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REPORTS OF CASES

DECIDED BETWEEN

JUNE 9, 1962 and MARCH 1, 1963

IN THE

Supreme Court of Nebraska

VOLUME CLXXIV

WALTER D. JAMES
OFFICIAL REPORTER

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By WALTER D. JAMES, REPORTER OF THE SUPREME COURT
For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1962

BJORN LINDELOW, APPELLEE, V. PETER KIEWIT SONS', INC., A CORPORATION, APPELLANT.

115 N. W. 2d 776

Filed June 15, 1962. No. 35157.

1. **Negligence.** An "invitee" is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.
2. ———. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but licensees take the premises as they find them, the only duty of the occupier being to give notice of traps or concealed dangers.
3. **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.
4. ———. In every case, before the evidence is left to the jury, there is a preliminary question for the judge, 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.
5. ———. 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.

6. ———. A mere scintilla of evidence is not enough to require the submission of an issue to the jury.
7. ———. If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts.
8. Witnesses. As a general rule, a party calling a witness vouches for his credibility and is ordinarily bound by any evidence he gives which is not contradicted or shown to be unreliable by evidence which would justify the trier of facts in arriving at a different conclusion.

Appeal from the district court for Douglas County: JOHN A. BURKE, Judge. Reversed and remanded with directions.

Stoehr, Rickerson, Sodoro & Caporale, for appellant.

Seymour L. Smith and W. L. (Jim) Weber, for appellee.

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

BROWER, J.

This is an action for damages for personal injuries brought by Bjorn Lindelow, plaintiff and appellee, against Peter Kiewit Sons', Inc., a corporation, defendant and appellant, in the district court for Douglas County, Nebraska. A trial was had before a jury. At the close of the plaintiff's case the defendant moved for a directed verdict. The court overruled the motion and the defendant rested without introducing any testimony. Thereupon, the case was submitted to the jury which returned a verdict for the plaintiff in the sum of $379,500, and judgment was rendered against the defendant in that amount.

The defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial and upon the overruling thereof has brought the case to this court on appeal.

The injuries which the plaintiff sustained were in-

curred when he dove from a dock on the premises maintained by the defendant. The dock was on a lake known as Kiewit Lake. It is located on an area in Cass County which is east of highway No. 75, three-quarters of a mile south of the Platte River and 3 miles west of the Missouri River. The lake itself was created about the year 1934 by dredging and the hole incident thereto filling with water from underground, and from rain, snow, and runoff. About 12 or 18 months after the area was dredged the banks were at least in part sloped and sand was added for bathing. The original work was done by Peter Kiewit Sons' Company, a separate corporation, which still has title to the land itself. Commencing in the year 1941, it was first maintained by Peter Kiewit Sons' Company but during the times mentioned herein by defendant for picnicking, boating, swimming, fishing, ice skating, softball, and horseshoes. Its use was restricted to the employees of both Peter Kiewit Sons' Company and the defendant Peter Kiewit Sons', Inc. It was maintained to facilitate better employee morale. No charges were made to the employees though on occasion charcoal was sold to them for fuel in preparing food. On the northerly side of this lake was a floating dock. It was a platform 8 by 12 feet in dimensions in the nature of a raft, covered with burlap or sacking and supported on the surface of the water by a bevy of 10 55-gallon common oil barrels. On the side of the raft towards the lake was a diving board which on comparison with the raft from photographs in evidence seems to extend half its length or 6 feet farther out toward the center of the lake. On the side towards the shore was a plank which served as an approach to the float and also tended to keep the raft in position. It was fastened to the raft and in turn to a wooden timber on the shore. Ropes ran from the two corners of the raft nearest the shore to a post and a tree, respectively, to keep it from moving to the right or left, though it could move somewhat either way as the

lake rose or fell or, to some extent, from the wind. If the lake rose the ropes were shortened and if it fell they were lengthened.

There was a caretaker and watchman employed by the defendant on the grounds whose name was John Thomas, who will hereafter be referred to as Thomas. He resided the year-round in a cottage near the lake. This caretaker was 72 years of age. He had served continuously as watchman and caretaker since 1939. His duties were to see that outsiders didn't get in and those entitled to enter could do so, to keep the grass and weeds cut and raked, and to destroy the leaves according to instructions given him originally by defendant's vice president. Thomas and the plaintiff, his wife, and child had known each other for several years.

On the Sunday morning of March 10, 1957, the plaintiff, then about 34 years of age and employed by the defendant as an estimator, with his wife and 10-year-old daughter, went to this area, taking their lunch. They arrived there shortly before noon. Thomas was then at church. There were two gates to the grounds, both of which were locked. They stopped at both gates and honked at the gate close to the caretaker's cabin. Getting no response, they climbed over and crawled under the gate. They had previously entered in this manner when the gate was locked. They went to a cabin which had an open fireplace where food could be cooked. It had a screened porch facing the lake. Thomas returned from church about 12:30 p.m. Noticing their car at the gate, he went to the cabin where they were eating and visited with them. Plaintiff said to Thomas he was sorry they drove all the way down and he wasn't there, and in his absence they decided to climb over the gate. Thomas answered that he was sorry he wasn't there because it was his job. Plaintiff then stated that if Thomas went to church it didn't matter, they got in anyway.

Plaintiff's wife asked the caretaker, "Do you think we are crazy to go swimming this early in the year?"

Thomas replied, "No, I don't. The premises are open here. The lake is here, you can go swimming any time you want to." Plaintiff told his wife that she had cheated him by having her bathing suit under her slacks while he had not brought his own. Thomas then informed the plaintiff that his swimming suit was in the change house; that plaintiff had forgotten it last fall; and that he knew it was the plaintiff's because he was the last to swim there. After this conversation Thomas left to prepare his lunch.

It was a warm day for March with the temperature about 70° at the time of the accident. The report of the United States Weather Bureau at Omaha that day showed a high of 71° and a low of 38°. When they finished their lunch the plaintiff and his wife changed into bathing suits. After sunning themselves on the beach for about an hour the wife stood up and hurried out to the lake and waded out until the water came to her waist and then swam in a semi-circle back approximately to the same point. While she was doing this the plaintiff, in what he says was a half run, went to the dock and, after watching his wife a short time, dove in at a point shown on a photograph taken of the dock about 3 feet from the southeasterly corner of the dock, which corner is toward the lake.

On being helped from the water after this one dive it was found that plaintiff was injured. An ambulance was called and he was taken to the hospital. It was there found that his injuries were very severe. Though they are not necessary to this opinion, it can be said that he suffered a comminuted fracture of the sixth cervical vertebra resulting in paralysis of the lower limbs and of any functions where the nerve roots leave the spinal cord below the sixth cervical vertebra. Plaintiff's condition is diagnosed as that of a quadriplegic, which is paralysis involving the four extremities, and in plaintiff's case included the loss of the normal control of his kidneys and bowel. The condition appears perma-

nent and he will always be confined to a life in a wheelchair and a specially-made bed, with a device for lifting him from one to the other. He has had operations and extensive treatment of an expensive nature in the past which have necessitated great care, and he will require both treatment and care in the future.

The facts as set out above are of course ascertained from the evidence introduced by the plaintiff's own witnesses and are not in dispute. The rest of the evidence will be discussed as it appears pertinent to our decision. In those particulars where we find a variance we will note it as the plaintiff is entitled to receive every reasonable inference in view of the verdict of the jury.

The defendant makes 16 assignments of error, but in view of our ruling it will be necessary to discuss only the following: The trial court erred in holding that the evidence was sufficient to sustain the verdict; in not holding as a matter of law that the plaintiff was a licensee; in ruling that there was sufficient evidence of defendant's negligence for the jury to consider; in not ruling that the plaintiff was guilty of contributory negligence as a matter of law sufficient to bar recovery; in not holding that the plaintiff was guilty of assuming the risk as a matter of law sufficient to bar recovery; and in overruling defendant's motion for judgment notwithstanding the verdict.

In consideration of the case before us the first question to be deduced is the status of the plaintiff with respect to his presence on the premises where he was injured. That involves the question of whether the plaintiff was an invitee or a licensee thereon. The trial court evidently considered that under the evidence this was a question of fact to be determined by the jurors and submitted it to them for their decision. On this issue, as in all such questions, the rule is that before the evidence is submitted to the jury, there is a preliminary question for the judge, not whether there is literally no evidence but whether there is any evidence upon

which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Edgar v. Omaha Public Power Dist., 166 Neb. 452, 89 N. W. 2d 238.

The law with respect to invitees and licensees was discussed by this court in Malolepszy v. Central Market, 143 Neb. 356, 9 N. W. 2d 474, where this court stated: "This court has clearly defined the three terms as follows: 'The law places those who come upon the premises of another in three classes: Invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter.' "

The case of Malolepszy v. Central Market, *supra,* cites certain portions of Restatement of the Law, on the question of licensees as distinguished from business invitees which, though applicable, are not deemed to exactly express the rules affecting the case before us as well as these from which we will now quote from the same work.

In Restatement, Torts, § 330, p. 893, the general rule defining a licensee is given as follows: "A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission. * * *

"An invitation differs from a permission only in this: an invitation is conduct which justifies others in believing that the possessor desires them to enter; a permission is conduct justifying others in believing that the possessor is willing that they shall enter if they desire to do so. It is immaterial whether the consent which creates the license is an invitation originating with the possessor of the land or by a permission given upon request made by the licensee. The important fact is that the entry is by the consent of the possessor and it is immaterial that the suggestion of the visit originates with him or with his licensee." On page 894 of the

same section of that work it states: "A license may be given by any words, either written or spoken, which manifest consent."

"An 'invitee' is defined as a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage." 65 C. J. S., Negligence, § 43(1), p. 508. The same rule appears to be recognized in Restatement, Torts, § 332, p. 897.

The case of Kruntorad v. Chicago, R. I. & P. Ry. Co., 111 Neb. 753, 197 N. W. 611, is cited by the plaintiff herein and the language of the court is quoted wherein it said: "There is much confusion from the failure of courts to distinguish between a license and an invitation, and particularly between an implied license and an implied invitation. An invitation is inferred where there is a common interest or mutual advantage, or where an owner or occupant of premises, by acts or conduct, leads another to believe the premises, or something thereon, were intended to be used by such other person; that such use is not only acquiesced in by the owner or occupant, but is in accordance with the intention or design for which the way, place or thing was adapted or prepared or allowed to be used; while a license is implied where the object is the mere pleasure, convenience or benefit of the person enjoying the privilege."

Plaintiff argues that the wording of the quoted portion of the decision is applicable to the case before us and that the premises here involved were intended and designed for use as a recreation ground for plaintiff, including swimming, and it follows that the plaintiff was an invitee within the words quoted in that case. In the cited case the stairs in question were not constructed by the defendant railroad. They had no connection with its business but were adapted, prepared, and allowed to be used for the "mere pleasure, convenience, or benefit of the person enjoying the privilege." The holding in

the cited case we believe was clearly based on the fact that the injured plaintiff was using the stairway for his own affairs not connected with the defendant's business and not built by it or maintained with respect to its business.

In cases attempting to distinguish between licensees and invitees where there is an express invitation there is also confusion over the term invitation. In many instances where the court finds there was a license only it continues by further stating there was no invitation under circumstances that might lead one to suppose that wherever there is an invitation as a layman uses it in ordinary social affairs of life, the one receiving it becomes an invitee as the term is used in law.

The authorities cited and the cases clearly hold however that a license may result from an invitation making one a licensee or, on the other hand, may be such as to make one an invitee. The real difference is the purpose of the invitation. If the invitation relates to the business of the one who gives it or for the mutual advantage of both parties of a business nature, the party receiving it is an invitee. If it is an invitation for the convenience, pleasure, or benefit of the person enjoying the privilege it is only a license and the person receiving it is a licensee.

Many courts speak of those who receive invitations for matters not connected with business as social guests. They are however but licensees. The matter is discussed in 38 Am. Jur., Negligence, § 117, p. 778. It there states: "Although there is not a great deal of authority upon the point, the rule appears to be that the relation between host and guest is not that of invitor and invitee, but that of licensor and licensee, and that, in accord with the general principle which determines liability of an owner or occupant of premises to one who comes thereon as a mere licensee, the host is not liable for an injury sustained by the guest from some defect in the condition of the premises, except as the licensee is

needlessly exposed to peril through the failure of the owner or occupant to warn him of danger, or by the active negligence of the owner or occupant. There is no duty on the part of the host to reconstruct or improve the premises for the purpose of making his house more convenient or more safe for those accepting his hospitality, gratuitously extended. The guest assumes the ordinary risks which attach to the premises. No exception is made to the rule because of the fact that the guest enters on the host's express invitation to enjoy his hospitality. * * * However, the rule is that a host who knows of a concealed danger upon the premises is guilty of negligence if he permits the guest, unwarned of the peril, to come in contact therewith, and he may be held liable to the guest for an injury thus sustained."

Other courts speak of persons receiving invitations not connected with business as gratuitous licensees and the rule is the same as given in regard to social guests. Cases to this effect are cited in a note in 25 A. L. R. 2d 598; and in that annotation, § 4, p. 605, a general rule is stated in cases where invitation of a social guest did have incidental motives other than purely social as follows: "In most of the cases here considered the status of the plaintiff as a social guest has been conceded or assumed in the light of the uncontested facts. However, it is sometimes necessary to decide the preliminary issue of the plaintiff's status at the time of injury. It is clear that the fact that the visit during which the plaintiff was injured may have incidental motives other than purely social ones will not be sufficient to characterize the visitor as an 'invitee.' "

In Spence v. Polenski Bros., Schellak & Co., 110 Neb. 56, 193 N. W. 101, the court held: "Where a pond is formed on the premises of an owner as the natural consequence of removing clay for the manufacture of brick, and where an employee of the owner, a boy 16 years of age, during the noon hour, without the direction of the master, either express or implied, but with his knowl-

edge and consent, voluntarily goes swimming in the pond for his own pleasure, and not in furtherance of the master's business, and is drowned, such employee is a licensee, and the master owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the master or his servants." In the cited case the court further stated: "It is a well-settled doctrine that, before the master can be held liable for an injury to his servant growing out of such relationship, it must appear that the servant was injured through the negligence of the master, and that at the time of the injury the servant was engaged in carrying out some part of the master's business, or going to or from the master's service along avenues provided by the master. The rule, however, does not extend to a situation where the servant at the time of the injury was acting outside of the scope of his employment, for his own purpose, without the direction of the master, either express or implied." It is true that there is general language in the cited case in which the court says that a knowledge or acquiescence on the owner's part does not amount to an invitation so as to impose upon the owner the obligation which he owes to an invited guest. The decision however was based upon the premise that the employee was at the time pursuing his own pleasure and that his presence on the premises had no connection with the employer's business.

It appears from an examination of the authorities that in order to be an invitee on the premises of another the invitation of the owner or occupant must be related with the business of the owner or occupant or to their mutual advantage.

In the case before us the defendant had sent letters to its employees, including the plaintiff, with respect to the use of the recreation grounds. Four of these are contained in the evidence. The first is dated July 31, 1953, and is directed "To All Home Office Employees." The letter explains it is for the benefit of new employees:

and states the wish to outline the policies and rules of the company. Thereafter, it gives directions to enable them to reach the lake. It says further that it will be open for all employees on Saturdays and Sundays; that on those days because of the large number using the lake its use must be limited to married employees, husband, wife, and children, and single employees with one or two friends or relatives; and that the use of the grounds, Monday through Friday, must be reserved and tells who must be contacted to make the reservation so that the ones reserving it might invite friends. It then states that there were no arrangements for disposal of tin cans or bottles and that such items must be taken home and not thrown in the fireplace. All garbage, paper plates, napkins, cartons, and papers must be burned or carried off the premises. Lastly, if the cabin were used it must be swept and left orderly.

On May 7, 1954, another letter was sent which mentions the premises and the lake which is described as suitable for swimming, with sand beach, picnic tables, and outside fireplace. It gives the same instructions concerning those entitled to its use on days of the week, except it states that only three reservations may be made by one employee on Monday through Friday because of the great demand during the past years. The rules with respect to garbage and other refuse were repeated and the requirements somewhat enlarged upon, including a statement that the gate must be closed at all times and locked on leaving. The letter contains the following statement: "*If we are to continue to* provide these facilities for your enjoyment, we must ask your wholehearted cooperation in observing the above. You are all welcome to use the lake and it is our hope that by limiting the reservations to three per employee, more of you will be able to enjoy its facilities *this season.*" (Emphasis supplied.) On May 9, 1955, another letter was sent in which it states: "Because of the great demand for Kiewit Lake and the limited number of days

during *the summer* that it is available, it has been necessary to revise our policy in regard to reservations." (Emphasis supplied.)

The reservation privilege was further restricted to two reservations a year and it provided that during that year only one reservation could be made at a time and that it had to be used before another was made. The use on Saturdays and Sundays was continued as restricted to the employees and their immediate families. The explanation of requirements for disposal of garbage and trash by the employees was repeated.

On July 5, 1956, another letter was sent in which it was said that as a result of heavy demands, it was more important than ever that all observe the rules governing the use of the lake, which rules were set out in detail.

