of the almost 300 patrons of the company, only two witnesses appeared against the allowance of the application. One of those was admittedly interested in securing the ownership of the company for the South Sioux City company. The other seemed to take the position that the company should first rehabilitate its lines and modernize its plant at the ex-

penditure of considerable funds. To that the company replies that its present revenues are such that the securing of outside capital is a practical impossibility and that by the provisions of its articles of incorporation its power to borrow is limited to "30 percent of the paid-up capital stock" of the corporation, and that the above provision "cannot be amended."

We had a somewhat comparable situation in Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 87 N. W. 2d 715. There we said: "A mere recital of this record is sufficient to show that the commission's acts, violating its own rules made for its own proceedings and violating those rules made by it for the protection of the rights of an applicant, were unreasonable and arbitrary. The applicant, for all this record shows, was accorded no hearing before the commission. The commission listened to no argument (section 75-402, R. R. S. 1943); it made no finding of facts; it gave the applicant no reason for its action; and it provided no basis for a review of findings of fact. * * * the effect of the order is to find that there was no need for more revenue so that the applicant could meet the needs of its property for maintenance, betterments, and extension of service. Also that there was no need for more revenue to meet the applicant's fixed charges such as taxes and interest. Also that there was no need for more revenue to meet the payment of an adequate fair return to its stockholders. As to these three areas of need, the evidence was unchallenged. The commission denied any relief to the applicant without an examiner's report, without a hearing by the commission, and apparently without access to the transcript of the evidence. * * * The duty of determining what conclusion should be made as to those matters rests upon the commission. The commission has the duty to give full, adequate, and fair consideration to the claims of an applicant for rate increases. The applicant has the right to require that it be done. * * * The commission should consider each

of the several items and make findings of fact thereon. In that way if the applicant is dissatisfied, we, on appeal, may consider the matter in the light of the rule that: On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary. Chicago, B. & Q. R. R. Co. v. Keifer, 160 Neb. 168, 69 N. W. 2d 541.

"The evidence here does not meet that test.

"There is evidence here which, without dispute, demonstrates that the commission's finding denying any rate increase applicable thereto was unreasonable and arbitrary.

"A public utility is entitled to rates for its service that may normally be expected to yield a fair return upon the reasonable value of the property that is being used for the public convenience. Marquis v. Polk County Telephone Co., 100 Neb. 140, 158 N. W. 927; Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission, 103 Neb. 695, 173 N. W. 690."

(Here there is a question about the base value of the company's property, but a substantial value is conceded by protestants.)

"There is no question about the return that the rates required by the commission may normally be expected to yield. There is no question about the amount that the applicant may be able to pay to its investors. There can be no question that it is not a fair return on invested capital.

"The order of the commission is clearly wrong. It is reversed and the cause remanded."

We repeat and again hold what we said and held in Skeedee Independent Tel. Co. v. Farm Bureau, *supra*.

REVERSED AND REMANDED.

JOHN L. MORTON ET AL., APPELLEES AND CROSS-APPELLANTS, V. TRAVELERS INDEMNITY COMPANY, A CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES.

106 N. W. 2d 710

Filed December 16, 1960. No. 34820.

1. **Trial.** A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. ———. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court.
3. **Negligence: Trial.** A definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is obvious and unmistakable, and failure to define proximate cause as such by instructions of the court could not have reasonably entered into and affected the result.
4. **Trial: Appeal and Error.** Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
5. ———: ———. Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defect.
6. **Insurance.** The parties to an insurance contract may make the contract in any legal form they desire, and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.
7. ———. An insurance policy should be construed in the same

manner as any other contract in order to give effect to the intent of the parties at the time it was made.

8. ———. The language therein used should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean.

9. ———. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.

10. ———. The clause, "collapse of the building or any part thereof," appearing in an insurance policy such as that at bar, means a sudden or unusual shrinking, settling, or falling of the building or any part thereof, or a loss of firm support, rigidity, or connection with other parts, but the wall or walls or other parts of the building need not have actually fallen down or together into an irregular mass or flattened form within the abstract text definitions of the term "collapse," unless the policy so prescribes.

11. **Insurance: Attorney and Client.** The power of the court to award attorneys' fees taxed as costs in legal proceedings is generally dependent upon statutory authority, and statutes so providing, such as section 44-381, R. R. S. 1943, must be strictly construed and applied.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Cline, Williams, Wright & Johnson and *Charles E. Wright*, for appellants.

Crosby, Pansing, Guenzel & Binning and *Donn E. Davis*, for appellees.

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

CHAPPELL, J.

Plaintiffs, John L. Morton and Mary Ellen Morton, who jointly owned a dwelling house property at 2702 Bradfield Drive in Lincoln, brought this action against defendant, Travelers Indemnity Company and others, seeking to recover under the provisions of a "Comprehensive Dwelling Policy" of insurance covering the

dwelling, which policy defendant company had duly executed and delivered to plaintiffs on or about January 1, 1957, upon payment of $88.80 as the first annual premium. Among other things, such policy insured plaintiffs to the extent of but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after loss against all direct loss by fire, lightning, windstorm, and hail perils and other multiple enumerated scheduled risks.

Among other things, the policy agreed to pay for direct loss by: "9. Collapse: Loss by collapse shall mean only the collapse of the building or any part thereof." Also, under the terms of the policy, the homeowner had a contractual duty to make reasonable repairs confined solely to protection of the property from further damage, and keep an accurate record of such repair expenditures. It further provided that costs of any such repairs directly attributable to any peril insured against should be included in determining the amount of loss.

In that connection, plaintiffs attached a copy of the policy to their petition, and, relying upon its provisions aforesaid, sought to recover from defendant the cost of repairing the basement walls and other damages to their dwelling as direct loss when sometime between about March 23, 1957, and March 28, 1957, a part of their dwelling's concrete basement walls allegedly collapsed and damaged other parts of the house, and imposed serious and immediate danger that the dwelling would further collapse. Original defendants other than Travelers Indemnity Company were dismissed out of the action and are not here involved.

Defendant's answer admitted that plaintiffs were joint owners of the property, and that defendant issued the policy of insurance thereon for a risk entitled therein "collapse," as alleged. Defendant then specifically denied that plaintiffs suffered any "collapse" loss as de-

scribed in the policy, and denied generally except as expressly admitted. It was stipulated that plaintiffs' reply in the nature of a general denial should be considered as filed.

Upon trial to a jury, plaintiffs adduced evidence in their behalf and rested. Thereupon, defendant moved for a dismissal of plaintiffs' petition and cause of action, or in the alternative to direct a verdict in favor of defendant substantially upon the grounds that plaintiffs' evidence was insufficient to support and establish any cause of action under the "collapse" provisions of the policy. Such motion was overruled and defendant rested without adducing any evidence in its behalf.

Upon submission to the jury, it returned a verdict in favor of plaintiffs and against defendant for $1,500, and judgment was rendered accordingly. Thereafter, plaintiffs' motion for an allowance of attorneys' fees, under the provisions of section 44-381, R. R. S. 1943, and defendant's motion for judgment notwithstanding the verdict or in the alternative for new trial, were overruled. Thereupon, defendant appealed, assigning and arguing that the trial court erred as follows: (1) In overruling defendant's motion to dismiss and failing to render judgment for defendant pursuant to its motions; (2) in the giving of instruction No. 5; (3) in failing to instruct on proximate cause; (4) in admitting exhibits Nos. 2 to 13, inclusive; and (5) in failing to hold that the verdict and judgment were excessive and not supported by the evidence. We do not sustain the assignments.

On the other hand, plaintiffs cross-appealed, assigning and arguing that the trial court erred in overruling their motion for an allowance of attorneys' fees. We do not sustain their assignment.

As recently as Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238, we reaffirmed that: "A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision

thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence."

Also, in Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N. W. 2d 557, we reaffirmed that: "Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court."

As summarized, plaintiffs' evidence discloses substantially the following: Plaintiffs purchased the property known as 2702 Bradfield Drive shortly prior to January 1, 1957, when they purchased the policy here involved from defendant and paid the $88.80 premium therefor. The policy's multiple provisions appear in the original policy which was offered and received in evidence. Plaintiffs moved into the house on February 1, 1957, with their two sons who were respectively 5 and 3 years old. The boys played almost daily in the basement, and Mrs. Morton was in the basement working and looking after them several times a day. The house was about 30 years old when purchased but it was in good condition. It had recently been redecorated and there were no visible warps or cracks in the walls on the first and second floors; or a drop in one end of the house; or cracks; or bowing, bulging, or caving in of the north, south, and west walls of the basement when plaintiffs purchased the house or when they left Lincoln for a trip to Chicago on March 23, 1957. In that connection, Mrs. Morton had been working in the basement until 2 a. m. on Saturday morning, March 23, 1957, in order to prepare for that trip, but the house was then

intact. Thus, about 8 or 9 a.m. on March 23, 1957, plaintiffs both left for the trip and returned therefrom on the evening of Thursday, March 28, 1957. While absent from Lincoln, there had been a heavy snow which was rapidly melting upon their return.