The letters, which plaintiff's counsel treats as invitations making the plaintiff an invitee, appear to welcome the employees to make use of the premises but in none of them is any suggestion that they are urged to use them or that the use of the facilities is particularly sought or desired by the defendant. The employees' attendance at the area had nothing to do with their work. Certainly no immediate business benefit accrued to the defendant. The defendant maintained no control over those using the area except it sought to require them to take care of their own trash and garbage, and to close and lock the gates. The employees were warned that if the use of the area were to continue they must obey these requirements. The restrictions as to use were narrowed each year because of increased patronage. As we view the letters, coupled with all the evidence in the case, the plaintiff was granted the privilege to make use of the premises as a licensee and not as an invitee.

Neither is our opinion altered by the claims of the plaintiff that the consent to go upon the premises was of business value to the defendant. This is apparently the theory which the trial court considered raised a question of fact for the jury. Plaintiff's contention rests

largely on the testimony of Dr. William H. Thompson, a psychologist and professor at the University of Omaha, who had made a study of industrial psychology. He testified as an expert witness that the defendant's facility had some business value to the defendant because it built up the morale of the employees, discouraged dissatisfaction, and encouraged continuity of employment. We think if such value existed, which might well be, it was remote and intangible in nature and not one directly connected with a business purpose. Neither does the testimony that on occasion the caretaker sold charcoal to the employees to facilitate cooking lunch make the plaintiff an invitee. These sales were trifling and appear wholly as a convenience to the employees and certainly were not for commercial profit. They were not connected with swimming or diving and were not availed of by the plaintiff on this occasion, nor does the evidence show he ever bought any.

The contention of the plaintiff that the conversation between himself, his wife, and the caretaker Thomas made the plaintiff an invitee is not convincing. The letters from defendant all told the employees whom they might contact for further information concerning the use of the lake, and he was not the caretaker. The plaintiff himself testified that the caretaker's duties were understood by him to consist of caring for the trees and keeping people that did not work for the company away from the grounds; that he kept the premises in order as far as raking, cutting the grass around his home, and taking care of the house or cottage. Some of the letters from the defendant speak of the use of the premises mentioned during the "season" or "summer." Two of them were sent in July, the first reciting it was for the benefit of new employees. The other two were sent in May. Thomas, a witness for the plaintiff, testified that the swimming season for 1956 was from about May 1st to September 1st. There was no evidence to the contrary and the evidence as a whole indicates no one used

the lake for swimming in March or April, except the plaintiff on the occasion when he was injured. It seems clear that the plaintiff knew at the time of the conversation with Thomas that the lake had not been made ready for the usual swimming period. The question plaintiff's wife asked Thomas as to whether he thought they were "crazy" to go swimming at that season shows that they understood it was unusual. The reply of Thomas could only be construed as a further permission or license applicable to that time, and not as an invitation on behalf of the defendant with a business implication when it concerned only one employee. It was in furtherance only of the plaintiff's recreation, enjoyment, and pleasure.

We will now state the rules of law which we deem applicable in this case, both on the question of the status of the plaintiff as a licensee or invitee, which we have hitherto considered, and the other questions which will be discussed later.

In Edgar v. Omaha Public Power Dist., *supra,* this court stated:

" '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.' Crane v. Whitcomb, 160 Neb. 527, 70 N. W. 2d 496."

As stated in Fairmont Creamery Co. v. Thompson, 139 Neb. 677, 298 N. W. 551: "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The rule is well stated in Farr Co. v. Union P. R. Co., 106 Fed. (2d) 437, as follows: 'The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, 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.' " See, also, Armer v. Omaha & C. B. St. Ry. Co., 153 Neb. 352, 44 N. W. 2d 640.

In Kohl v. Unkel, 163 Neb. 257, 79 N. W. 2d 405, this court held: "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."

Also, in Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544, we held: "If, from undisputed evidence, different minds may not reasonably reach different conclusions or draw different inferences, the trial court should render judgment consistent with the facts. * * *

"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, Davis v. Dennert, 162 Neb. 65, 75 N. W. 2d 112.

Relating these rules to the evidence before us nothing appears from which it might reasonably be inferred that the plaintiff was an invitee upon the premises. The issue with respect to whether he was an invitee or a licensee should never have been submitted to the jury and the trial court erred in not finding as a matter of law that the plaintiff at the time of his injury was a licensee thereon.

The trial court, after submitting to the jury the question of whether the plaintiff was a licensee or an invitee, submitted the question of the defendant's negligence to the jury, in case it found he was an invitee, in the following particulars:

"1. In failing to furnish a place around and out from said dock of sufficient depth and in such condition so as to permit diving with safety.

"2. In failing to mark the depth of the water at or near said dock.

"3. In failing to warn its employees and particularly the plaintiff of the insufficiency of the depth of the water around and out from said dock for diving.

"4. In failing to determine whether or not the water was of sufficient depth to permit the plaintiff to dive with safety as he had done on prior occasions."

The plaintiff contends that even if the plaintiff was a licensee it was the duty of the defendant who maintained the premises to give notice of traps or concealed dangers to the plaintiff. Such a rule is set out in Malolepszy v. Central Market, *supra,* in which this court quoted from the previous case of Haley v. Deer, 135 Neb. 459, 282 N. W. 389, saying: "The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but a licensee takes the premises as he finds them, for the only duty of the occupier to a licensee is to give notice of traps or concealed dangers."

The plaintiff's claim of an entrapment or concealed danger is premised on evidence that the raft or dock had been moved since October 1956, and that the water at the dock was not as deep as it was in the fall when the plaintiff had last been swimming. The defendant on the other hand contends that under the circumstances shown by the evidence, the plaintiff assumed the risk involved when he dove as a matter of law, and that he was guilty of contributory negligence more than slight as a matter of law. Inasmuch as the evidence concerning these questions is the same, we will now discuss that which has not already been referred to with respect to these conflicting claims.

In regard to changing of the location of the dock the plaintiff himself testified that it was in the same position it had been in the fall. Thomas in his testimony said he was aware of no change although it did at times change on the rise and fall of the lake or from wind

within the limits of the ropes which held it in place. On the rise and fall of the lake which on occasion varied as much as 3 feet, he shortened or lengthened the ropes and that he had not done so since the swimming season of 1956, which was prior to September 1, and a considerable time before the plaintiff used the dock in October. He estimated the lake to be of average height at the time of plaintiff's injury. Pictures of the dock about the time of the accident show these ropes and there appears to be some slackness in one of them, though it does not appear very great. The plaintiff's wife did tesitfy that the dock had moved considerably and that it appeared to her to be 2 or 3 feet closer to the shore than in previous years. She had testified in a previous deposition that its position was not changed. Her testimony might have been of some probative value considering the fact that the jury might consider the evidence in the light most favorable to the plaintiff were it not for the fact that she further stated she had been in Sweden from June 1956, through October 1956, during which time her husband used the lake. Under such circumstances it would appear that she could have no knowledge of whether its position had changed since her husband used it in 1956. Plaintiff's wife testified that when she got to the plaintiff and got her elbows under his arms the water was only about to her waist or 3 feet deep, but the evidence shows he had been struggling in the water as she had been going to him and it is not shown whether or not this was the place at which he entered the water. She previously stated in a deposition that she had waded out until the water became quite high on her.

After the accident the plaintiff's wife pointed out the place near the dock from which her husband dove. She is shown in a photograph in evidence standing upon the dock and pointing to the place where he had stood. After the plaintiff's injury the sheriff was summoned, and he and Thomas with a fishing pole made soundings

about this spot and reached out 8 or 10 feet in the direction in which he dove, and they both estimated the depth of the water at that place was 5 feet. Within 2 or 3 days thereafter a boat which was usually on the lake, but at the time of plaintiff's injury had been taken away for painting, was brought back and Thomas made soundings with a rake for obstacles within a distance of 8 or 10 feet of the dock at the point where plaintiff dove. No obstacles which he might have struck were discovered and there is no evidence whatever that there were any obstacles in the vicinity. On the 12th and 13th of March 1957, Richard Lawrence Foster, employed by the defendant, made soundings on the lake. Stakes or hubs, as they were called, were placed on the lake bank every 25 feet on either side of it, 5 feet back from the waterline. Foster, with a helper, got in the boat and they sighted from one hub to the one on the other side of the lake. They dropped a weight on a rope with a tape twined about it every 10 feet for 50 feet out from either shore. He then made profiles showing the result of the work. Exhibit 15 is the profile of the line crossing the lake and passing through about the center of the dock and through the length of the diving board. On this line he testified his sounding made 20 feet from the hub on the shore was right in front of the raft. At that point the profile exhibit 15 shows the lake about 4 feet deep. This point however, from an examination of the photographs in evidence, must be 5 or 6 feet across the end and corner of the dock from the place where the plaintiff dove from the side of the raft. Going out from the front of the raft toward the end of the diving board the lake bottom drops rapidly and under the end of the diving board it is 7½ to 8 feet deep. Foster testified also from exhibit 5, a photograph of the dock, diving board, and the lake shore to the southwest thereof, taken by the sheriff on March 10, 1957, the day of the injury, that the weeds and vegetation came right down to the water's edge. An examina-

tion of this exhibit 5 clearly shows this to be true. It appears therefrom that the lake could have been no lower than the previous fall. There is certainly no evidence that the defendant or Thomas, the caretaker, knew of any difference in the location of the raft or the depth of the lake which they were under obligation to impart to a licensee.

Plaintiff cites a great number of cases where proprietors of bathing pools or resorts, to which the public is invited and admission is charged, were held liable for injuries to bathers. These are cases where the person injured had entered a pool or beach run for profit under circumstances where he was clearly a business invitee and generally negligence is quite clearly shown. They are not applicable to the case before us.

We are unable to find that negligence on the part of the defendant has been proved and negligence cannot be inferred from the accident. Nolan v. Young Men's Christian Assn., 123 Neb. 549, 243 N. W. 639.

Defendant assigns as error that the trial court should have ruled plaintiff assumed the risk in diving as he did as a matter of law. The plaintiff's testimony shows he was an expert diver. He has been diving since he was 7 or 8 years old. He learned to swim in Sweden when he was 6 years old. In Sweden he swam in lakes with gravel, dirt, or rock bottoms and had taken tests in long-distance swimming. The "Kandidat" medal had been awarded him. This was the next to the top medal of which there was a series of 6 graduating in excellence of performance. In one test he swam a mile and a half; in another under water for 40 yards. In diving he picked up plates at a depth of 15 feet. He picked up 8 of 9 plates when 6 was passing. Likewise he was given, and passed, tests requiring swimming with clothes one-half mile, including boots above the ankle. Life saving tests were given. Dives were made from 10 feet and 30 feet. In Sweden he swam in water with ice about him and at times where holes were cut in

the ice. He swam in the Baltic Sea at shores, on beaches, and amid rocks. Plaintiff was familiar with the danger of diving in shallow water. In strange places he checked the depth by looking in the water. In Sweden the water was clear and he could see a considerable distance in it.

Plaintiff had been an employee of defendant since September 1951, and lived in Omaha since September 1952. He had used the recreation area at Kiewit Lake frequently since the winter of 1952 to 1953, when he first went there on a picnic with friends. Since that time he had used the cabin at the premises between 25 and 30 times. He started swimming from the dock in the summer of 1953, and had last used it in October 1956. Plaintiff testified he had been swimming at the lake on his visits 23 to 27 times and used this dock every time from 3 to 5 or 6 times, and dove from the same place with the same kind of a dive two dozen times. Plaintiff estimates it would take 5½ feet of water to execute this dive, which he had been doing for more than 25 years. An expect, Rex Aubrey, who testified on behalf of the plaintiff in answer to a hypothetical question, stated it would take 6 to 8 feet of water to make this type of dive. There were never any signs showing the depth of the water and plaintiff had no conversations with Thomas concerning its depth.

The exact cause of the injury of plaintiff is not clearly shown. The testimony shows there was no object in the lake that he could have hit. There is some evidence by the plaintiff's wife, a nurse, and an uncle, who visited him at the hospital, that he had a mark on the top of his head. His uncle described it as a reddish-blue mark, a little to the front of center of the top of his head about the size of the end of a thumb. This is not corroborated by anything the doctor says he observed. The only notes the nurse was able to find in the hospital record indicated hot packs applied to the right side of the head. This is perhaps sufficient for the jury to conclude that the

defendant hit the bottom of the lake. The dive was from the dock at an angle of 30° towards the lake and 8 feet out in that direction from the dock. He entered the water at an angle of 45° with the surface of the lake.

He was an experienced swimmer and diver, thoroughly familiar with the premises involved. It seems impossible for him to have gone swimming and diving from this dock on so many occasions without understanding the nature of this dug lake; that it was fed by surface water and underground seepage; and that its depth was not always constant or its bed uniform. He went there on March 10, 1957, which, at least for swimming, is considered still winter in Nebraska. It was almost 2 months before others swam there. He was the last person there in the fall before and had left his swimming suit. The ropes on the stakes had been taken from the poles which the year before had marked off the area of 3-foot water for bathing. They had not been replaced. The conversation of the wife with Thomas indicates that all three knew it was unusual to swim at the lake at that time of year. After going to the dock and looking down at the water without being able to see the bottom, though he says he could see 4 feet into its depth, he, without any further steps to determine its depth at the time, dove into the lake without going to the front of the dock or upon the diving board. It is lamentable that the plaintiff was so seriously injured. Whether it takes 5½ feet of water to make the particular dive, or 6 to 8 feet, as testified by the expert Rex Aubrey, it plainly appears that the plaintiff before diving should have checked the depth of the water and the uniformity of the lake bed, and his memory of both from previous years. When with his knowledge of the premises and his experience in diving he dove without taking such precautions, he assumed the risk involved in the venture. McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639.

Having found no negligence attributable to the defendant and that the plaintiff assumed the risk of diving under the circumstances shown from the evidence, it becomes unnecessary to discuss whether or not the plaintiff was also barred from recovery because of contributory negligence on his part.

It follows that the motion of the defendant for judgment notwithstanding the verdict should have been sustained and the plaintiff's petition dismissed.

The judgment is reversed and the cause remanded with directions to enter judgment notwithstanding the verdict dismissing the plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA EX REL. CITY OF GRAND ISLAND, A MUNICIPAL CORPORATION IN HALL COUNTY, NEBRASKA, APPELLEE, V. CHARLES TILLMAN, COUNTY ASSESSOR, IN AND FOR HALL COUNTY, NEBRASKA, APPELLEE, LUMAN H. ALBERTI ET AL., INTERVENERS-APPELLANTS.

115 N. W. 2d 796

Filed June 15, 1962. No. 35203.

1. **Parties.** Section 25-328, R. R. S. 1943, permitting intervention before trial as a matter of right, does not prevent a court of equity in the exercise of its discretion and in the furtherance of justice from allowing intervention after judgment to protect inherent rights of the parties seeking intervention.
2. ———. The interest required as a prerequisite of intervention is a direct and legal interest of such character that the person seeking to intervene will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.
3. **Equity: Appeal and Error.** A court of equity should, upon proper application, be sure that the rights of all persons before it are protected and that they be given the right to appeal from an adverse judgment.
4. **Municipal Corporations.** The power conferred upon municipal corporations by their charters to make ordinances on specified

subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.

5. ———. A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the Legislature and when so conferred must be exercised in strict accord with the statute conferring it.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions.

Harry Grimminger, John A. Wagoner, and Baylor, Evnen, Baylor & Urbom, for appellants.

Paul C. Holmberg and E. G. Kroger, for appellee City of Grand Island.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

CHADDERDON, District Judge.

This is a mandamus action brought by the City of Grand Island, which will be referred to herein as city, against Charles Tillman, County Assessor in and for Hall County, Nebraska, who will be called Tillman in this opinion. After the trial court had allowed a peremptory writ of mandamus and had overruled Tillman's motion for a new trial, Luman H. Alberti and Phyllis M. Alberti, herein called Albertis, filed an application to intervene for the purposes of appeal. The trial court denied the Albertis the right to intervene. The Albertis filed a motion for new trial which was overruled, and the matter was appealed to this court.

The city, in its amended motion and affidavit for writ of mandamus, alleges among other things that it is a city of the first class with a population of more than 25,000 and less than 40,000, and has been operating under a home rule charter since June 3, 1928; that on

August 29, 1961, at a special meeting of the city council, the city passed an ordinance annexing certain territory set out in the ordinance, a description of which is unnecessary; that on August 30, 1961, said ordinance was published in Grand Island; that on August 31, 1961, the city filed a certified copy of the ordinance together with a plat of the property described therein in the office of the register of deeds of Hall County, Nebraska; that on September 20, 1961, the city council unanimously passed a resolution directing the city attorney to make a demand on Tillman to place the property on the tax assessment records of the city; that on September 21, 1961, such a demand was made on Tillman, and that he refused to place the property on the tax assessment records of the city; and that it did not have an adequate remedy at law. It prayed that the court issue an alternative writ of mandamus directing Tillman to place the property on the assessment records of the city. Tillman filed a return and answer, and the action was tried to the court. The court entered a writ of peremptory mandamus. Tillman filed a motion for new trial which was overruled by the court. Thereafter an application was filed by Albertis to intervene for the purpose of appeal, which application was denied. The Albertis filed a motion for new trial, which was overruled, and the action was appealed to this court. The evidence was such that the trial court could have found that the ordinance was passed in accordance with law, and that finding is not questioned. The other evidence necessary for decision herein will be set forth as occasion arises.

The first matter to be decided is, should the Albertis have been allowed to intervene 2 days after the court had overruled the motion for new trial filed by Tillman? This proposition consists of three questions: (1) Under our law could they intervene after the trial of the case? (2) Did the petition show a right to intervene? (3) Were they guilty of laches in failing to intervene before trial?

In Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co., 126 Neb. 744, 254 N. W. 507, the court said: "We meet the contention, made for the first time in this court, that parties cannot come into a case by intervention after judgment. Section 20-328, Comp. St. 1929, provides: 'Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.' We have passed directly upon this matter in several cases. 'In the first place the contention of the appellee that a statutory petition in intervention must be filed before trial must be conceded. But there are two kinds of intervention—that provided by section 7609, Rev. St. 1913 (now section 20-328, Comp. St. 1929) which, we have decided in common with the courts of other states having like provisions, is a matter of right, and which requires no leave to be granted by the court. In such a case the intervener can only file as a matter of right before the trial. * * * The other kind of intervention is that which prevailed in this state before the enactment of the statute mentioned, and which, while not an ancient procedure in courts of equity (note at page 281, 123 Am. St. Rep.), has been adopted by many courts as essentially equitable in its nature, and which may be allowed by a court of equity in its discretion in a proper case.' State v. Farmers State Bank, 103 Neb. 194.

" 'It is first argued that a petition to intervene must be filed before trial, that the right of intervention terminates with the final decree, and that the trial court

erred in overruling the motion to strike intervener's pleadings from the record. In this connection reference is made to the statutory right of intervention before trial. Comp. St. 1922, sec. 8552 (now Comp. St. 1929, sec. 20-328). Intervention under this statute is a matter of right, but does not prevent a court of equity in the interests of justice from allowing a proper party to intervene after the trial has begun. State v. Farmers State Bank, 103 Neb. 194. Was intervention properly allowed 17 days after entry of the unexecuted decree of foreclosure? Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule. In the light of both reason and precedent it has been said: "Applications for leave to intervene after entry of a final decree are unusual, and generally have been denied. There are instances, however, where petitions for leave to intervene have been filed and granted after decree." 21 C. J. 345.' Engdahl v. Laverty, 110 Neb. 672. See, also, 21 C. J. 341-343, 345, and notes; Brown v. Brown, 71 Neb. 200; Ward v. Clark, 6 Wis. 509; Webb v. Patterson, 114 Neb. 346."

This court in Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65, said: "We have held: 'The interest in a matter in litigation which will authorize a person to so intervene must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. * * * Such an interest must be one arising from a claim to the subject matter of the action or some part thereof or a lien upon the money or property or some part thereof, as distinguished from an indirect, remote, or conjectural interest in the result of the suit which is not enough to permit intervention.' Gilbert v. First Nat. Bank, 154 Neb. 404, 48 N. W. 2d 401."

Again in Noble v. City of Lincoln, 158 Neb. 457, 63

N. W. 2d 475, the court said: "Appellants challenged the petition in intervention by general demurrer. It was overruled. The interveners alleged that they were taxpayers and electors of the city of Lincoln and that they had an interest in the matter in litigation in this suit. There is statutory authority for any one who has or claims an interest in the matter in litigation to become a party to the action. § 25-328, R. R. S. 1943. The interest required is a direct and immediate legal interest of such a character that the person seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. The ultimate facts must be alleged by him evidencing his interest in the matter in litigation and an averment that he has an interest in the subject matter is a conclusion and is not sufficient to permit intervention. Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808; Drainage District v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 583; Cornhusker Electric Co. v. City of Fairbury, 131 Neb. 888, 270 N. W. 482. Contrary to any claim that there was fraud, inefficiency, or lack of diligence on the part of appellees in their efforts herein to assert and protect the rights of the city, its officers, and inhabitants, the petition of the interveners asserts that the city of Lincoln is defending the suit 'on the basis of its good faith.' This negatives any inference of fraud, collusion, or inattention or that their interest in the litigation as taxpayers was not being properly represented. Taxpayers are not qualified to intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N. W. 2d 150; City of Omaha v. Douglas County, 125 Neb. 640, 251 N. W. 262; State ex rel. Randall v. Hall, 125 Neb. 236, 249 N. W. 756."

With these rules of law in mind let us examine the facts in this case so far as they relate to the matter of intervention. The Albertis allege in their application,

which allegations are sustained by the evidence, in substance that they are representing themselves and all other persons similarly situated; that they own real estate situated in the area involved in this suit; that the question of whether or not the city had met the requirements of the statutes for annexation was determined by the trial court; that Tillman had undertaken to defend this action; that his attorney had publicly stated on various occasions that he would carry the case to the Supreme Court and they had relied upon these statements; that upon learning that an appeal might not be taken they requested Tillman to take the necessary steps to appeal the case to the Supreme Court; that they would guarantee the payment of costs for such an appeal; and that their interest in this matter was a determination of whether or not the annexation of the territory involved herein, part of which was their land, became a part of the city of Grand Island.

The Albertis were in the position of having their interests protected by Tillman, whose attorney had publicly announced that regardless of the result in district court the case would be appealed to the Supreme Court. Just before the court announced its ruling on the motion for new trial Tillman announced that if the ruling was adverse he would not appeal. Two days later they filed an application to intervene, which we think was a reasonable time.

A court of equity should, upon proper application, be sure that the rights of all parties before it are protected and that they be given the right to appeal from an adverse judgment.

We determine that the Albertis could intervene after the motion for a new trial was overruled; that the application was sufficient to show that they had such an interest in the suit to allow them to intervene and that they did so as soon as possible after they learned that Tillman would not appeal the case; and that the trial

court should have allowed their application to intervene for the purpose of appeal.

We now come to the assignments of error on the merits of the case. These may be described as involving four questions: (1) Did the annexation ordinance passed by the city meet the requirements of the State of Nebraska and its home rule charter? (2) Was it necessary for the City of Grand Island to comply with the provisions of sections 16-107, 16-108, and 16-109, R. R. S. 1943? (3) Are these sections of the statute unconstitutional? (4) Was the question of constitutionality of these statutes raised in the trial court?

With regard to the first question the city in its amended motion and affidavit for writ of mandamus sets out its home rule charter with regard to the extension of the city limits and annexation of territory as follows: "The corporate limits of the City shall remain as heretofore and the Mayor and Council may by ordinance include therein all the territory contiguous or adjacent, which has been by the act, authority or acquiescence of the owners subdivided into parcels containing not more than five acres, and the Mayor and Council shall have the power by ordinance to compel the owners of land so brought within the corporate limits, to lay out streets, ways and alleys to conform and be continuous with the streets, ways and alleys of such city, and vacate any public road heretofore established through such land when necessary to secure regularity in the general system of its public ways." It further alleges that the home rule charter also provides: "Saving to itself all other rights and powers that are now or may hereafter be given the city on general law."

The ordinance involved herein does not comply with the provisions of its home rule charter as it now exists because the stipulation in this case provides in paragraph VI thereof: "It is further stipulated that all of the area included in the ordinance involved in this case had been subdivided or platted into tracts of

twelve acres or less, but one or more of said tracts or parcels of land are subdivided into parcels which contain in excess of five acres, all of said subdivisions having been made prior to the passage of the ordinance of annexation, with the exception of one tract of twenty acres owned by the Grand Island School District, and that tract was included at the request of said School District." We see that several tracts contain in excess of 5 acres and one tract is 20 acres. Thus we are only concerned with the statutes of Nebraska which provided for the annexation of property to the city.

There are two methods of annexing territory to a city of the first class, both of which are provided for in sections 16-106, 16-107, 16-108, 16-109, and 16-112, R. R. S. 1943, as amended. Section 16-112, R. R. S. 1943, provides that the owner of any land contiguous to the corporate limits shall plat the same as described therein, obtain the approval of the mayor and council, and file the same in the office of the register of deeds, and then such tract shall be included within the city for all purposes. This method was not used in this instance, but rather the method provided in sections 16-106, 16-107, 16-108, and 16-109, R. R. S. 1943, as amended. Section 16-106, R. S. Supp., 1961, provides as follows: "The corporate limits of such city shall remain as before and the mayor and council may by ordinance include therein all the territory contiguous or adjacent, which has been by the act, authority, or acquiescence of the owners subdivided into parcels containing not more than twelve acres and any tract consisting of twelve or more acres which is entirely surrounded by land already embraced within the corporate limits of said city, except as provided by section 19-2504. The mayor and council shall have power by ordinance to compel the owners of lands so brought within the corporate limits to lay out streets, ways, and alleys to conform to and be continuous with the streets, ways, and alleys of such city, and may vacate any public road heretofore established through such

land when necessary to secure regularity in the general system of its public ways." With this in mind let us examine the cases decided by this court in regard to the annexation of territory by cities of the first class. In Chicago, B. & Q. R.R. Co. v. City of Nebraska City, 53 Neb. 453, 73 N. W. 952, the court said: "The adoption of said ordinance was wholly insufficient to change the boundaries of the municipality. The statute at that time in force designated the mode for the annexation of adjacent territory to a city of the first class having less than 25,000 inhabitants. (Compiled Statutes 1891, ch. 13a, art. 2, secs. 4, 6.) The one for which provision is made in said section 4 permits such annexation to be accomplished by the passage of an ordinance by the mayor and council extending the corporate limits so as to include territory contiguous or adjacent to the city, which by the authority or acquiescence of the owner has been subdivided into tracts or parcels containing not to exceed five acres. The record fails to establish that the real estate sought to be annexed by the ordinance in question had been subdivided by the owner into parcels of the size specified by said section 4. It is true the amount of land attempted to be added to the city does not exceed five acres, but that is an unimportant consideration, and does not meet the legislative requirement that the contiguous territory must have been subdivided by the proprietor into parcels of not to exceed five acres, in order to entitle the same to be attached to the corporation by the mere passage of an ordinance ordering it to be annexed. It is a familiar doctrine that municipal corporations can exercise only such powers as are conferred by law, either expressed or implied. Where the statute points out the mode of procedure for the extension of the boundaries of a city, the same must be substantially followed, else it will be of no validity."

In that case the court held that the annexation ordinance was not valid because the territory sought to be annexed was not divided into lots as provided in the

statutes in effect at that time, and held that the interpretation of annexation statutes should be strictly construed.

In Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490, the court set out the rules with regard to the interpretation of annexation statutes both under the home rule charter and the statutes. In that case the court said: "Annexation of territory under this authority is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the lands to be annexed. Campbell v. Youngson, 80 Neb. 322, 114 N. W. 415; Winkler v. City of Hastings, 85 Neb. 212, 122 N. W. 858; Witham v. City of Lincoln, 125 Neb. 366, 250 N. W. 247.

" 'Constitutional and statutory limitations on the nature and extent of the territory which may be annexed to a municipal corporation must be observed.' 62 C. J. S., Municipal Corporations, § 46, p. 130.

"In doing so it is not for the courts to determine what portions might be properly annexed, for the fixing of boundary lines under this authority is a legislative act. State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420; City of Houston v. State ex rel. City of West University Place, 142 Tex. 190, 176 S. W. 2d 928.

"The home rule charter adopted by the city of Omaha is a grant as distinguished from a limitation of power. Being a grant of power the charter is to be construed according to the same rules as a legislative act containing the same provisions in determining what authority is thereby granted the city government. Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643; Falldorf v. City of Grand Island, 138 Neb. 212, 292 N. W. 598.

" 'A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair

implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.

" 'The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the law applicable to such subjects.' Reid v. City of Omaha, *supra*. See, also Interstate Power Co. v. City of Ainsworth, 125 Neb. 419, 250 N. W. 649.

" 'A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided for by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it.' 37 Am. Jur., Municipal Corporations, § 24, p. 640."

In that case the annexation ordinance included what the court found to be agricultural lands and as a result it declared the whole ordinance void, saying: "In view of the foregoing we have come to the conclusion that the city, by including these agricultural lands which are rural in character in the area sought to be annexed, exceeded the authority granted it by section 14-117, R. S. 1943. Since we have no authority to revise the boundary line of the city, as extended by the ordinance, we find that its doing so makes the entire ordinance invalid."

With these rules in mind let us examine the evidence in this case. The stipulation entered into by the parties as set forth above states that one tract owned by the Grand Island school district was included at the request of said district. Since that tract was more than the legal maximum which the statute allowed, and since the Grand Island school district did not comply with the provisions of section 16-112, R. R. S. 1943, the city did not have the authority to extend its boundaries over that real estate, and we find that the entire ordinance

was invalid. In view of these findings, it is unnecessary to decide whether or not the city was required to comply with the provisions of sections 16-107, 16-108, and 16-109, R. R. S. 1943. The same is true with regard to the constitutionality of these statutes and also as to whether or not the constitutionality of these statutes was properly raised in the court below. These questions therefore are not passed upon.

The judgment of the trial court is reversed and the cause remanded with directions to enter a judgment of dismissal, with costs both in this court and in the district court to be paid by the City of Grand Island.

REVERSED AND REMANDED WITH DIRECTIONS.

NILE VALLEY FEDERAL SAVINGS & LOAN ASSOCIATION, APPELLEE, V. ERNEST W. SCHANK ET AL., APPELLANTS, IMPLEADED WITH DONALD D. BASTEMEYER ET AL., APPELLEES.

115 N. W. 2d 774

Filed June 15, 1962. No. 35232.

1. **Evidence: Appeal and Error.** This court will not take judicial notice of the rules of practice of the district court.
2. **Appeal and Error.** The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions.
3. ———. In the absence of a bill of exceptions, it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.
4. ———. In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct and supported by sufficient evidence.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Straight Townsend, for appellants.

Donald L. Wood, Neighbors, Danielson & Van Steenberg, and Willis A. Herman, for appellee Nile Valley Fed. Sav. & Loan Assn.

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

SPENCER, J.

This is an appeal from an order overruling a motion to set aside an order of confirmation of a judicial sale in a mortgage foreclosure.

Nile Valley Federal Savings & Loan Association is plaintiff and appellee. The appellants are Ernest W. Schank and Ivah May Schank, who were the mortgagors and will be hereinafter referred to as defendants.

There is no bill of exceptions and the proceedings in the transcript start with the decree of foreclosure. The return of the sheriff indicates that the property in question was sold pursuant to the foreclosure decree on January 5, 1962. Subsequent thereto, and on the same day, an order of confirmation was entered. This order of confirmation reads in part: "* * * the court, having carefully examined the proceedings of the officer and being satisfied that the sale of said real estate was in all respects made in conformity to the process of law governing the same, and that said real estate was sold for a fair value under the circumstances and conditions of the sale, and that a subsequent sale would not realize a greater amount, the court therefore finds that said sale should be confirmed."

On January 11, 1962, or 6 days thereafter, a motion was filed by the defendants for an order setting aside the order of confirmation. Attention was directed to rule No. 18 of the rules of practice and procedure for the district court for Scotts Bluff County, Nebraska, which provided that at least 4 days must elapse after a judicial sale before confirmation. The only reason

given by the motion for the relief sought is in the fourth paragraph of the motion and is as follows: "The order of confirmation was entered so soon after the said sale and the return of sale that these defendants had no reasonable opportunity to make objections thereto, *if any they may have had.*" (Italics supplied.)

The motion was heard and overruled on January 17, 1962. There is in the transcript a copy of what purports to be rule No. 18 of the rules of the district court of the Seventeenth Judicial District of Nebraska, adopted December 30, 1958. It reads as follows: "Except by consent of parties, judicial sales shall not stand for confirmation until the fourth day after the day of sale unless otherwise ordered by the court. No motion, notice or 'first order' shall be necessary as a condition precedent to confirmation."

As stated, there is no bill of exceptions. If this rule or any other evidence was offered on the motion, it is not now before us for consideration. This court will not take judicial notice of the rules of practice of the district court. Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811.

The defendants' assignments of error are disposed of by what we said in Federal Farm Mtg. Corp. v. Hughes, 137 Neb. 820, 291 N. W. 475: " 'The rules of practice in a district court, alleged to have a material bearing on the rulings complained of, before they can enter into a determination of a question presented in this court, must be incorporated in the bill of exceptions.' Jones v. Cleary, 2 Neb. (Unof.) 541, 89 N. W. 386."

If the rule was properly before us, and if it should be considered that the court had not "otherwise ordered," there is nothing in the motion filed by the defendants which in any way suggests that the sale was not fair or that it was irregular in any way. Nor is there any allegation that another sale would realize a greater amount than the one confirmed. We note also that the defendants did not file their motion within the 4 days

but waited until after that time had expired before moving on the order of confirmation.

In the absence of a bill of exceptions, it is presumed that issues of fact presented by the pleadings are established by the evidence, that they were correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment. Schroeder v. Homestead Corp., 171 Neb. 792, 107 N. W. 2d 750. The only pleadings in the record, as suggested, start with the decree of foreclosure, and there is no contention that the pleadings are inadequate to support the order of confirmation. The order made specific findings which are undisputed in this record.

We dispose of this appeal under the general rule enumerated in Federal Farm Mtg. Corp. v. Hughes, 137 Neb. 820, 291 N. W. 475: "'In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence.'"

It follows that the judgment of the district court is correct, and it is affirmed.

AFFIRMED.

SIMMONS, C. J., not participating.

PHYLLIS SPATH, APPELLANT, v. HAMILTON H. MORROW ET AL., APPELLEES.

115 N. W. 2d 581

Filed June 15, 1962. No. 35242.