When they returned that evening, Mr. Morton went down into the basement to see whether the rapidly melting snow had leaked into the basement. It had not done so. However, he observed that the north wall had a slight water stain on it and that the wall was bulging and caving in his direction, as was also the west wall. The same condition existed on the south wall, only more so. That wall was coming into or buckling into the center interior of the basement. That wall was cracked from almost the upper righthand corner to almost the lower lefthand corner, and some of the concrete blocks had broken. That wall bulged inward about 4 to 6 inches and had the appearance of immediately falling into the basement. The southwest portion of the south wall was no longer intact with the house, and there was a hole in between the blocks where they had broken open and the mortar had come out onto the basement floor, which it continued to do thereafter. The floor in the southwest corner of the basement was cracked and raised up some. The basement walls remained standing with the bulges and cracks in them, but they were not intact. Mr. Morton testified that he did not see any of the wall blocks lying out on the basement floor as a result of what you would call a collapse, but it looked like it could happen any minute. He did not know what the term "collapse" meant as used in the policy, but his opinion was that "collapse" was where something falls completely down, and in this situation it hadn't fallen completely down, but from the way it bulged and leaned it looked like total collapse could happen any time. The east wall was straight and looked like it had been repaired on some previous occasion.

Mrs. Morton made comparable observations, except that by measuring from an electric pipe on the south wall she thought it was bowed in from 9 to 10 inches.

A graduate consulting engineer, who specialized in soil, asphalt, and concrete problems, casually inspected the basement of plaintiffs' home on or about April 1, 1957, at the request of an agent for defendant. He testified that the north, west, and south walls all had a degree of inward bow or buckling, with the south wall being more pronounced and critical. He estimated that the convex bulging was 2 or 3 inches from a perpendicular line distributed fairly well over the entire south wall, and that same was buckling rather critically. Such wall was cracked and opened up between some blocks where they had been previously filled and painted, and that the east wall appeared to be relatively new. He advised that the walls needed to be replaced or repaired by being braced or otherwise supported, because they could completely collapse in the foreseeable future. He testified that the north and south walls would be carrying the predominant load of the house, and if they fell in, the house would follow them down and the floor base would collapse in the areas adjacent to the walls, and generally that the house and wall would go down or topple into the basement, but that no part of the house had yet collapsed into the basement. He testified that the condition so found was caused by previous relatively heavy precipitation and exterior pressure therefrom. He only inspected the basement walls.

Another witness, who examined and fully inspected the basement walls in April 1957, had been a contractor in Lincoln for 15 years, specializing in concrete masonry excavation work, and replacement of basement walls and foundations. He found considerable bulging and a vertical crack in the south and north walls, with less in the west wall. His opinion was that such basement walls had in fact a loss of firm connecting rigidity or support; that they had lost any holding power; that

after becoming overbalanced, they had lost their balance; that some of the blocks themselves were cracked in two, as distinguished from cracks in between the joints; and that the cracked blocks had very little holding power against outer pressure. He testified that evidently the east wall had been previously relaid with the same type of material. His opinion was that the condition of the north, west, and south walls was such that they could not have been repaired and made good or permanent without removal and reconstruction. He actually supervised their removal and replacement with newly constructed footings and walls. In doing so, timbers were placed up against the floor joists of the house and supported by jacks along the walls to hold the joists into position, then the walls were torn out and new 10-inch walls were laid back on the footings up under the house in such manner as to firm its support on the walls. The undisputed evidence is that he was paid $1,250 by the plaintiffs for such work, and that such amount was a fair and reasonable charge for the work and materials. In that connection, defendant argues that if plaintiffs are entitled to recover, the verdict and judgment should be reduced to $1,250 because, for want of sufficient evidence, plaintiffs could recover nothing for claimed damages and costs for repairing other parts of the house allegedly resulting from the damaged condition of the basement walls.

With respect to the upstairs portion of the house, plaintiffs testified that the house had been recently decorated and that prior to their trip to Chicago there were no visible cracks in or damage to the upstairs walls. However, upon their return from Chicago, they found cracks in the walls and corners that warped the paper, and other wall damage, to wit: In the south bedroom; over the window sills in the living room; in the bathroom; in the back hall and entryway; and in the den, hall, and stairway. The mantle on the south side of the fireplace could be seen to be warped and slanted

down toward the south, out of level; and the back entry door and walls were warped and pushed so clearly out of line that they had to change the lock on the door in order to keep it shut. In that connection, the consulting engineer who had inspected the basement walls at defendant's request, testified that the house walls would go downward if the north or south wall moved down as much as one inch. Photographs appearing in this record as exhibits Nos. 2 to 13, inclusive, graphically reflect the aforesaid condition of the upstairs on March 28, 1957, and November 10, 1959, and, contrary to defendant's contention, they were properly admitted in evidence, which disposes of defendant's fourth assignment of error.