Physicians and Surgeons: Limitations of Actions. A cause of action for malpractice based upon the alleged failure of a physician to remove a foreign object left in the body of a patient by mistake does not accrue until the patient discovers, or in the exercise of reasonable diligence should have discovered, the presence of the foreign object.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded.

Tesar & Tesar, for appellant.

Sidner, Lee, Gunderson & Svoboda, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

BOSLAUGH, J.

This is an appeal in an action for malpractice. The amended petition alleged that the plaintiff was hospitalized at Fremont, Nebraska, on July 10, 1951, for the delivery of a child; that the plaintiff had been under the care of Dr. Carl H. L. Stehl; that Dr. Stehl referred the plaintiff to his agent, the defendant Dr. Dorwin B. Wengert, in accordance with an arrangement whereby Dr. Wengert would care for the patients of Dr. Stehl while Dr. Stehl was absent from the county; that Dr. Wengert, as agent for Dr. Stehl, retained the defendant Dr. Hamilton H. Morrow to assist in the delivery; that in assisting with the delivery Dr. Morrow acted as an agent for Dr. Stehl, knew that the plaintiff was originally a patient of Dr. Stehl, and that Dr. Stehl was absent from the county; that following the delivery and while suturing the plaintiff, the defendants broke a suture needle and a part of the needle was left in the soft tissue of the left perineum in the plane of the symphysis; that the defendants should have known that a part of the needle was left in the body of the plaintiff but negligently failed to discover and remove the needle and failed to disclose to the plaintiff that a part of the needle had been left in her body; that the defendants had a continuing duty to discover and remove the needle and their failure to do so was a fraudulent concealment and continuing negligence and a failure to complete the operation; that immediately after the delivery plaintiff had difficulty and disability caused by the presence of the needle; that Dr. Stehl resumed the care of the plaintiff 1 week after the delivery and she continued

under his care until June 13, 1960, when Dr. Stehl informed the plaintiff that the needle was in her body; that the needle was removed on January 23, 1961; that the plaintiff did not or through the use of reasonable diligence could not discover the presence of the needle until she was informed of the fact by Dr. Stehl; that the plaintiff believed, relied, and acted on the representations of Dr. Stehl as to the cause of her difficulty and disability; and that the plaintiff was damaged as a result of the negligence of the defendants.

The defendants filed separate general demurrers which alleged that the action was barred by the statute of limitations. The demurrers were sustained. The plaintiff elected to stand upon her amended petition and the action was dismissed. The plaintiff has appealed from the judgment dismissing the action.

The issue presented by the appeal is very narrow. The delivery is alleged to have occurred on July 10, 1951. The plaintiff is alleged to have not discovered or have been able to discover the presence of the needle in her body until June 13, 1960. The action was commenced on May 29, 1961. The statute requires that an action for malpractice be brought within 2 years after the cause of action shall have accrued. § 25-208, R. R. S. 1943. The question to be determined is when the cause of action accrued.

The general rule is that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Dewey v. Dewey, 163 Neb. 296, 79 N. W. 2d 578. There are, however, many exceptions to this general rule.

In Williams v. Elias, 140 Neb. 656, 1 N. W. 2d 121, the plaintiff alleged that on April 4, 1938, he fractured the laminae of the fifth lumbar vertebra and injured the sacroiliac joint and surrounding muscles and tendons; that the defendant physician incorrectly diagnosed his injury as lumbago and failed to properly treat him for

his injuries; that the defendant physician continued to treat him until August 15, 1938, when he was hospitalized at Omaha, Nebraska, examined, X-rayed, and the nature of his injuries ascertained and treated; and that as a result of the improper diagnosis and treatment, his spinal column and sacroiliac joint became deformed, stiff, and enlarged and the left sciatic nerve impinged. This court held that the statute of limitations did not commence to run until August 15, 1938, the date that the treatment by the defendant physician ended.

The defendants contend that the rule announced in the Williams case is applicable here and that the statute of limitations commenced to run in this case on or about July 17, 1951, the date on which Dr. Stehl is alleged to have resumed the care of the plaintiff. This would result in the plaintiff's cause of action being barred nearly 7 years before it is alleged that she was informed as to the cause of her difficulty following the delivery. We do not believe that this is what the Legislature intended.

The statute of limitations is a statute of repose; it prevents recovery on stale demands. In re Estate of Anderson, 148 Neb. 436, 27 N. W. 2d 632. The statute is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the right to proceed. The basis of the presumption is gone whenever the ability to resort to the courts is taken away. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545. The mischief which statutes of limitations are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert. 34 Am. Jur., Limitation of Actions, § 10, p. 20. If an injured party is wholly unaware of the nature of his injury or the cause of it, it is difficult to see how he may be charged with a lack of diligence or sleeping on his rights.

The Supreme Court of Pennsylvania recently com-

mented upon the unusual situation of a patient who has a foreign object left in his body by mistake. In Ayers v. Morgan, 397 Pa. 282, 154 A. 2d 788, the plaintiff alleged that he did not know that the defendant surgeon had left a metallic gauze sponge in his abdomen until it was discovered there 9 years later. In holding that the cause of action was not barred by the statute of limitations the court said: "Did the laws of nature prevent Ayres from ascertaining what was causing the pain in his abdomen? Certainly he could not open his abdomen like a door and look in; certainly he would need to have medical advice and counsel; certainly he would have to be dependent upon those who with appropriate instruments and devices could pierce the wall of flesh which hid from his own eyes the cause of his wretchedness."

The statutes of New Jersey require that an action for malpractice shall be commenced within 2 years after the cause of action shall have accrued. In a recent case, Fernandi v. Strully, 35 N. J. 434, 173 A. 2d 277, the plaintiff alleged that the defendant surgeon negligently left a wing nut from a retractor in his body. The Supreme Court of New Jersey held that the cause of action accrued when the plaintiff knew or had reason to know about the foreign object and the existence of the cause of action based upon its presence. The court observed that foreign object malpractice cases present special considerations which set them apart from other cases. The court said: "They involve the confidential doctor-patient relationship, the negligent failure to remove a foreign object during the course of the doctor's operation on his patient, the patient's total ignorance during the customary period of limitations of that fact or of circumstances suggesting it, the later discovery of the foreign object and the material harm it had done and the patient's expeditious institution of legal action thereafter. These circumstances eliminate the danger of a belated false or frivolous claim."

The cases which have considered this question are collected and discussed in a recent annotation appearing in 80 A. L. R. 2d 368, and in earlier annotations appearing in 144 A. L. R. 209 and 74 A. L. R. 1317. The cases from other states are in conflict and the defendants have cited a number of cases which support the ruling of the trial court in this case. However, we believe the following statement of the New Jersey court in Fernandi v. Strully, *supra,* is pertinent: "It is significant to us that in malpractice actions, particularly where, as here, they involve foreign objects, an ever increasing number of jurisdictions have used one just legal approach or other to avoid the truly harsh result reached in Weinstein."

In Williams v. Elias, *supra,* this court took note of the mutual confidence which is essential in the relation between physician and patient; that the physician should have a reasonable opportunity to correct the mistakes incident to even skilled surgery; and that the physician should not be harassed by premature litigation instituted in order to save the rights of the patient. Patients should not be encouraged to go from physician to physician in an effort to ascertain whether the diagnosis made and the treatment received are proper. Silence on the part of the physician for the statutory period should not destroy the rights of the patient.

We conclude that the cause of action in this case did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, that a foreign object had been left in her body. The demurrers of the defendants should have been overruled. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BLANCHE I. LIGHT ET AL., APPELLANTS, V. ETTA ASH ET AL., APPELLEES.

115 N. W. 2d 903

Filed June 22, 1962. No. 35156.

1. **Trusts.** When a person obtains the legal title to real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him.
2. **Trusts: Frauds, Statute of.** Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception.
3. **Fraud.** The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto.
4. **Trusts: Equity.** If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.
5. **Trusts.** A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
6. ———. In such cases the promise need not be express in order to raise a constructive trust, actual cooperation and silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction.
7. ———. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.

Appeal from the district court for Custer County: S. S. SIDNER, Judge. Affirmed.

Edwin J. Myers, Frank E. Edgerton, and William L. Andrews, for appellants.

Carlos C. Schaper, Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

BROWER, J.

This is an action brought in the district court for Custer County by the plaintiffs and appellants Blanche I. Light and Allen Light, her husband, Fern Ellingson and Melvin Ellingson, her husband, and Alonzo Boyd Ash, against Etta Ash, Criss B. Ash and Frieda Ash, his wife, Etta Ash as administratrix of the estate of Alonzo B. Ash, deceased, and the Federal Land Bank of Omaha, a corporation, defendants and appellees.

Hereafter the parties will be referred to as plaintiffs or defendants, as they were designated in the trial court. Alonzo Boyd Ash will be designated as Boyd Ash, which name he generally used and to further distinguish him from his deceased father.

The action sought a judgment declaring and raising a constructive trust with respect to the title to two tracts of farm lands in Custer County. Plaintiffs prayed that the defendants Criss B. Ash and his wife Frieda Ash, and Etta Ash, who held and had held the legal title to the property, be found and adjudged to be trustees holding an equitable undivided one-fourth interest for each of the plaintiffs Blanche I. Light, Fern Ellingson, and Boyd Ash. It further sought a judgment requiring the defendant Criss B. Ash to pay or secure the discharge of a $4,500 mortgage placed on the premises by the defendants Criss B. Ash and wife, and Etta Ash in favor of the defendant Federal Land Bank of Omaha, or that said amount and mortgage be held to be a lien upon the remaining one-fourth interest in the premises

alleged to be in the defendant Criss B. Ash.

Before the trial of the cause in district court the defendant Etta Ash died and the action was revived as to her interest in the name of Criss B. Ash, special administrator of her estate. Likewise the plaintiff Fern Ellingson passed away and Melvin Ellingson, executor of her estate, was substituted as party plaintiff. The Federal Land Bank of Omaha filed a demurrer which was sustained and it was dismissed from the action. Allen Light appeared before trial and dismissed the action so far as he was concerned.

The factual situation from which this dispute grew arose in the following manner: Alonzo B. Ash, a farmer residing near Broken Bow, Nebraska, owned the two farms in question prior to his death. While he and his wife Etta Ash were visiting their son Criss B. Ash, who was then living in California, he died on December 24, 1937, intestate, leaving his widow Etta Ash and his children, the plaintiffs, Blanche I. Light, Fern Ellingson, and Boyd Ash, and the defendant Criss B. Ash, as his only heirs-at-law. His remains were brought back to Broken Bow for burial and the funeral was held there on December 29, 1937. On the morning of December 30, 1937, a meeting took place at the Ash farm home at which Etta Ash, the widow, and all of the children of the deceased, except Boyd Ash, who was then in Idaho, were present. A banker, T. T. Varney, and a lawyer, William C. Schaper, came to the home that day also and were present at the family gathering. Schaper brought with him a quitclaim deed to all the land and an assignment of all the personal property of the estate. In these instruments Etta Ash was grantee and assignee, respectively. The assignment contained a power of attorney naming Etta B. Ash as attorney in fact for the children of the deceased with respect to matters concerning the estate of Alonzo B. Ash. The deed and assignment were prepared for the signatures of the children then present and their spouses.

Both instruments were in the usual form and contained no reservation. The deed recited a consideration of $1 and love and affection and the assignment of love and affection only. They were executed by the children and their spouses at that time.

On the following day there was a meeting at the office of attorney Schaper. A similar deed for Boyd Ash and wife, Amber Ash, and a letter to Boyd Ash in Idaho were prepared by Schaper. According to the testimony of Schaper the letter was signed by all three children present, their mother, Etta Ash, and an uncle of the children, B. P. Ash. Boyd Ash who received it said to the best of his recollection it was signed by the three children and Frieda Ash, Allen Light, and the uncle. An unsigned carbon copy of it was identified and placed in evidence, the original not having been preserved. Its contents as far as pertinent is here set out:

"Dear Boyd: Mother has filed a petition to probate father's estate and is asking for her appointment as administratrix of the estate. Mr. Schaper and Mr. Varney were out home last night and we were all present when the petition for the probate of the estate was signed by mother. We have all signed a quit claim deed conveying our interest in the real estate to mother and we have all signed an assignment of interest in father's estate to mother. We have had Mr. Schaper prepare a quit claim deed for you and Amber to sign and also have had prepared an assignment of interest in father's estate for you to sign. The deed and the assignment of interest are identical with those which we have signed and delivered to mother, and we hope you will take the deed and the assignment of interest and you and Amber both sign these papers before a notary public and have your signatures witnessed and return these papers in the enclosed envelope to Schaper & Runyan, at Broken Bow.

"Now, Boyd, we all felt this was the proper thing to do, so that mother will have all of the estate to do with as she pleases as long as she lives. We sincerely hope

you will feel the same way about the matter and execute the papers prompty and mail them in the enclosed envelope. In addition to this letter we are writing you personally. As you will probably will know, this letter is dictated in the presence of all of us, but we will write separately."

The letter with the papers was duly sent to Boyd in Idaho. On January 5, 1938, Boyd Ash wrote and mailed a letter to Schaper & Runyan, the relevant portion of which is here set out:

"They write me there is no catch in my signing the quit claim deed. I realize that I am merely signing my rights from Dad to mother, but Mr. Schaper also I realize I am signing away my rights forever, (which is just what my mother wants) unless mother *chooses* to include me. Now, how well does she know that I am never to be included and besides just what will be left to be divided after she has deeded almost everything to Criss. It seems to me t'would be far more fair to have livestock & machinery divided, (not to own) to farm both places instead of Criss getting the use of machinery and all the livestock to farm both places.

"It has *always* been this way, Dad has always wanted to do what was fair (by me) (this is an awful thing to say) but my own mother would not let him. It has always been for Criss. Now all the reasons she would give for doing so I could name just as many."

On January 12, 1938, Schaper & Runyan answered. After explaining the presence of the family when the deed and assignment were signed it stated that his uncle had thought it best to have the letter signed by all. The letter contained the following paragraphs:

"Your mother has a friendly attitude toward you and at the present time has in mind that you two boys should later farm the places, and we believe you will get farther if you will take a cooperative attitude and work together with your mother and the family than if you retain an antagonistic attitude.

"It is true, however, that if you convey this property to your mother that you do so unconditionally and she could do with it as she pleases, but after all she is your mother and usually a mother will do the fair thing with her children. Every family at times has more or less differences but in the final annalysis (sic) the old saying that blood is thicker than water holds true. In all probability when you consider the circumstances you and your wife will not have any hesitancy in executing the papers and mailing them to us or your mother."

Boyd replied briefly on January 14, 1938, that he and his wife had decided on a settlement of the father's estate. Shortly thereafter Etta Ash, Blanche I. Light, and her daughter, and Criss and Frieda Ash made a trip to the residence of Boyd Ash at Fairfield, Idaho. Boyd hitched the team to the sled and got them from the place on the highway where they were stuck in the snow. After being there 4 or 5 days, Boyd Ash and wife executed a like quitclaim deed and assignment of the personal property of the estate of Boyd's father at Fairfield, Idaho, and delivered them to Etta Ash. The visitors left the day the papers were signed without returning to the ranch.

On October 19, 1953, Etta Ash deeded both farms to Criss B. Ash, reserving a life estate which was filed for record the same day. On February 2, 1953, she had made a will leaving everything to Criss except $1 for each of her other children and providing that any obligations owed by Boyd Ash to her should not be forgiven but should be collected by her executor. On June 10, 1959, Etta Ash died at the age of 87 years.

Approximately a year before his mother's death, Boyd Ash learned of the conveyance to Criss B. Ash and this suit was commenced.

Plaintiffs' petition set out the execution of the deeds and assignments. It further alleged in considerable detail that the deed and assignment executed on December 30, 1937, were procured by Etta Ash upon her oral as-

surances, promises, and agreement that she would retain the ownership of the property deeded and assigned during her lifetime, and neither deed nor mortgage them or permit any lien to be placed thereon; that she would manage and control the same, rent the same and collect the rents, pay the taxes and insurance, and maintain the buildings in good condition; and that upon her death the real estate and personal property would descend unencumbered to her four children Blanche I. Light, Fern Ellingson, Boyd Ash, and Criss B. Ash, share and share alike, together with any revenue therefrom not needed for the grantee's personal and living expense. It further alleged that the deed and assignment obtained on the trip to Idaho from Boyd Ash and wife were procured by means of similar oral representations and agreements to him; and that the oral promises, agreements, and representations of the defendant Etta Ash by which she procured said deeds and assignments were made by her with the fraudulent intent to deprive the plaintiffs of their share of their father's estate. It set out that they were induced to sign the same because of their love for the mother and their desire that she have the necessary rights and powers to manage the estate. It further set out that they believed their mother and accepted her promises, agreements, and representations in full faith and for that reason executed the deeds; that notwithstanding her solemn oral agreements and promises, Etta Ash executed the deeds to Criss B. Ash and thereby defrauded the plaintiffs and that the deeds to Criss were given for the purpose of defrauding them; that Criss B. Ash joined and confederated with his mother in an attempt to defraud the plaintiffs and in so doing well knew all of the promises and agreements of his mother; that plaintiffs did not discover the fraud until July 4, 1958, when they learned of said deeds to Criss; and that by reason of the complicity in the fraud of Etta Ash by Criss B. Ash, he and his mother are both estopped to deny the one-fourth

interest of each of the plaintiffs in said premises. Its prayer is to establish the constructive trust as heretofore mentioned.

The separate answers of Etta Ash and Criss B. Ash, so far as they are necessary to our decision, admitted the execution of the instruments set forth in the petition; denied the other allegations thereof; and set forth an indebtedness from Etta Ash to Criss B. Ash arising from the alleged furnishing of a home, care, and ministrations to Etta Ash in her old age. All affirmative allegations of the answers were denied by the plaintiffs' replies.

The matter proceeded to trial and at the conclusion of the evidence a motion to dismiss the plaintiffs' petition was made by counsel for defendants for the reason that the record and evidence were insufficient to sustain any judgment favorable to the plaintiffs. The court sustained the motion and dismissed the petition. Plaintiffs' motion for a new trial being thereafter overruled, they have brought their appeal to this court.

The general rules relating to constructive trusts have been quite clearly stated in decisions of this court. In Musil v. Beranek, 160 Neb. 269, 69 N. W. 2d 885, it was held: "When a person obtains the legal title to real estate belonging to another by means of fraud or misrepresentation, actual or constructive, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. A court of equity will enforce such a trust for the benefit of the grantor or those claiming under him.

"Trusts arising by implication, or by operation of law, are excepted from the operation of the statute of frauds. Resulting and constructive trusts therefore fall within the exception.

"The existence of an intent to defraud at the time the promise was made may be inferred from the failure to comply with the promise, and the promisor may be presumed to have intended, when he made the promise, to do what he finally did do with respect thereto.

"The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character."

The case of Box v. Box, 146 Neb. 826, 21 N. W. 2d 868, where a constructive trust was established laid down applicable rules in that case and of value here, stating: "If a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits, out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title.

"A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.

"In such cases the promise need not be express in order to raise a constructive trust, actual cooperation and silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction."

In McCormick v. McCormick, 150 Neb. 192, 33 N. W. 2d 543, the court in speaking of trusts of this character, said: "So reluctant are the courts to engraft a trust by parol on the legal title to real estate that there is perhaps no better established doctrine than the one which requires a high degree of proof in order to establish the trust by parol evidence.

"When the person to whom a conveyance of real property is made is the wife, who is the natural object of the husband's bounty, it raises a presumption of a gift or settlement rather than of a trust. This presumption

is rebuttable." On these same questions, see, also, Nelson v. Seevers, 143 Neb. 522, 10 N. W. 2d 349.

The plaintiffs make 19 assignments of error to the ruling of the court but the following are the only ones we deem it necessary to discuss. They are that the trial court erred (1) in holding the evidence was insufficient to establish a prima facie case in favor of the plaintiffs; (2) in not finding that the relationship between Etta Ash and her four children was of such a confidential relationship as to prove a prima facie case of constructive trust; (3) in refusing to permit the plaintiff, Boyd Ash, to testify as to statements made to him by the defendant Criss B. Ash in the presence of Etta Ash under the so-called dead man's statute, section 25-1202, R. R. S. 1943; and (4) in holding that any agreement or promise giving rise to a constructive trust or estoppel must have been made by Etta Ash alone, and that any statements, representations, or promises made by Criss B. Ash out of the presence of Etta Ash could not be considered as raising a constructive trust or estoppel against either Etta or Criss B. Ash.

At the time of trial death had stilled the voice of Etta Ash and the law had barred those of her children who were plaintiffs, the spouses of those residing in Nebraska, and the son-in-law Melvin Ellingson who had succeeded to the rights of his wife from speaking.

The evidence with respect to what was said, agreed to, or done, to induce the plaintiffs to execute the documents transferring the estate of Alonzo B. Ash to Etta Ash, his widow, was very brief.

As to the meeting at the farm home near Broken Bow on December 30, 1937, William C. Schaper, the attorney, was called by the plaintiffs. He was not questioned about what was said at the meeting. He identified some of the exhibits and stated he was asked to prepare the papers by T. T. Varney, president of the Broken Bow State Bank. He said at that time he supposed he acted as attorney for the whole family. He was sure he had

not been consulted by Criss B. Ash previously and didn't think he had been consulted by Etta Ash before. Nothing he said or was asked about tended to prove or disprove any oral agreement or promise that might have induced the execution of the deeds or assignments.

Allen Light, the husband of the plaintiff Blanche I. Light, was the only other witness to give evidence concerning this meeting. He was permitted to testify because he and his wife were residents of Colorado. This was done under the rule announced in Kiser v. Sullivan, 106 Neb. 454, 184 N. W. 93, holding such a spouse has no direct interest in the litigation. He testified that at this meeting on December 30, 1937, Schaper, the attorney, at the request of the banker Varney, arose to explain what had to be done to allow Etta Ash to go ahead. He read the paper they were asked to sign which the witness remembered as one document, and asked if others desired to read it. He said if they signed it would give Etta Ash the right to all the property and the rights of all the children. They couldn't then touch a thing as long as she lived. Etta Ash asked them to sign it and said that her hands were tied and she couldn't do anything. She then said that if they would only sign it she would take care of things as long as she lived and would see that they each got an equal share when she was through with it. Something was said about what would happen if Boyd refused to sign with them. The witness said he asked the question concerning this. Fern Ellingson asked what would happen if her mother married again, and the witness' wife Blanch I. Light, said to her, "Fern, can't you trust your mother?" The banker then recommended the mother's honesty and the mother again stated that if they would sign the paper she would take care of the property as long as she lived, increase it, try to double its value, pay the taxes, not allow a mortgage on the land, and would leave each of her children an equal share when she was through with it.

On cross-examination the witness failed to remember

several things that happened at that meeting, many of which he naturally might forget. There were things of importance however that it might be supposed he would have remembered. He stated he and his wife signed one paper only though his signature appears on both the deed and the assignment. He says he was never in Schaper's office and knew of no letter signed there. When asked to identify his own signature on the quit-claim deed that he signed with the others under his wife's signature, he testified: "Q Now, did you see your wife, Blanche I. Light, sign that deed that night, or that afternoon? My question is, did you see her sign this deed? A Is this a deed? Q Yes, sir. A All I can remember of is signing one paper, and all I can remember her signing is one paper. Now, if it's a deed, - I can't read, - but there was one paper we signed, and that's all I remember. Q Is that your signature that appears as the second signature on that Exhibit 10? A Can I get to more light? Well, I don't wish to answer that question, if possible, on account of I was asked not to. Q Okay. A But my lawyer — I done my best to prove something, but they don't want me to use this in this court, so I won't answer. That's one thing I can't answer. My name is on there; and if that isn't good enough — I ain't going to say that I signed it. Q Did you sign it? A I ain't going to say that I did, no."

The conversation in Idaho when the papers were signed by Boyd and his wife was testified to by Amber Ash, his wife, they being residents of Idaho. Her evidence was that the conversations took place in the kitchen of their home on the ranch near Fairfield, Idaho; and that they took place between her husband, Boyd, Criss B. Ash, and Etta Ash, who nodded her head and added a word here and there. The substance of the conversation as repeated by her was that Criss told her husband Boyd that the papers would have to be signed since Boyd's mother, Etta Ash, couldn't conduct business otherwise; and that she would take perfectly good care

of all her property and when she was through with it, it would be equally divided among her four children. Something was said about attorney's fees and that it would make it easier for the mother if the papers were signed. The mother said at that time that she didn't know what she would do if the papers were not signed. She was crying at different times during the conversation.

The foregoing was the only evidence received concerning anything said or done in the presence of Etta Ash on the trip to Idaho tending to show an agreement on her part to convey or devise any of the property to Boyd at her death. It is true that in certain cases the promise need not be express in order to raise a constructive trust and that silent acquiescence on the part of the grantee may be sufficient where one has knowledge of the grantor's intention and understanding of the transaction. Box v. Box, *supra*. This evidence therefore was admissible as tending to show an assent on the part of Etta Ash to the agreement outlined by Criss B. Ash in her presence.

The plaintiffs attempted to show by Boyd Ash a conversation between him and his brother Criss in the presence of his mother. It was apparently the same conversation as related by his wife. It took place at the same place with the same persons present. It was excluded by the trial court which ruled that the witness could not testify as to the conversation because of the so-called dead man's statute, section 25-1202, R. R. S. 1943, Etta Ash being then present. Thereupon, an offer of proof was made. It is evident from the offer that the conversation was the same to which his wife had already testified. Under the circumstances it would have been but corroborative. In view of our decision the only relevance or materiality of the offered testimony would be on the theory that Etta Ash sat mute when she should have spoken. Amber Ash had already testified that Etta Ash cried, nodded her head, and said

she did not know what she would do if Boyd would not sign the papers. In Pearson v. Bertelson, 244 Minn. 224, 69 N. W. 2d 621, the Supreme Court of Minnesota, with respect to the dead man's statute of that state, quoted and approved its former decision in these words: "In the Pomerenke case we said, (228 Minn. 263, 36 N. W. [2d] 708):

"'* * * The all-inclusive coverage of this language is not to be evaded by dissecting a *conversation with* a decedent so as to allow testimony of what participants other than the decedent said and then to supply the import of decedent's contribution by a process of negation. A *conversation with* a decedent is not a one-sided affair in which only what the decedent said is to be considered.'"

We think the trial court did not commit error when this corroborative testimony was excluded.

There was testimony by Boyd that out of the presence of Etta Ash there were conversations between him and his brother Criss on a hunting trip in which Criss and his wife Frieda Ash urged him to sign the papers. The inducements held out by Criss as shown by this testimony were different and more attractive than those previously mentioned by Criss in his mother's presence. According to Boyd, Criss told him if the papers were signed each of the boys would get a farm and the daughters each an equivalent amount of money. These were admitted for the time being over objections that the testimony was irrelevant and immaterial, but the court's statement in dismissing the petition makes it clear it did not consider them. Plaintiffs complain that Criss and his mother were conspirators and that these statements should have been considered as binding upon the mother but, in any event, as estopping Criss. The position of the plaintiffs is without merit. There is no pleading in the petition except by conclusions of law of a conspiracy or estoppel. Neither is a separate cause of action stated against Criss. He was made a party

because when action was brought he held title and it was asserted he had knowledge of his mother's fraud in which it was alleged he participated, had notice of, and by which he was estopped. There is no showing that Criss said or did anything when the papers were executed at the home in Nebraska. In Idaho he only urged making the conveyance to his mother. Any agreement with Criss to be binding on him as a separate agreement would not create a resulting or constructive trust but would be an attempt to create an express one, as he received nothing by the plaintiffs' conveyance. The express trust would under such circumstances be void as not in writing under the statute of frauds. Halsted v. Halsted, 169 Neb. 325, 99 N. W. 2d 384.

As we view the evidence the question before us is whether there is sufficient evidence to show an agreement on the part of Etta Ash to reconvey or devise the property in question to the four children on her death. The plaintiffs urge that the rule that if a defendant in an action in equity moves at the close of the evidence of the plaintiff for a dismissal of the action for want of proof to support a judgment, he admits the truth of the evidence and any reasonable conclusions deducible from it. Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56. We do not feel that this rule abrogates or dispenses with the rule in this class of cases that the burden of proof is upon the one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. Musil v. Beranek, *supra*.

The oral statements of the witness Light as to the meeting at the home in Nebraska on December 30, 1937, and of Amber Ash in Idaho, were made more than 20 years after the conveyances. The testimony of Light, though he does recite the agreement, is not very clear, satisfying, or convincing. His cross-examination, a portion of which is set out heretofore, is not conducive to establish credence in what he says. He was the husband

of a party and, though qualified to testify, his story is subject to scrutiny because of that fact. The documents in question were drawn by a lawyer. They contained nothing to show the conveyances were not absolute. The letter to Boyd, signed by all the next day, was drawn by the lawyer thereafter and no such agreement was recited therein. The plaintiffs point to the fact that the letter did say that execution of the papers was the proper thing to do "so that mother will have all of the estate to do with as she pleases as long as she lives." They contend it indicates she was not to have the property therefor after her death. It is not however indicative of the agreement described by Light that she was neither to deed nor to mortgage it. It says that she can do with it as she pleases. If the lawyer present at the conversation testified to by Light had heard and understood there was the agreement Light describes, it was his duty as a careful lawyer to fully describe it therein. The conveyance of a life estate could have been drawn without great effort and a lawyer would have seen the necessity of it. There is nothing to suggest that the lawyer was lacking either in ability or integrity. Boyd's letter to Schaper and Runyan, after receiving the letter signed by all the children, clearly shows he understood the papers to be an absolute conveyance. In their letter in reply Schaper and Runyan clearly point out they understood it as Boyd did. Boyd's last letter shows he still understood the conveyance to be absolute. Thereafter he executed conveyances that contained no new provisions and reserved nothing whatever. Indeed they seem from the exhibits to be those originally sent to him, both as to appearance of the exhibits from comparison with the prior documents, and the dates contained therein.

After these letters and after the explanation of Schaper and Runyan, the plain import and effect of these instruments is sought to be altered in material and important aspects after more than 20 years by oral testi-

mony of one witness to each transaction, in each instance a spouse of a party, concerning conversations one of which was participated in by the grantee herself and the other by brief conversations of the brothers before their mother who is now deceased, at which time she only cried, nodded, and said she did not know what she would do if Boyd and Amber Ash did not sign. There is no showing of other circumstances or evidence that might substantiate the statements, either by word or deed.

The plaintiffs contend that, as stated in Restatement, Trusts, § 44, p. 137, in many instances a confidential relation exists not only between attorney and client, trustee and beneficiary, guardian and ward, and similar relationships, but also where because of family relationships the transferor is in fact accustomed to be guided by the judgment of the transferee or is justified in placing confidence and believes that the transferee will act in the interest of the transferor. In this case however, the children of Etta Ash were not shown to have been particularly close to her. They had lived for some time apart from her, were not home and did not see her often, and there was no showing that they were in the habit of depending on her judgment or looking to her for guidance in their business matters. Boyd quite clearly did not show that he relied on her or was under her influence.

A conveyance by children to their recently widowed mother under such circumstances would more likely be presumed a gift than a conveyance procured because of any fiduciary relationship raising a constructive trust.

It is because of the necessity of giving stability to written muniments of title that require courts of equity and good conscience to establish and decree constructive trusts only by clear, convincing, and satisfactory evidence.

The trial court found the evidence was insufficient to establish such a trust and to warrant a judgment in

favor of the plaintiffs, and with its ruling we are in accord.

The judgment is therefore affirmed.

AFFIRMED.

THURMAN F. WENZEL ET AL., APPELLANTS, V. OLIVER R. WENZEL ET AL., APPELLEES.
116 N. W. 2d 788

Filed June 22, 1962. No. 35180.

1. **Estoppel.** The doctrine of estoppel is applicable 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.
2. **Partition: Wills.** Involuntary partition of an estate devised in equal shares to the testator's children cannot be decreed contrary to a provision in the will which forbids a division for a reasonable time fixed by the testator in definite terms; the condition not being a void restraint on alienation nor a limitation repugnant to the fee.

Appeal from the district court for Lancaster County: ELMER M. SCHEELE, Judge. Affirmed as modified.

William L. Walker and Earl Ludlam, for appellants.

F. C. Radke and Wagener & Marx, for appellees.

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

CARTER, J.

This is a suit in equity brought by Thurman F. Wenzel and wife to quiet title to a quarter section of land specifically described in the petition as against a note and mortgage for $19,990 and to recover $16,000 paid on the purchase price of the land. The second cause of action raises the issue of the amount owing for pasture rent by the plaintiffs under a written lease. The third cause of action raises the question as to whether or not plaintiffs are entitled to make conditional payments to the

clerk of the district court on the $19,990 mortgage to avoid a default in payments thereon when the payments are due the executor of the estate of Fred C. Wenzel, deceased. The fourth cause of action is for the partition of the lands in the estate of Fred C. Wenzel, deceased. The trial court found generally against the plaintiffs and for the defendants on all causes of action, and the plaintiffs have appealed. We shall deal with each cause of action in the order above stated.

Fred C. Wenzel died on April 4, 1960, owning 5 tracts of land designated in the record as follows: The Home Place containing 160 acres, the North Place containing 160 acres, the Hay Shed Place containing 160 acres, the Berlett Place containing 145 acres, and the Cass County Eighty, containing 80 acres. Fred C. Wenzel died testate, having executed a will on September 2, 1958. His wife predeceased him, she having died on April 26, 1958.

On February 25, 1960, Fred C. Wenzel entered into a written contract to sell the Home Place to his son, Thurman F. Wenzel, the principal plaintiff herein, for the sum of $36,000, payable as follows: $10 in cash and $16,000 by a mortgage in that amount to be placed on the land by Fred C. Wenzel which plaintiffs were to assume. Upon the payment of the $16,000 mortgage, the deed which was placed in escrow was to be delivered to plaintiffs who at the same time were to execute and deliver a note and mortgage for $19,990 to Fred C. Wenzel. Because of the illness of Fred C. Wenzel, the parties on February 29, 1960, orally amended the contract of sale to provide for the immediate delivery of the deed, the obtaining of a first mortgage by plaintiffs to make the $16,000 payment, and the giving of a second mortgage to Fred C. Wenzel in the amount of $19,990.