Contrary to defendant's contention, the evidence was sufficient to support a contention that the upstair damages aforesaid directly resulted from the sudden and unusual condition and damages to the basement walls. No other inference could reasonably be drawn from the evidence.

In that connection, the parties stipulated, subject to objection by defendant, that if a named painter and paperhanger were called as a witness, he would testify that he had examined plaintiffs' house on or about April 8, 1957, and again on November 10, 1959, at which times it was in about the same condition, and that in his opinion the fair and reasonable value of repairing the cracks and repapering the upstairs would be respectively as follows: The living room, $150.50; the hall and stairway, $230.50; the lower bathroom, $27.50; the southwest bedroom, $29.50; the back hall, $75.00; and the den, $70.55. The total thereof was $583.55. Defendant's objection to such evidence, as incompetent, irrelevant, immaterial, and not tending to prove or disprove any issue in this case, was overruled, and from what has been heretofore and will be hereinafter pointed out, we believe that ruling was proper. It will be noted that the verdict of the jury was for only $1,500, and $1,250 thereof

was undisputed, so evidently the jury awarded plaintiffs only $250 for the upstairs repairs, and plaintiffs make no complaint thereof.

In the light of the foregoing, the first and primary question is the construction and application of the provision of the policy providing for direct loss insured against by "the collapse of the building or any part thereof." In substance, defendant argues from several text definitions of the term "collapse" that "the collapse of the building or any part thereof" means to fall together, as a building, through the falling of its sides; to fall into an irregular mass or a flattened form through loss of rigidity or support; to fall or cave in; to break down or fall; or to come to nothing. In that connection, defendant contends that the word "collapse" as so defined is unambiguous; that its meaning is fixed and understood by all, therefore plaintiffs' basement walls did not collapse; that the upstairs was not directly damaged by collapse of such walls within the terms of the policy; and that plaintiffs could not recover thereon because to permit it would create a new contract between the parties.

On the other hand, plaintiffs contend that this court is not faced with the problem of defining only the word "collapse" as argued by defendant, but rather with what the parties to the insurance contract meant by the clause "collapse of the building or any part thereof"; that is, what a reasonable person in the position of insured would have understood such clause to mean. Plaintiffs argued that a reasonable insurance purchaser would understand the coverage for direct loss by "collapse of the building or any part thereof" to mean a sudden or unusual shrinking, settling, or falling in of the building or any part thereof, or the loss of firm support, rigidity, or connection with other parts, but that the basement walls would not need to have actually fallen down, as stated by instruction No. 5 given by the trial court when considered in connection with

all other instructions given and the factual situation presented. Defendant made no request for a more specific instruction.

In that connection, it is generally the rule that: "Instructions to a jury must be considered together, so that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.

"Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects." Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

Also, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 146 Neb. 47, 18 N. W. 2d 551, held that: "Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions, considered separately, contain mere informalities or omissions which are not misleading or confusing."

As hereinafter observed, we agree with plaintiffs' contention; therefore the trial court did not err in giving instruction No. 5, or in failing to define proximate cause. With respect to proximate cause or direct loss, numerous instructions given by the trial court relating to plaintiffs' loss required that it be a "direct loss," or "direct result," or "directly attributable," or a "directly causing," or "causing" loss by collapse of the building or any part thereof, as provided in the policy. Such quoted words are plain and clear language, generally well understood. Also, a definition of proximate cause generally has no materiality and is not required to be given in order to avoid prejudicial error when, under the facts of the case, the legal causation is clearly obvious and unmis-

takable, and failure to define proximate cause as such, by instructions of the court, could not have reasonably entered into and affected the result. See, Danielsen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913; Kielley v. McCauley, 139 Neb. 60, 296 N. W. 437; Hildebrand v. McCauley, 139 Neb. 55, 296 N. W. 434.

In Lonsdale v. Union Ins. Co., 167 Neb. 56, 91 N. W. 2d 245, we reaffirmed that: "An insurance policy should be construed in the same manner as any other contract in order to give effect to the intent of the parties at the time it was made.

"The language therein used should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean.

"If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted.

"In the construction of a contract, the instrument must be construed as a whole giving force and effect to all of the provisions of the contract.

"The parties to an insurance contract may make the contract in any legal form they desire and, in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed." See, also, Koehn v. Union Fire Ins. Co., 152 Neb. 254, 40 N. W. 2d 874.