Before the application for the first mortgage was approved, Fred C. Wenzel died. His son, Oliver R. Wenzel, was appointed special administrator and then executor of his father's estate. On April 12, 1960, following the death of Fred C. Wenzel on April 4, 1960, a copy of the

will of Fred C. Wenzel and a copy of the notice of probate were mailed to all the heirs of Fred C. Wenzel, including the plaintiffs, which plaintiffs admit they received. On April 22, 1960, plaintiffs notified the heirs, the special administrator, and the latter's attorney, that they were ready, willing, and able to complete the real estate transaction, and desired to do so. On April 26, 1960, the transaction was closed. The first mortgage was executed and delivered to the mortgagee, $16,000 was paid to the special administrator by plaintiffs, the deed was delivered by the escrow agent, and the note and second mortgage for $19,990 were likewise delivered to the special administrator.

The will of Fred C. Wenzel was admitted to probate on May 19, 1960, and Oliver R. Wenzel was at that time appointed executor by the county court. On June 8, 1961, plaintiffs filed their amended petition alleging that under the fifth paragraph of the will of Fred C. Wenzel the debt of $36,000, other than the $10 cash payment, was forgiven and that plaintiffs were entitled to receive back the $16,000 paid to the special administrator and to have the $19,990 note and second mortgage cancelled and held for naught, and that title to said real estate should be quieted in the plaintiffs.

The fifth paragraph of the will of Fred C. Wenzel provided: "If at my decease any of my children shall be indebted to me such debts shall not be an asset of my estate and shall be forgiven." The primary question raised as to the first cause of action is whether or not the cited provision of the will had the effect of forgiving the purchase price of the farm except for the cash downpayment of $10, and whether or not plaintiffs are estopped from asserting the fifth paragraph of the will as the basis for recovering back the $16,000 and securing the cancellation of the $19,990 note and mortgage.

The defendants first contend that the contract of sale between Fred C. Wenzel and Thurman F. Wenzel was conditional or contingent and therefore not a debt within

the meaning of the fifth paragraph of the will. We shall not discuss or pass upon that question for the reason that the case is determinable under the law of equitable estoppel.

The controlling facts are as follows: The contract of sale was entered into by Fred C. Wenzel and Thurman F. Wenzel on February 25, 1960. On February 29, 1960, the parties orally modified the contract by providing for the immediate delivery of the deed and the procuring of the $16,000 mortgage by the plaintiffs instead of by Fred C. Wenzel as first contemplated. Thurman F. Wenzel made application for a first mortgage loan on February 29, 1960, and the deed to the land was placed in the hands of an escrow agent on that date. Before the loan was approved, or obtained, Fred C. Wenzel died. A petition for the probate of the will of Fred C. Wenzel was filed on April 4, 1960. On April 12, 1960, copies of the will of Fred C. Wenzel and the notice of probate were mailed and received by plaintiffs. On April 22, 1960, plaintiffs notified the heirs of Fred C. Wenzel that they were ready, willing, and able to complete the real estate transaction, and advised them that plaintiffs would be prepared to close the transaction at the place stipulated in the contract of sale on April 26, 1960, at 2 p.m. The parties met at the designated place at the hour set. The plaintiffs paid $16,000 to the special administrator. The escrow agent delivered the deed to the plaintiffs and the note and mortgage for $19,990 to the special administrator. The transaction was completely closed.

There is evidence in the record that the market value of the land was $40,000. The contract price was $36,000. Thurman F. Wenzel served notice of his desire and ability to close the transaction. It was completed in accordance with his demand and the terms of the agreement made. It is quite evident that plaintiffs desired to complete the transaction in accordance with the contract of purchase and the oral modifications made there-

to. Plaintiffs had received a copy of the will before the transaction was closed. They knew and understood its contents. They elected to close the transaction in accordance with the contract of purchase, and made no claim that the purchase price other than the $10 cash payment was forgiven by the fifth paragraph of the will. The motivating factors which impelled plaintiffs to press for an immediate closing of the transaction are not shown by the record. We can only speculate that they may have considered the purchase price to have been less than the value of the land, or had doubts of the position they now present to this court. In any event, they elected to demand the delivery of the deed. They performed all covenants of the purchase contract. They voluntarily paid the $16,000 and executed and delivered the note and mortgage for $19,990.

After the contract of purchase was fully complied with in accordance with its terms, they assert that they are entitled to receive back the $16,000 and to have the note and mortgage cancelled. They are estopped from asserting the claim they are presently litigating.

In Securities Acceptance Corp. v. Brown, 171 Neb. 406, 106 N. W. 2d 456, this court stated: "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."

In Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612, we quoted the following with approval: " 'Equitable estoppel or estoppel by misrepresentation is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct; and it arises where a person, by his acts, representations,

or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and the other person rightfully relies and acts on such belief, and will be prejudiced if the former is permitted to deny the existence of such facts.' "

Thurman F. Wenzel admits that he read the will of Fred C. Wenzel and understood its contents before he served notice on the heirs that he was ready, willing, and able to close the transaction in accordance with the terms of the real estate contract. It must be assumed, we think, that he preferred to take the land at the contract price rather than to risk litigation as to the interpretation of the will of Fred C. Wenzel. His insistance on closing the deal in accordance with the contract foreclosed any dispute as to the intention and effect of his father's will. He elected to take the benefits of the contract of purchase as orally modified. He further recognized the validity of the transaction by paying into court the first installment of principal and interest on the $19,990 second mortgage amounting to $1,500. Equity will not permit plaintiffs, after complying with the real estate contract and accepting its benefits with full knowledge of the import of the fifth paragraph of the father's will, to now assert it in order to escape the liability they assumed with their eyes open. Plaintiffs will not be permitted to obtain title to the land by asserting their rights under the contract and after obtaining the title to disavow the means employed to obtain it. Under such circumstances plaintiffs will not be permitted to retain the benefits and avoid the obligations they assumed in order to obtain them. The position that plaintiffs have assumed is unconscionable and inequitable, and is not deserving of the helping hand of a court of equity. The facts require a court of equity to apply the rules of equitable estoppel and deny relief.

The second cause of action involves the amount of pasture rent due under a written lease entered into on Feb-

ruary 25, 1960, between Fred C. Wenzel as lessor and Thurman F. Wenzel as lessee. The lands leased were the Berlett Place, the North Place, and the Hay Shed Place. The North Place was specifically excluded from the lease until March 1, 1961. The lease in question was for a term of 5 years beginning on March 1, 1960, and terminating on February 28, 1965. By the terms of the lease Thurman F. Wenzel agreed to pay Fred C. Wenzel "$6.00 per acre for about 75 acres of pasture," payable on September 1 of each year.

Thurman F. Wenzel testified that there are 20 acres of pasture on the Berlett and the Hay Shed Places and 55 acres on the North Place. Since the North Place was excepted from the first year of the lease, he tendered $120 as the rental for the 20 acres on the Berlett and Hay Shed Places. The tender was refused by the executor. The executor contends there were 22 acres fenced as pasture on the Berlett Place. He testified also that there were approximately 13 acres fenced on the Hay Shed Place and that there were additional acres available for pasture which included waterways and turn rows. The trial court found that approximately 60 acres of pasture were to be paid for as pasture at the rate of $6 per acre on the Berlett and Hay Shed Places. We do not think the evidence sustains this finding. After a consideration of all the evidence we conclude that there are 35 acres of pasture on the Berlett and Hay Shed Places within the meaning of the lease and that plaintiffs owe $210 as rent therefore for the year 1960. The judgment of the district court will be modified accordingly.

On the third cause of action the trial court found that the payments of interest and principal on the $19,990 note and mortgage should have been paid to the executor and not to the clerk of the district court and directed the clerk of the district court to pay any amounts so held to the executor. The disposition of this cause of action by the trial court is correct.

The fourth cause of action prays for the partition of the real estate in accordance with the respective shares of the heirs of Fred C. Wenzel. On this question the sixth and seventh paragraphs of the will of Fred C. Wenzel are pertinent. They are as follows:

"SIXTH, all the rest and residue of my estate I give, devise and bequeath to my nine children, sons and daughters, in equal shares, subject, however, to the following:

"At this time some of my land is subject to mortgage debt. It is my will therefore that my Executor, or his successor in office, keep my estate open and operate my farms until the said mortgage debt is paid if there remains not sufficient personal estate out of which to pay said mortgage debt; and my Executor, or his successor in office, is hereby fully empowered to operate generally all of my farm lands and to borrow money for such purpose if needed, from Lincoln Production Credit Association, and to pledge necessary security for such loans to the same extent that I could have done in my lifetime. The operation of my farm lands for the above stated purpose shall not continue for more than five years. The pay for the Executors special services in operating the farms as above intended shall be determined and authorized by order of the County Court. My executor shall make a complete annual accounting of the farming operations as above authorized.

"SEVENTH. I hereby appoint my son Oliver Wenzel to be the Executor of this, my last will and testament and to administer my estate, hereby revoking all former wills made by me. I hereby empower my Executor, or his successor in office, to sell and convey any or all of my real estate without order of any court when the mortgage debt thereon has been paid, or at the end of five years if not paid. This provision is made for the convenience in making final distribution of my estate to the beneficiaries thereof and such sale or sales may be at either public or private sale subject only to the

approval of the County Court by order entered."

Ordinarily, the right to partition property is one of right and not a matter of grace. The right to partition, however, may be restricted by the terms of a testator's will where the restriction is reasonable. In the instant case the testator by paragraphs six and seven of his will provided that his estate should be kept open and his lands remain in the possession of the executor until the mortgages on his lands were paid off or for a period of 5 years whichever occurred first. Mortgages on the lands of the deceased in the approximate amount of $33,377.43, exclusive of the two mortgages placed on the Home Place after testator's death, existed on testator's lands at the time of trial. The restrictions on the sale of the lands were within the province of the testator to make. The restrictions against the sale of the lands were reasonable and lawful. The result is controlled by Peterson v. Damoude, 98 Neb. 370, 152 N. W. 786, 14 A. L. R. 1238, wherein it is said: "It is evident from the language of the will that it was the purpose of the testator to postpone a division of the estate until her death. The general rule is that an adult tenant in common may demand partition as a matter of right * * *; and the fact that he is a remainderman and that the particular estate has not expired is not a valid objection * * *; but equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed upon the estate by one through whom he claims * * *; nor is such a condition or restriction in the instrument conveying the estate invalid as repugnant to the estate granted, or as against public policy * * *. We regard the language of the will fixing the time at which the estate shall be divided as an express condition against partition prior to that time. No partition can be had, therefore, until the particular estate of Hanorah Dee is extinguished." The trial court properly denied partition in the instant case as being prematurely brought.

The judgment of the trial court is in all respects correct except as to the modification of the amount adjudged to be due under the second cause of action.

AFFIRMED AS MODIFIED.

SAMUEL H. HANSEN ET AL., APPELLEES, V. THE COMMONWEALTH COMPANY, A CORPORATION, APPELLANT.

115 N. W. 2d 895

Filed June 22, 1962. No. 35183.

1. **Money Lenders: Usury.** The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made.
2. **Usury.** The burden of proving usury in an action on a promissory note rests upon the party charging it unless usury is apparent on the face of the note.
3. **Appeal and Error.** This being an action in equity it became the duty of this court to retry the issue or issues of fact in the finding or findings of fact complained of upon the evidence contained in the bill of exceptions, and upon trial de novo of such questions of fact to reach an independent conclusion as to what findings were required upon the pleadings and all of the evidence without reference to the conclusion reached in the district court.
4. **Usury.** Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument.
5. **Evidence.** Parol testimony is not admissible where it is offered for the purpose of proving by parol some other agreement as to the contractual terms and the method of payment other than that specified in the writing.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded with directions.

Ginsburg, Rosenberg & Ginsburg and Norman M. Krivosha, for appellant.

E. D. Warnsholz, for appellees.

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

MESSMORE, J.

This is an action in equity brought by Samuel H. Hansen and Emma M. Hansen, plaintiffs, against The Commonwealth Company, a corporation, defendant, in the district court for Lancaster County, to declare a loan made by the defendant to the plaintiffs to be void and uncollectible.

The trial court found that the promissory note and extensions thereof did not set forth the true and complete agreement between the parties; that the true and complete agreement between the parties called for repayment of the loan in a final, unequal, and balloon installment to be paid from the proceeds of the sale of the real estate; that such a final, unequal, and balloon installment was prohibited on all loans calling for interest charges in excess of 9 percent per annum; that said loan was void and uncollectible under the provisions of section 8-432, R. R. S. 1943, and the defendant was prohibited from collecting or receiving any portion of the principal or interest; and that the promissory note and four extensions thereof, the chattel mortgage, the real estate mortgage, and the assignment of rents should be held to be void and cancelled, and defendant should refund to plaintiffs all payments made on said loan, together with interest at the rate of 6 percent per annum computed from the date of each installment payment. Judgment was rendered in the amount of $1,688. The promissory note and four extensions thereof, the chattel mortgage, the real estate mortgage, and the assignment of rents were held to be void and cancelled. The clerk of the district court was ordered to refund to plaintiffs the payments made by them in compliance with the previous order of the court entered October 12, 1960.

The defendant filed a motion for new trial which was

overruled. The defendant perfected appeal to this court.

The plaintiffs' amended petition alleged that The Commonwealth Company was a Nebraska corporation, licensed as an industrial loan and investment company under the provisions of sections 8-401 to 8-433, R. R S. 1943, as amended; that on November 15, 1957, plaintiffs and defendant entered into a contract under which defendant loaned plaintiffs $2,704.20; that said loan was evidenced by a promissory note; that the loan was extended by four subsequent notes executed on March 25, 1958, September 9, 1958, February 5, 1959, and December 31, 1959; and that the plaintiffs made and the defendant accepted certain payments set forth in the plaintiffs' amended petition. The plaintiffs further alleged that the original loan and its extensions were void and uncollectible because installment payments, consisting of unequal, final balloon payments, were extended over a period of more than 36 months in violation of section 8-429, R. S. Supp., 1959; and that at the time of the negotiation of the loan, November 15, 1957, the defendant verbally informed plaintiffs and plaintiffs verbally agreed that the principal and interest of said loan would be paid in monthly installments of $50 each, beginning December 15, 1957. Plaintiffs further alleged that the defendant should refund to the plaintiffs all payments made by them, and that the loan should be cancelled. Plaintiffs prayed that the loan be declared void and uncollectible and that plaintiffs recover judgment for payments made by them, together with interest and costs.

There was a second cause of action pleaded by the plaintiffs which has been abandoned on this appeal.

The defendant's answer to the plaintiffs' amended petition admitted defendant's legal capacity, the execution of the original note and the extensions thereof as alleged in the plaintiffs' amended petition; and denied each and every allegation contained in the said petition except as specifically admitted. The defendant alleged that the loan of November 15, 1957, was made

for a 1-year period, payable in quarterly installments; that the plaintiffs failed to make the installments called for in the loan agreement; that at the plaintiffs' insistence and request, the defendant granted the extensions thereof; that at the time of making the extensions the plaintiffs represented to the defendant that they would, during the period of such extension, pay off their loan, and informed the defendant that they were in the process of selling certain real estate they owned which sale would be made before the loan became due and the loan would be paid; that the plaintiffs failed to comply with their representations and requested further extensions, assuring the defendant that they would sell their real estate and pay off the loan; that each and every extension of the loan was made at the specific request of the plaintiffs; that at no time did the defendant have any intention that the loan should run beyond 1 year from the date of the making thereof; that at no time did the defendant intend or expect to make any extension of the original loan, but in each and every instance the plaintiffs failed to make payment within the time required by the note and requested additional extensions; that none of the extensions were made at the request of the defendant, nor prearranged or planned for by the defendant; and that during the period of the extensions the plaintiffs made payments on account of their indebtedness, stating that thereby they would cut down the total indebtedness due the defendant and which would have to be paid out of the proceeds of the sale of their property.

By cross-petition the defendant alleged the execution of the note, the chattel mortgage on the house trailer, and a real estate mortgage as security for the payment of the note; and that the note and mortgage indebtedness were delinquent and unpaid. It prayed for foreclosure of the mortgages for the satisfaction of the amount due the defendant.

The plaintiffs' reply generally repeated the allega-

tions of their amended petition, and admitted payments made by them and accepted by defendant were as set forth in defendant's answer. These payments will appear in the statement of the evidence. The prayer of the reply was for the same relief as contained in the plaintiffs' amended petition.

"The design of the Installment Loan Act is to license and control the business of making installment loans and to restrict the enforcement or collection of illegal loans once they have been made." Robb v. Central Credit Corp., 169 Neb. 505, 100 N. W. 2d 57.

The sections of the statutes involved in this appeal are as follows.

Section 8-418, R. S. Supp., 1961, provides: "Any industrial loan and investment company may contract and receive on any loan, charges including interest at graduated rates not exceeding eighteen percent per annum on that part of the unpaid principal balance on any loan not in excess of one thousand dollars; not exceeding twelve per cent per annum on that part of the unpaid principal balance on any loan in excess of one thousand dollars and not in excess of three thousand dollars; not exceeding nine per cent per annum on that part of the unpaid principal balance on any loan in excess of three thousand dollars; Provided, that such graduated rates shall be computed strictly as simple interest on the unpaid principal balance for the time actually outstanding."

Section 8-429, R. S. Supp., 1961, provides in part: "Every loan made under sections 8-418 to 8-433 shall be repayable within a period of thirty-six months or less in approximately equal or declining installments of principal and interest at approximately equal intervals."

Section 8-423, R. R. S. 1943, provides in part: "All charges based upon due performance of the loan contract and computed as provided in section 8-418 may be included in the amount of any installment scheduled to be repaid by the borrower; Provided, however, that

the borrower may prepay the loan, in whole or in part, at any time and in case of such prepayment, whether in cash, extension, renewal or otherwise, the full unearned portion of the precomputed charges shall be canceled in such an amount that the charges paid by the borrower will not exceed the rates contracted for applied to the unpaid principal balance for the time actually outstanding, except that the charges retained may be increased to the extent that delinquency charges are computed in accordance with the monthly percentage agreed rates, either on a prepaid loan or a loan paid at maturity or after maturity."

Section 8-432, R. R. S. 1943, provides in part: "If the industrial loan and investment company shall fail to comply with any of the provisions of sections 8-418 to 8-433, in the making or collection of any loan which is subject to said sections, the loan shall be void and the lender shall have no right to collect and receive any principal, interest or charges."

For convenience we will refer to the plaintiff Samuel H. Hansen as Hansen, to The Commonwealth Company as defendant, and the Hansens at times as plaintiffs or Hansens.

Sumner E. Copple, called as a witness for the plaintiffs, testified that he was the president of the defendant; that a loan was made to the Hansens on November 15, 1957; that this loan was extended on March 25, 1958, September 9, 1958, February 5, 1959, and December 31, 1959; and that Marvin Copple, the vice president of the defendant, negotiated this loan and the extensions of the loan.

This witness identified the original promissory note and the extensions thereof, as follows: The original note, loan No. 27971, signed by the Hansens on November 15, 1957, was for the amount of $2,704.20. The principal and interest were payable in three payments of $991 each, one each 4 months, the first payment due on March 15, 1958, and the final payment due November

15, 1958. This note was secured by a chattel mortgage on a 1955 Mercury house trailer, a mortgage on real estate, and an assignment of rents. The agreed rate of charges on the unpaid principal balance of this note until paid was 1½ percent per month on that part of the unpaid principal balance not in excess of $1,000, 1 percent per month on that part of the unpaid principal balance in excess of $1,000, and not in excess of $3,000, and three-fourths of 1 percent per month on that part of the unpaid principal balance in excess of $3,000. Said charges were to be computed strictly as simple interest on the unpaid principal balance for the time actually outstanding, a month being any period of 30 consecutive days, and the daily rate 1/30th of the monthly rate. Further provisions in the note are unnecessary to relate.

The first extension was loan No. 28975, dated March 25, 1958. The principal amount of the note was $2,666.52. The principal and interest were payable in three payments of $952 each, one each 3 months, the first payment due on June 25, 1958, and the final payment due on December 25, 1958. The same security as appears in the original note was given. This note was executed, delivered, and accepted, not in payment, but for the purpose of extending the time of payment of a certain note dated November 15, 1957, for $2,704.20 in favor of the defendant.

The second extension was loan No. 30324, dated September 9, 1958. The principal amount of the note was $2,539.90. The principal and interest were payable in two payments of $1,336 each, one each 3 months, the first payment due December 10, 1958, and the final payment due March 9, 1959. The same security as appears in the original note, and the same extension language appears on this note as appeared on the first extension note.

The third extension was loan No. 31345, dated February 5, 1959. The principal and actual amount of the loan was $2,640.68. The principal and interest were payable

in three payments of $972 each, one each 4 months, the first payment due June 5, 1959, and the final payment due February 5, 1960, with the same security and the same language with reference to the extension as was used in the preceding extension notes.

The fourth extension was loan No. 33737, dated December 31, 1959. The principal amount of this note and actual amount of the loan was $2,619.04. The principal and interest were payable in three payments of $958 each, one each 4 months, the first payment due April 30, 1960, and the final payment due December 31, 1960, with the same security as appears in the original note, and extension provisions the same as appears in the preceding extension notes.

Each of the notes was a separate transaction as indicated by the loan numbers thereon.

There was a real estate mortgage given as security for the loan, made to the defendant by the plaintiffs, dated November 15, 1957, on real estate owned by the plaintiffs in Spencer, Nebraska. There was also a chattel mortgage given by the plaintiffs to the defendant as security for the original loan on a used 1955 Mercury house trailer on November 15, 1957. This chattel mortgage was endorsed as a first lien on the certificate of title to the trailer on November 22, 1957. There was also an assignment of rents executed by the plaintiffs to the defendant.

Sumner E. Copple further testified that each time an extension note was made, the old balance due was carried forward on such note, and no further security was asked for by the defendant; that the last payment received from the Hansens on their indebtedness was on September 8, 1960; that no payments have been made since that time; and that after giving credit for the payment of September 8, 1960, the balance owing by the Hansens to the defendant was $2,587.25, plus accrued interest from September 8, 1960.

The payments made by the Hansens to the clerk of

the district court as per order of the court were as follows: October 25, 1960, $50; November 8, 1960, $50; December 14, 1960, $50; January 9, 1961, $50; February 9, 1961, $50; March 12, 1961, $50; and May 11, 1961, $50. It was stipulated that the above amounts were correct.

Marvin E. Copple testified that he personally negotiated the loan with the Hansens; that at the time the loan was made he had a discussion with the Hansens regarding the method of repayment before the loan was finally signed; that they talked about the amount of money they wanted to borrow; and that Hansen said he had a house he was selling which would be sold shortly, that it had been for sale prior to the time the loan was made, that when he sold the house he would pay the loan in full, and that he would have the loan paid off before the first payment became due, which was 4 months from the time of signing the original note. Hansen asked this witness if he could pay the loan off sooner than the 4 months, and was told that he would be charged interest for the number of days the money was borrowed, and that he was free to pay off the loan at any time he wanted to. Hansen wanted to know if he could pay off the loan if he sold the house in the next few weeks, and he was informed that he could do so. This witness further testified that Hansen said he wanted to pay the loan off, and that the house would definitely be sold before the first payment became due. This witness further testified that $50 was paid on December 2, 1957; $50 on January 2, 1958; $50 on February 3, 1958; and $50 on March 4, 1958. On March 28, 1958, the loan was extended. At that time a discussion was had about the extension of the loan, and this witness told Hansen that he wanted the loan paid off. Hansen said that he did not have the money to pay it, that the house had not been sold but was still for sale, and that as soon as it was sold the loan would be paid. Then Hansen asked if he could have the loan extended until the house was sold. On March 28, 1958, Hansen promised that he

would be able to pay the loan in full before the next payment became due. When the second extension was made, there was the same type of discussion as before. Hansen again said he wanted to pay the loan but was unable to do so. On February 5, 1959, the house had not been sold. Hansen said the house would be sold before the first payment on the extension note of February 5, 1959, became due. At the time of the fourth extension note, this witness had the same type of discussion with Hansen as on the previous occasions when the extensions were made. Each and every time the original note was extended, Hansen stated that he would be able to pay off the loan before any of the payments due thereon would have to be made.

Marvin E. Copple further testified that the payments made by Hansen on the November 15, 1957, loan as extended were as follows: April 7, 1958, $50; May 6, 1958, $50; June 9, 1958, $50; July 7, 1958, $50; August 4, 1958, $50; and September 2, 1958, $50. The loan was extended on September 9, 1958, then payments were made by Hansen as follows: October 6, 1958, $50; November 10, 1958, $50; December 8, 1958, $50; January 12, 1959, $50; March 10, 1959, $50; April 20, 1959, $50; May 18, 1959, $50; June 15, 1959, $50; July 27, 1959, $50; September 22, 1959, $50; October 19, 1959, $50; December 1, 1959, $50; January 19, 1960, $8.21; May 24, 1960, $80; June 25, 1960, $75; July 22, 1960, $75; August 24, 1960, $75; and September 8, 1960, $75.

This witness further testified that during the time the payments of $50 a month were being made there was a discussion with Hansen concerning these payments. Hansen was told that these payments were inadequate and were not being made in accordance with the contract, and that the defendant wanted the note paid off as per schedule of the loan and as it was set up, not at the rate of $50 a month. When Hansen was told this, he said he could not pay the loan off and that the only way he could pay off the loan would be when he sold his

house in Spencer. This witness further testified that at the time the plaintiffs signed the original note they were told that even if they did not sell the house, they would be expected to make payments in accordance with the terms of the note; and that if Hansen wanted to make prepayments, he could do so. The first payment made by Hansen was within 17 days after the loan was made. Each time this loan became delinquent or the extension notes became delinquent, Hansen was contacted and always requested an extension of the original note for the reason that he had not sold his house and said that when he did so he would pay the loan. The evidence is rather extensive on this point and need not be discussed further.

This witness further testified that at no time was there any agreement that this loan was to be paid off at the rate of $50 a month. At no time were the plaintiffs advised that they would be obligated to pay the loan in any manner other than that set forth in the written instrument which they signed. Every extension was made in reliance on Hansen's representations that he was negotiating the sale of the house and would have it sold within a reasonably short time. The defendant had no alternative other than to extend the loan or foreclose the mortgages given as security for the loan.

Louis Klasna testified that he was engaged in the real estate and insurance business at Spencer, Nebraska; that he was acquainted with the Hansen property and was engaged to negotiate a sale of this property; that Hansen called him on March 24, 1960, to list the property for sale at $2,100 and to put an ad in the paper, which he did; that before March 1960, he was not representing Hansen but was representing a prospective buyer; and that the deal with the prospective buyer fell through on October 1, 1959.

Samuel H. Hansen testified that on November 15, 1957, he negotiated a loan with the defendant, the amount of which was $2,704.20; that he talked to Marvin Copple

about signing the papers; that he needed the money for the purpose of purchasing a trailer house; that he was to give the abstract to his property in Spencer to be held as security; that he was to pay $50 a month until he sold the property; that Marvin Copple agreed to that arrangement; that when he sold his property he was going to pay the loan in full; and that Marvin Copple called him in a few times and tried to get him to sell the house.

On cross-examination this witness testified that when he talked to Marvin Copple he had some people who were interested in the house and to whom he was selling the house for $3,000, but the deal fell through; that he and his wife thought the house would be sold; that Marvin Copple told him that he would make out his loan for 1 year and whenever the house was sold the loan could be paid off; and that he told Marvin Copple that he was going to try again to sell the house to another party and this deal ran for quite a while and then fell through. He then told Klasna to list the property and see what he could do about selling it. Up to the time the deal fell through on October 1, 1959, Hansen thought he had the property sold to a Mr. Harris. Marvin Copple told Hansen to dispose of the property so that he could make a settlement, that the loan was delinquent, and that the defendant could not carry it any longer. Hansen said he would put the house up for sale at auction rather than have a foreclosure. At the time the loan was made, Hansen asked Marvin Copple if he had a right to make any prepayments at any time, and was told he could pay any amount at any time.

Mrs. Samuel H. Hansen testified that she was present when the loan was made; that Marvin Copple was told that $50 a month was the amount that they could pay as they were paying on a trailer, and Marvin Copple said that would be all right; and that Marvin Copple was told that when the house in Spencer was sold the loan would be paid in one lump sum. This witness further

testified that she did not read the note before it was signed, and that no one tried to stop her from reading it.

The defendant assigns as error that the trial court erred in admitting in evidence parol evidence to contradict and vary the terms of the written instrument in suit; in finding that the loan in question provided for payment by a final, unequal, and balloon installment in violation of section 8-429, R. S. Supp., 1961; in finding that the loan in question was void and uncollectible under the provisions of section 8-432, R. R. S. 1943; in failing to find that the defendant was entitled to a foreclosure of the chattel mortgage and the real estate mortgage held by the defendant; and in failing to grant defendant judgment as prayed for in its cross-petition.

The burden of proving usury in an action on a promissory note rests upon the party charging it unless usury is apparent on the face of the note. See Nitzel & Co. v. Nelson, 144 Neb. 662, 14 N. W. 2d 197.

This being an action in equity it became the duty of this court to retry the issue or issues of fact in the finding or findings of fact complained of upon the evidence contained in the bill of exceptions, and upon trial de novo of such questions of fact to reach an independent conclusion as to what findings were required upon the pleadings and all of the evidence without reference to the conclusion reached in the district court. § 25-1925, R. R. S. 1943.

The defendant objected to the introduction of parol testimony given by the plaintiffs relating to payments on the loan at $50 a month and payment of the remaining indebtedness on the loan when they sold their house in Spencer, Nebraska, for the reason that such oral testimony was an attempt to contradict and change the terms of a written instrument and the extension notes relating thereto, and that such evidence was incompetent. This objection was overruled and such evidence was admitted.

In Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19, this court said: "Since usury is generally accompanied by device, subterfuge, scheme, and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument."

Parol testimony is not admissible where it is offered for the purpose of proving by parol some other agreement as to the contractual terms and the method of payment other than that specified in the writing. See 55 Am. Jur., Usury, § 166, p. 439.

The following, while not similar in facts to the instant case, does apply here.

As stated in Blindman v. Industrial Loan & Thrift Corp., 197 Minn. 93, 266 N. W. 455, 104 A. L. R. 1253: "The usury claim now presented by the plaintiffs is that prior to the signing of the note there was an oral agreement between the plaintiffs and the defendant that the note should be paid in four monthly instalments, on the 18th day of January, February, March, and April, 1932. The note itself reserved no interest before maturity, and the legal rate of six per cent after maturity. Plaintiffs rely solely on this oral agreement that the note, in contradiction to its plain terms, was payable in monthly instalments instead of in four months from date. * * * The question is squarely presented whether, as found by the trial court, this oral agreement that the note should be paid on dates different from those stated therein can here be shown for the purpose of establishing usury. The evidence of this alleged oral promise or agreement not only contradicts the terms of the note itself, but it is in contradiction of the general rule that parol evidence cannot be shown for the purpose of varying the terms of a written contract made, covering the same subject, prior to the execution and delivery of the note. * * *

There are numerous cases holding that on the question of usury parol evidence may be received to vary the terms of a written contract for the purpose of showing that it is illegal. There is a minority of decisions to the contrary. * * * Few, if any, of the decisions apply the majority rule where the oral evidence varies and contradicts the express terms of the note or contract sued upon in other respects than in reference to the consideration. To allow the time of payment to be changed by parol evidence, while the contract is still executory, is a very different process from using similar proof to show conduct of the parties in performance of it, where it has been executed in whole or in part. The distinction is clearly noted in Koehler v. Dodge, 31 Neb. 328, 334, 47 N. W. 913, 914, 28 A. S. R. 518, * * *."

In Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913, 28 Am. S. R. 518, it was said: "It appears from the tenth finding that at the time of the making of the four notes which were renewed by the notes in suit it was agreed between the defendants and the payee that the makers should pay interest thereon from their date at the rate of eighteen per cent, instead of ten per cent as expressed on their face. It is argued by counsel that the parol contemporaneous agreement to pay a usurious rate of interest did not taint the notes with usury. It is doubtless true that when a person borrows money and gives his note therefore, specifying a lawful rate of interest, a verbal promise of the borrower made at the time the indebtedness is incurred to pay an unlawful rate of interest for the use of the money would not of itself make the transaction usurious." Cases are cited.

In A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687, the lender was prevented from showing that the oral agreement was different from the written agreement for the reason that the oral agreement varied and contradicted the terms of the written agreement.

In Perry v. Gross, 155 Neb. 662, 53 N. W. 2d 73, it was said: "Also the parol evidence rule is not merely

one of evidence. It is one of substantive law as well. As a rule of substantive law it renders ineffective proof of an oral prior or contemporaneous agreement the effect of which would be to vary, alter, or contradict the terms of a written agreement." Cases are cited.

In the instant case there was no contention made by the plaintiffs in their pleadings that the defendant exacted and received interest in excess of that permitted by law. What the plaintiffs contended for, and what the trial court determined by its judgment, was that the payment of the loan was in unequal installments and included a balloon payment. There is no contention on the part of the plaintiffs in their pleadings that they in any respect paid or contracted to pay more than the legal rate of interest.

The parol evidence in the instant case was not offered for the purpose of showing a contract to pay or the actual payment of usury, but for the purpose of showing that the note was not to be paid in accordance with its terms. In the light of the foregoing authorities relating to the admissibility of parol evidence in usury cases, the trial court erroneously admitted parol evidence over objection to be introduced in this case.

With reference to any preponderance of the evidence on the part of the plaintiffs to prove their case, there is positive evidence on the part of the defendant that the loan was made for a term as set forth in the original note, with the understanding that the plaintiffs could repay when they sold their house. There is, opposing thereto, the evidence of the plaintiffs that they told the defendant that they could only pay $50 a month. Plaintiffs do not deny that they told the defendant that before the note became due they would have their house sold and would be able to pay the loan. It appears that this evidence is entirely consistent with the defendant's understanding that the first payment, which was due in 3 months, would actually be anticipated by the sale of the house prior to that date.

We conclude that the judgment of the trial court should be reversed and the cause remanded with instructions to grant the defendant foreclosure of its security as prayed for in its cross-petition, that the plaintiffs' cause of action should be dismissed with prejudice, and that the trial court should render judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SPENCER, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LOUIS WILSON, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. HOMER CHARLES SMITH, APPELLANT.

115 N. W. 2d 794

Filed June 22, 1962. Nos. 35217, 35218.

1. **Criminal Law.** In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Robbery: Trial.** The testimony of a single witness which identifies a defendant as a participant in a robbery is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe the defendant.
3. **Criminal Law: Evidence.** Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded.

Appeals from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

W. D. O'Shaughnessy and Edward T. Hayes, for appellants.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

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

BOSLAUGH, J.