We have not heretofore construed and applied the language "collapse of the building or any part thereof." However, a few other courts have done so, with varying results in some respects, since the clause apparently first appeared in 1954. In that connection, defendant

cited and relied on Central Mutual Ins. Co. v. Royal, 269 Ala. 372, 113 So. 2d 680, which involved the provision "collapse of the house or a part thereof." The effect of that opinion was to hold that such language seemed to be a clear and unambiguous statement; that there could be no doubt about the meaning of the word "collapse"; and in so doing, cited Nugent v. General Ins. Co. of America, 253 F. 2d 800, another case relied upon by defendant herein, which involved what the Missouri court would probably hold, but the opinion failed to disclose what rules of construction it used in arriving at its conclusion that the word "collapse" in such a clause should be given its strict text definition.

Be that as it may, Central Mutual Ins. Co. v. Royal, *supra*, is factually distinguishable from the case at bar in all material respects. In that opinion, the court said: "In the case at bar there was no collapse of the building. There was no collapse of any part of the building. Some of the walls appeared to have cracks in them and in two or more places the concrete footing contained cracks, but there was no collapse of the building within the foregoing authorities. There was no falling in, no loss of shape, no reduction to flattened form or rubble of the building or any part thereof. The building was still in its original form and condition with the exception of a few cracks. Accordingly, we do not consider that the appellant was liable under the provisions of the policy to which we have referred or that the plaintiffs were entitled to recover." Also, a comparable situation appeared in Nugent v. General Ins. Co. of America, *supra*.

Defendant also relies upon Weiss v. Home Ins. Co., 9 App. Div. 2d 598, 189 N. Y. S. 2d 355, which involved the policy provision: "Collapse of building(s) or any part thereof including collapse caused by weight of ice, snow or sleet." Plaintiffs therein sought to recover damages for the alleged collapse of a lake dock. There was no proof as to whether or in what manner the dam-

age occurred or whether it occurred at the same time or gradually. The principal questions presented were whether such dock was a building within the meaning of the policy clause, and if so, whether the damage to it constituted "collapse." In that opinion the court said: "We agree with the trial court that 'To constitute the dock as a building under these circumstances however would require a strained construction which would not appear to be warranted by the facts.' But the decision need not depend upon that determination. The record is entirely barren of any proof that the damage to the dock constituted a 'collapse' within any accepted meaning of that word. Certainly the word involves an element of suddenness, a falling in, and total or near total destruction. Neither the oral testimony nor the photographic exhibits demonstrate any such thing. From the evidence it could as readily be determined that the damage to a portion of the dock was due to age or slow deterioration. Hence the plaintiffs have failed to sustain their burden of proof in establishing that their damage was caused by one of the perils insured against." Thus, that case is clearly distinguishable from the case at bar.

Plaintiffs herein rely upon recent cases almost directly in point. Travelers Fire Ins. Co. v. Whaley, 272 F. 2d 288, decided November 12, 1959, involved the clause "Collapse of building(s) or any part thereof." Decision therein turned upon whether there was a collapse of the basement foundation walls of the building under facts comparable in all material respects with those at bar. As in the case at bar, there was no claim that the building or any part thereof collapsed in the sense that it tumbled down or fell in a heap, and the insurance company, relying upon text definitions of "collapse," contended that the record did not support a finding that there was a collapse of part of the building within the meaning of the clause involved. The court's opinion, after citing and quoting from Grady v. Erhard, 143 Kan. 170, 53 P. 2d 478, said: "The court in that case

construed the word 'collapse' as it concluded the parties intended it should be used in the contract. So here, we must construe the word in the context it was used by the parties in executing this insurance contract. Did the parties intend there should be no coverage, and, therefore, no recoverable loss, unless there was a complete collapse and tumbling down of the foundation wall, so as to cause the superstructure to come crashing down in a heap of rubble; or did they mean the more realistic situation that if the foundation distintegrated by settling, pulling away or cracking so that it would no longer support the house, that there was a partial collapse? * * * If the appellant intended that the word 'collapse' should be ascribed the abstract dictionary definition it now contends for, it should have so stated. In the absence of such an expressed intent, we think it more realistic to define the terms in such a contract as connoting a sinking, bulging, cracking, pulling away of the wall so as to impair its function of supporting the superstructure and destroying its efficiency as a habitation."

Also, Jenkins v. United States Fire Ins. Co., 185 Kan. 665, 347 P. 2d 417, relied upon by plaintiffs, was decided December 12, 1959, and involved the clause "collapse of building(s) or any part thereof." Decision therein depended upon whether there was a collapse of the basement foundation walls of the building under facts comparable in all material respects with those at bar. As in the case at bar, there was no claim that the building or any part thereof collapsed in the sense that the basement walls had fallen, and the insurance company contended that there was no coverage under the collapse clause of the policy until the basement walls fell into a flattened, wrecked, or distorted shape. Referring to the evidence, the opinion said: "With respect thereto it suffices to say that although no one contends the basement walls had fallen, there was evidence of a crack running lengthwise almost all the way around the basement walls and, with reference to the north wall, that

such wall had settled, cracked and bulged to the extent its condition created an unsafe and dangerous situation with a possibility of its caving or falling in." The court then rejected the company's contention and, after pointing out that portion of the clause "or any part thereof," said: "When construed on the basis of intention, as required by the foregoing decision, and others therein cited, we believe the clause 'collapse of building or any part thereof' as used in the involved insurance contract is to be interpreted as comprehending that, if brought about by unusual and extraordinary circumstances which the parties to that agreement could not normally expect or foresee on the date of its execution, the settling, falling, cracking, bulging or breaking of the insured building or any part thereof in such manner as to materially impair the basic structure or substantial integrity of the building is to be regarded as a 'collapse' of the building within the meaning of that word as used in such clause of the policy. We further believe that questions relating to whether that condition came about under the previously related conditions and circumstances are questions of fact for the jury and the trial court." In that connection, such definition is in substance the language of instruction No. 5 given by the trial court in the case at bar, when considered in connection with all other instructions given.

Further, Bradish v. British American Assurance Co., 9 Wis. 2d 601, 101 N. W. 2d 814, relied upon by plaintiffs, was decided March 8, 1960, and involved the clause "Collapse of building(s) or any part thereof." Plaintiff therein contended that there was a collapse of a part of the building, to wit, the basement walls, under facts comparable in all material respects with those at bar, and defendant contended that there was no collapse whatever under the text definition of "collapse." In that connection, defendant contended that "collapse" meant: " 'To fall together or into an irregular mass or flattened form, through the loss of firm connection or

rigidity and support of the parts, or loss of the contents, as a building through the falling in of its sides, * * *.'" In such respect, the court then said: "Appellant submits that coverage against a collapse is limited to such an occurrence. Of course, such a falling would be a collapse. It is undisputed that this wall did not fall into an irregular mass or flattened form. The question is whether something short of a wall reduced to a heap of rubble will satisfy the term 'collapse' as used in the policy."

Thereafter, the opinion cited and quoted with approval from Travelers Fire Ins. Co. v. Whaley, *supra*, and Jenkins v. United States Fire Ins. Co., *supra*, as we have done, and said: "These facts demonstrated that before remedial measures were taken the basement south wall had bulged and cracked in such a manner as to impair materially the wall's basic structure and substantial integrity. We conclude, therefore, that a collapse occurred to a part of the insured building and the defendant is liable upon its policy for the loss attendant upon 'collapse.'"

In the light of such authorities relied upon by plaintiffs, it cannot be reasonably assumed that a person purchasing insurance for his home, including coverage for direct loss by "collapse of the building or any part thereof" understood such phrase as providing coverage if and only if his home, or at least a part thereof, falls together in an irregular mass or flattened form. Otherwise, the homeowner would be purchasing little if any added protection.

In deciding this case as one of first impression in this jurisdiction, we conclude that the authorities relied upon by plaintiffs, as heretofore mentioned and discussed, are sound and well-reasoned cases. We follow the reasoning and conclusions appearing therein, and decide that the verdict and judgment are supported by the evidence and are not excessive; and that the trial court did not err in overruling defendant's motion to dismiss or in re-

fusing to set aside the verdict and judgment and render a judgment for defendant pursuant to its motion. We also conclude that the trial court did not err prejudicially in giving instruction No. 5, or in failing to instruct on proximate cause, or in admitting exhibits Nos. 2 to 13, inclusive.

We turn then to plaintiffs' cross-appeal assigning that the trial court erred in overruling their motion for an allowance of attorneys' fees. In that connection, section 44-381, R. R. S. 1943, provides in part: "The court, upon rendering judgment against the insurance company upon any such policy of insurance mentioned in section 44-380, shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as part of the costs." Such policy of insurance mentioned in section 44-380, R. R. S. 1943, is one "written to insure any real property in this state against loss by fire, tornado, or lightning, * * *."

In Eddy v. German Ins. Co., 51 Neb. 291, 70 N. W. 947, this court said: "The right of a litigant in any case at law to recover costs is a statutory right; and in order that a litigant may recover an attorney's fee as part of his costs in a suit against an insurance company he must bring himself within the provisions of * * *" the applicable and controlling statutes.

Also, in Branson v. Branson, 84 Neb. 288, 121 N. W. 109, dealing with allowance of attorneys' fees, this court held that: "The power to award and tax costs in legal proceedings being unknown at common law, statutes providing therefor are to be strictly construed."

It is plaintiffs' contention that whenever the risk of loss by fire, tornado, or lightning is included in any insurance policy on real property in this state, then a judgment secured on any type of loss covered by the policy will entitle successful plaintiffs to an allowance of attorneys' fees taxed as costs in the proceedings. We do not agree. Here we are dealing with a policy called a "Comprehensive Dwelling Policy" containing

many different types of coverage organized into five different groups, and involving a multiplicity of risks in addition to fire, lightning, windstorm, and hail. Plaintiffs in this action recovered a judgment under the separate "collapse" coverage provision thereof, and not for any loss by fire, lightning, or windstorm, yet they contend that they were entitled to an allowance of attorneys' fees simply because the policy insured their real property from loss by fire or lightning for which they neither sought nor received a judgment. On the other hand, defendant contends that where there is multiple coverage combined under the terms of one single policy, the actual nature of the loss determines whether the provisions of section 44-381, R. R. S. 1943, apply. We agree. The very wording of the statutes so indicate. See, Omaha Fire Ins. Co. v. Thompson, 50 Neb. 580, 70 N. W. 30; Security State Bank v. Aetna Ins. Co., 106 Neb. 126, 183 N. W. 92. We conclude that in order to recover an allowance of attorneys' fees under sections 44-380 and 44-381, R. R. S. 1943: (1) There must be a judgment recovered against an insurance company upon an insurance policy; (2) the policy must be one "written to insure any real property in this state against loss by fire, tornado, or lightning"; and (3) the actual loss must be caused by fire, tornado, or lightning. Otherwise, such statutory provisions would be extended far beyond the original intent of the Legislature and cover every conceivable type of loss, whether to real or personal property or otherwise which happened to be covered in a multiple risk insurance policy, which included provisions insuring against fire, tornado, or lightning.

We conclude that the trial court properly denied plaintiffs any allowance for attorneys' fees, and that the judgment of the trial court in all respects should be and hereby is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF PERL BOWER, DOING BUSINESS AS BOWER FREIGHT LINE, WOLBACH, NEBRASKA, FOR AUTHORITY TO OPERATE AS A COMMON CARRIER OF PROPERTY FOR HIRE IN NEBRASKA INTRASTATE COMMERCE.

PERL BOWER, DOING BUSINESS AS BOWER FREIGHT LINE, APPELLEE, V. GEORGE AND PERRY M. BUTCHER, DOING BUSINESS AS BUTCHER BROS., ET AL., APPELLANTS.

106 N. W. 2d 689

Filed December 16, 1960. No. 34829.

1. **Judgments.** If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order.
2. ———. The function of a nunc pro tunc order is not to correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded.
3. ———. A nunc pro tunc order must conform to and be no broader in its terms than the one originally rendered.
4. ———. The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth.
5. **Public Service Commissions.** Courts should, upon review, interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights.

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

Nelson, Harding & Acklie, for appellants.

Cyril P. Shaughnessy, for appellee.

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

WENKE, J.

On August 18, 1959, Perl Bower, doing business as

Bower Freight Line, Wolbach, Nebraska, filed an application with the Nebraska State Railway Commission, hereinafter referred to as the commission, in Application No. M-8784, Supplement No. 1, seeking an order nunc pro tunc with reference to the commission's order of August 14, 1942, in Application No. M-1061, thereby seeking to include authority to serve St. Paul, Nebraska, in the regular route authority granted him by the commission in Application No. M-8784, Supplement No. 1, by an order dated December 28, 1948. The commission granted the relief sought and, by order nunc pro tunc, included both Grand Island and St. Paul as intermediate points on applicant's alternate regular route authority. Appellants, who intervened before the commission and objected to its granting the relief asked for, filed a motion for rehearing and reconsideration with the commission and have perfected this appeal from the overruling thereof.

The principles governing orders nunc pro tunc have been frequently stated by this court. They are as follows:

"If a judgment in fact was rendered, if an order in fact was made, and such judgment or order not recorded, then the court, at any time afterwards, in a proper proceeding and upon a proper showing, is invested with the power to render nunc pro tunc such judgment or make such order." North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 149 Neb. 823, 32 N. W. 2d 869. See, also, Watson Bros. Transp. Co. v. Red Ball Transf. Co., 159 Neb. 448, 67 N. W. 2d 475; Central West Investment Co. v. Barker Co., 79 Neb. 47, 112 N. W. 291. As stated in 30A Am. Jur., Judgments, § 592, p. 578: "Generally, a court has the authority and duty to amend records of its judgments and have the amendments entered nunc pro tunc, where the record of the judgment is not in accord with that actually pronounced in the cause and rendered."

"The function of a nunc pro tunc order is not to

correct some affirmative action of the court which ought to have been taken, but its purpose is to correct the record which has been made, so that it will truly express the action taken but which through inadvertence or mistake was not truly recorded." Akins v. Chamberlain, 164 Neb. 428, 82 N. W. 2d 632. See, also, Lockard v. Lockard, 169 Neb. 226, 99 N. W. 2d 1; State ex rel. Coulter v. McFarland, 166 Neb. 242, 88 N. W. 2d 892; North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., *supra;* Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.*

"A nunc pro tunc judgment must conform to and be no broader in its terms than the one originally rendered." Phelps v. Wolff, 74 Neb. 44, 103 N. W. 1062. See, also, Lockard v. Lockard, *supra;* Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra;* North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., *supra.*

"The order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to satisfy the court that the order is required to make the record reflect the truth." Fisher v. Minor, 159 Neb. 247, 66 N. W. 2d 557. See, also, Lockard v. Lockard, *supra;* Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.*

"Courts should review or interfere with administrative and legislative action of the Nebraska State Railway Commission only so far as it is necessary to keep it within its jurisdiction and protect legal and constitutional rights." Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.* The rule applicable to the foregoing is: "On appeal to the Supreme Court from an order of the Nebraska State Railway Commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary." Watson Bros. Transp. Co. v. Red Ball Transf. Co., *supra.*

The evidence discloses that Andy Nelson, doing busi-

ness as Nelson Freight Line of Wolbach, Nebraska, began hauling property for hire by motor carrier in intrastate commerce sometime in 1928 out of Wolbach, Nebraska. In 1937, the Legislature passed the Motor Carrier Act. Laws 1937, c. 142, p. 526. On December 17, 1937, Andy Nelson, doing business as Nelson Freight Line of Wolbach, Nebraska, was issued a certificate of public convenience and necessity under the so-called grandfather clause thereof for routes over which he was conducting services on April 1, 1936. Laws 1937, c. 142, § 7, p. 531. Route No. 1 of this certificate included St. Paul, Nebraska, as an intermediate point and Route No. 2 included Grand Island, Nebraska, as a terminus.

Route No. 1 of his authority, which permitted Nelson to go from Wolbach to Omaha with his trucks, did not permit him to return directly from Omaha to Wolbach but required him to return through Lincoln, Nebraska. To correct this inconvenient and uneconomical situation Nelson filed a request in writing with the commission on June 10, 1942, for that purpose. That he did so is evidenced by the commission's order of August 14, 1942, although the application itself could not be found. In response thereto the commission gave Nelson the relief he asked for, authorizing him to return from Omaha to Wolbach over the same route he was authorized to use in going from Wolbach to Omaha. However, in describing the authority Nelson was granted therein the commission did not include St. Paul as an intermediate point nor was Grand Island included in the same manner as before. It is this fact which caused the present application to be filed, for that deficiency continued to exist when the commission transferred Nelson's authority to Bower by its orders of June 10, 1948, and December 28, 1948, in Application No. M-8784, and Supplement No. 1 thereto.

In its order of August 14, 1942, the commission found: "* * * that the instant application should be granted;

that authority should be granted to applicant herein authorizing regular-routes operations as herein set forth and that the certificate of public convenience and necessity issued to applicant should be *clarified and corrected to conform to actual operations as conducted continuously from April 1, 1936 to date hereof.*" Based on these findings, it held: "* * * that the certificate of public convenience and necessity issued in Application No. M-1061 to Andy Nelson, d/b/a Nelson Freight Line, Wolbach, Nebraska, be, and the same is hereby, clarified and corrected to *conform to actual operations* and that a certificate of public convenience and necessity be, and the same is hereby, issued to applicant herein authorizing the following described operations, to-wit: * * *." (Emphasis ours.) In describing the authority so authorized the commission failed to include in Nelson's regular route authority, apparently through oversight in preparing the order, St. Paul and Grand Island as intermediate points thereon although the evidence establishes that Nelson actually served both of these cities as such on his regular routes during the period from April 1, 1936, to August 14, 1942, and, we might add, that Nelson and his successor have done so ever since. Under this situation an order nunc pro tunc by the commission, in order to correct this oversight in the commission's order of August 14, 1942, was proper and within the principles hereinbefore set forth.

We shall not trace the transfer of Nelson's authority to that of applicant. It is apparent that the commission, in doing so, transferred to applicant all of the authority that Nelson had, which would include what has now been fully described by the order nunc pro tunc. In view of what we have said we affirm the order of the commission.

AFFIRMED.