Separate informations were filed in the district court charging each of the defendants with robbery under section 28-414, R. R. S. 1943. Upon the motion of the county attorney, the cases were consolidated for trial pursuant to subsection (3) of section 29-2002, R. S. Supp., 1961. The jury returned separate verdicts of guilty against each defendant. The defendants filed separate motions for new trial which were overruled and each defendant has appealed from the judgment of the district court. The cases were docketed separately in this court but, by stipulation, they were consolidated for briefing and argument. For that reason they will be disposed of by one opinion.

The principal assignment of error relates to the sufficiency of the evidence to sustain the conviction of each defendant. There was evidence from which the jury could have found that a robbery occurred in front of the First & Last Chance Cafe, also known as Johnny's Blue Room, in Omaha, Nebraska, between 3 and 4 a.m., on June 24, 1961.

The defendant Smith was identified as being at the scene of the crime and pointing a gun at William Roundtree, the complaining witness, by the testimony of Janie Williamson, Nathaniel Johnson, and Roundtree. Janie Williamson testified that the defendant Smith was holding a pistol in his hand and when she stepped in front of the complaining witness, Smith said, "Don't get in the way or I will burn you," or "If you don't move I will burn you."

Nathaniel Johnson, also known as "Lightning," is the proprietor of the Seventh Ward Improvement Club which is located at 5211 South Twenty-eighth Street in Omaha, Nebraska, and just across the alley north of the First & Last Chance Cafe. Johnson testified that he saw the defendant Smith point a gun at Roundtree.

Roundtree testified that he stopped his automobile in front of the First & Last Chance Cafe; that as he got out

of his car, five men came out of the alley between the cafe and the club; that the defendant Smith, also known as "Peaches" and "Peachy," pointed a gun at him and said, "You better not do nothing or I will shoot"; and that while Smith pointed the gun at him, a second man removed a billfold and some money from his pockets and struck him.

This evidence is sufficient to sustain the conviction of the defendant Smith. There was evidence to the contrary but it merely presented a question of fact for the jury. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51. In a criminal action this court will not interfere with a verdict of guilty based upon conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.

The issue with respect to the defendant Louis Wilson is more difficult. The defendant Wilson is identified as having participated in the robbery only by the testimony of Roundtree. Roundtree testified that he recognized two of the men who came out of the alley. One of the men was the defendant Smith with whom Roundtree had some acquaintance. The other man was a stranger to Roundtree and Roundtree testified that he did not know the man's name. However, Roundtree positively identified a man sitting in the courtroom, "The guy right here with the jacket on," as the man who took the billfold and money from his pockets and who struck him. There is nothing specific in the record that relates this testimony directly to the defendant Wilson but it is apparent that those present at the trial understood that Roundtree was referring to the defendant Wilson when he described him as "The guy right here with the jacket on."

No other witness identified the defendant Wilson

as being present at the scene of the crime until after the robbery had taken place. Janie Williamson testified that she did not see the defendant Wilson at the scene of the crime. Nathaniel Johnson testified that the defendant Wilson was not there when the defendant Smith was pointing the gun at Roundtree and that the defendant Wilson came to the scene a little bit later. Johnson also testified that when he asked several men in an automobile to return Roundtree's billfold, a "little short guy in the back seat throwed" the billfold to the defendant Wilson and that Wilson handed the billfold to Johnson.

The testimony of a single witness which identifies a defendant as a participant in a robbery is sufficient to sustain a finding of guilt if the witness had a reasonable opportunity to observe the defendant. Small v. State, 165 Neb. 381, 85 N. W. 2d 712, 70 A. L. R. 2d 984; Wilshusen v. State, 149 Neb. 594, 31 N. W. 2d 544. The credibility of the witnesses was for the jury and the jury in this case had a right to believe Roundtree. Thus, the evidence is sufficient to sustain the conviction of the defendant Wilson although it is just barely sufficient.

The remaining assignments of error relate to an effort on the part of the defendants to introduce evidence relating to an indecent act that was supposed to have taken place in Roundtree's car some time before the robbery occurred. It is clear that this evidence did not in any manner tend to prove or disprove that a robbery occurred or who may have participated in the robbery. Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relevant to the issue is properly excluded. Scherer v. State, 168 Neb. 127, 95 N. W. 2d 329. The objections of the county attorney to this evidence were properly sustained and the assignment of error is without merit.

The judgment of the district court in each of the cases is affirmed.

AFFIRMED.

JERRY ERVING, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
MILTON HOWARD, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
116 N. W. 2d 7

Filed June 29, 1962. Nos. 34911, 34912.

1. **Criminal Law: Evidence.** As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution.
2. ———: ———. However, in crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with the one charged may be received.
3. **Criminal Law: Witnesses.** When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him.
4. ———: ———. The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial court and, unless abused, its exercise is not reversible error.
5. **Criminal Law.** By section 29-102, R. R. S. 1943, the term "felony" signifies such an offense as may be punished with death or imprisonment in the penitentiary.
6. ———. A conviction by a court-martial is a felony within the Nebraska definition if the offense for which the conviction is had may be punished by imprisonment in a penitentiary.
7. **Appeal and Error.** Objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial.
8. ———. It is no part of the duty of this court to search a voluminous record for the purpose of ascertaining if there is error in it.
9. ———. The function of an assignment of error is to specifically point out the exact instance of the alleged error.
10. **Searches and Seizures.** All evidence obtained by searches and seizures in violation of the Fourth Amendment to the federal Constitution is, by virtue of the due process clause of the

Fourteenth Amendment, guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in the courts of this state.

11. **Criminal Law.** To be available, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.
12. **Appeal and Error.** In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate reference be made to the specific evidence against which objection is urged.
13. **Criminal Law: Evidence.** In a criminal case, the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written copies of statements and other documentary evidence for the inspection of defendant's counsel before trial. Error may be predicated only for an abuse of discretion.

Error to the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Schrempp & Lathrop and O'Sullivan & O'Sullivan, for plaintiffs in error.

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

Heard before SIMMONS, C. J., CARTER, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

SPENCER, J.

These are two criminal actions instituted in the district court for Douglas county by separate informations charging Jerry Erving and Milton Howard with murder in the first degree. The cases were consolidated for trial. The jury found the defendants guilty and fixed their punishment at life imprisonment. Both defendants appeal.

The record is voluminous and it will serve no useful purpose to attempt to summarize all the evidence. The defendants do not question its sufficiency to sustain the convictions. Suffice it to say that it was more than ample if believed by the jury to sustain a conviction.

We therefore will attempt only the briefest outline.

On December 27, 1959, Edward Ellis and Dorothy Elliott were found dead in an upstairs apartment they shared. Each had been shot twice in the head, once with a 38-caliber bullet and once with a 22-caliber bullet. Each had died of the gunshot wounds.

Edward Ellis, hereinafter referred to as Ellis, was to have been a witness against the defendant Milton Howard, hereinafter referred to as Howard, on a federal complaint which charged Howard with selling narcotics to Ellis. Preliminary hearing on that complaint was set for December 28, 1959.

Donald Williams, who confessed to being an accomplice in the killing, testified for the State that Howard told him on December 24, 1959, that it was worth $1,000 for Edward Ellis not to testify. Another witness, Rudolph Williams, testified he had been at the home of the defendant, Howard, on December 24, 1959, and while there heard Howard tell the defendant, Jerry Erving, hereinafter referred to as Erving, that Ellis had to go and it was worth $1,000.

Donald Williams testified he saw Erving's car at the Howard home on Christmas Day, and a little later Erving came to him and asked where Ellis lived and if he could arrange to get Ellis to come out or if not if he could get Erving up inside the house. Donald Williams said he might the next day. Later that day, Howard came over to Donald Williams' home and indicated his knowledge of Erving's conversation with Williams.

Donald Williams further testified that he called Erving the next evening, December 26, 1959, sometime after 11 o'clock, and the two of them went to the Elliott-Ellis apartment. Donald Williams took along a 38-caliber revolver he had earlier acquired from Howard. During the ride over, Erving gave Donald Williams one of his brown gloves to wear. Donald Williams was admitted to the house by Dorothy Elliott but he could not persuade Ellis to leave the house so he left, but as he did

so he fixed the lock on the front door so that it would not lock. Then he and Erving went back up the stairs to the Elliott-Ellis apartment, he picked a quarrel with Ellis, and pulled out his gun. Dorothy Elliott, who was sitting on the couch, grabbed his arm. The gun went off, and she slumped back on the couch. Donald Williams said he then ran out of the house but heard other shots behind him. He wasn't sure whether or not he shot Ellis.

Erving later picked Donald Williams up in his car and they drove to Carter Lake, about a mile away, where Donald Williams, at Erving's direction, threw both guns, his 38-caliber and a small caliber revolver given to him by Erving, into the lake. Williams also threw his brown glove out of the car window at Erving's direction.

When Erving left Donald Williams that night he told Williams he would be by the next day with some money for him. The next day Erving stopped at Donald Williams' home and gave him $150. Later that day Howard came to the Donald Williams' home with Rudolph Williams. Howard told Donald Williams he had paid Erving and gave him $250, saying that would make a total of $500, less the $100 Erving said that Williams owed to him.

After his arrest, Donald Williams took the police to Carter Lake where they found two brown gloves and where they later recovered a 38-caliber revolver and a 22-caliber revolver from the water at the spot where Donald Williams said he had thrown them. The guns were rusted and corroded, and both of them had spent shells in their chambers. The slugs found in the heads of the victims and in the sofa on which they were found were examined by experts. They appeared to have the same characteristics as the live bullets remaining in the guns; could have come from the spent shells in the guns; and could have been fired from guns having the same rifling characteristics as the guns found in the lake. The shells in the 22-caliber gun were of the same type as

some 22-caliber shells found in the glove compartment of the Erving car.

Howard's defense was a complete denial of implication in the shooting and an alibi. He denied ever mentioning it was worth $1,000 to get rid of Ellis. He did admit to giving Williams $250, but claimed it was for an unmounted diamond Williams sold to him on Christmas Eve. A court reporter testified on rebuttal that on an earlier occasion Howard had said he gave Williams the $250 for the purpose of enabling Williams and Ellis to leave town and to hide out in Chicago.

Erving's defense was also a denial and an alibi. He claimed he and Howard were in Council Bluffs at the time Donald Williams claimed the killing took place. There was no question the defendants had been in Council Bluffs earlier that evening. There was, however, some inconsistency in the time involved, which, if believed by the jury, was consistent with Donald Williams' testimony.

While the defendants do not question the sufficiency of the evidence, they do seriously urge nine separate assignments of error involving trial procedures and the admission of evidence. These will be considered in the order of assignment.

Defendants first contend that the court erred in permitting a witness for the State to testify that he had purchased narcotics from the defendants. This refers to the testimony by State's witness, Donald Williams, who had confessed to complicity in the murders and had implicated the two defendants. On direct examination, he had testified to his use of narcotics. On cross-examination he was questioned at considerable length about the use of narcotics as well as about his knowledge that the two murder victims were addicts. He was specifically asked on cross-examination if he had ever used narcotics with Edward Ellis, one of the victims. On redirect examination he was asked: "Q- Just explain where you would get these narcotics that you used

with Edward Ellis? * * * MR. O'SULLIVAN: (continuing:) Object to that as incompetent, irrelevant, immaterial, and not tending to prove or disprove any issue in the case; nothing in the direct examination to show whatever drugs he used. THE COURT: You may answer. A- We were supplied by either of the two defendants; they usually supplied any quantity."

As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Fricke v. State, 112 Neb. 767, 201 N. W. 667. However, in crimes involving motive, criminal intent, or guilty knowledge, evidence of independent crimes wholly disconnected with the one charged may be received. Swogger v. State, 116 Neb. 563, 218 N. W. 416. See, also, Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632. Motive was an important element of proof. It involves an exception to the rule contended for by the defendants. Exhibit No. 18, about which the witness had been questioned, was a complaint charging defendant Howard with a narcotics violation in which Ellis appeared to be an informer. Further, in the light of the extensive cross-examination of the witness as to his involvement with narcotics and his knowledge from personal observation of the addiction of the murder victims, it was not error to show the involvement of the defendant Howard in the sale of narcotics to the murder victim who was to be a witness against him on a charge of such sale. The evidence elicited as to the source of supply of narcotics involved both of the defendants and served to strengthen the showing of motive with respect to Howard.

Defendants' second assignment of error is that the court should have sustained a motion for mistrial occasioned by the State asking the defendant Howard if he sold narcotics to one of the State's witnesses. Objection was made to the question and the objection was sustained. Request was then made of the court to admonish counsel and also that the court instruct the jury

to disregard the statement of the prosecutor. The court then asked the reporter to read back the question and again sustained the objection to the question. Counsel for defendants then moved for a mistrial, which motion was overruled. While the defendant Howard might not be required to answer the question because it might incriminate him, the question itself was not prejudicially erroneous. The court did sustain the objection. As set out above, the showing of motive is an exception to the rule contended for by the defendants. The question did not inject any new crime or element into the case.

The third assignment of error contends that the court erred in permitting the deputy county attorney to cross-examine the defendant Howard concerning his alleged source of supply of narcotics. Howard, in his direct examination, testified that Cox, a federal narcotics agent, in an interview at the Douglas county jail, had suggested the story he should tell about his connection with the murder. He testified that he refused to do so, contending he had no connection with the murder. Howard also testified on direct examination that Cox wanted him to gather information on dope activity. The questions asked on cross-examination concerned his conversation with Cox, which subject was opened up by the direct examination.

In Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632, we said: "When a defendant in a criminal case testifies in his own behalf he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him." In the same case we also said: "The cross-examination of a witness which relates to the issues and facts pertinent thereto may be pursued by counsel as a matter of right, but when the object of the cross-examination is to collaterally ascertain the accuracy or credibility of

a witness, some latitude should be permitted. The scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error." There was no abuse of discretion in this instance. Actually, the record indicates that the trial judge could have been more lenient than he was and still have been within the rule.

In connection with these assignments of error, the court, by instruction No. 16, about which defendants make no complaint, restricted the evidence complained of to the proof of motive. The instruction given is as follows: "You are instructed that evidence adduced that the defendant Milton Howard committed another crime, or crimes, for which he had not been apprehended or tried, was admitted for the sole and only purpose of tending to prove that the defendant Howard had a motive and the intent to commit the alleged crime for which he is here tried, and such evidence shall be considered by the jury for that purpose only."

Assignments of error Nos. 4, 5, and 6 relate to the question as to whether desertion from the army is a felony under Nebraska law for the purpose of impeachment under section 25-1214, R. R. S. 1943. Defendant Erving was asked on cross-examination if he had ever been convicted of a felony. He replied, "Once." The State then introduced exhibits Nos. 82 and 83. Exhibit No. 82 is a certified copy of a court-martial record showing the conviction of Erving for desertion from the army. Exhibit No. 83 is a certified copy of a conviction of Erving in the United States District Court for the District of Nebraska for violation of the narcotics act, for which sentence was imprisonment for 2 years. It is the defendants' contention that desertion from the army is not a felony for the purpose of impeachment of a witness because it is not punishable under the civil law. They contend that when Erving testified he had been convicted once, he testified truthfully, and the admission of the record of the conviction was prejudicial error. We held in

Vanderpool v. State, 115 Neb. 94, 211 N. W. 605: "Under section 8848, Comp. St. 1922 (now section 25-1214, R. R. S. 1943), providing that a witness may be interrogated as to his previous conviction for a felony, but that no other proof is competent except the record thereof, a defendant in a criminal prosecution becoming a witness in his own behalf may be asked on cross-examination whether he has previously been convicted of a felony, and if he answers in the affirmative further examination along that line should cease. If he answers in the negative, he may be impeached only by the record of his conviction."

The cases cited by the defendants do make the distinction that desertion from the army is not a felony because it is not punishable under the civil law. Historically, by some early English statutes, desertion was made a felony punishable in the civil courts, but those statutes fell into disuse after the Revolution of 1688 when Parliament, by the Mutiny Acts, for the first time authorized mutiny and desertion to be punished by a court-martial in time of peace. In this country, desertion has been made a military offense by the statutes of the United States and, at least since the Declaration of Independence, has been considered exclusively a military crime punishable by court-martial and not by civil tribunals. However, there are cases which hold that conviction by a court-martial of desertion is admissible as affecting the credibility of a witness. See, Jordan v. State, 141 Ark. 504, 217 S. W. 788; Nelson v. State, 35 Ala. App. 179, 44 So. 2d 802.

In Nebraska, the term "felony" is defined by section 29-102, R. R. S. 1943: "The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary."

Title 10, U. S. C. A., § 885, p. 316, provides in part: "(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a

court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct."

The defendant Erving was sentenced to confinement in the United States Disciplinary Barracks, Fort Missoula, Montana, for 2 years at hard labor, or elsewhere as the Secretary of War may designate.

Title 18, U. S. C. A., § 1, p. 5, provides in part: "Notwithstanding any Act of Congress to the contrary: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony." Title 18, U. S. C. A., § 4083, p. 485, provides in part: "Persons convicted of offenses against the United States or by courts-martial and sentenced to terms of imprisonment of more than one year may be confined in any United States penitentiary."

The purpose of section 25-1214, R. R. S. 1943, is to bring before a jury elements which may serve to test the credibility of a witness. When the defendants testified in their own defense, they thereby assumed the position of ordinary witnesses and were subject to be discredited on cross-examination. The law presumes that the character and reputation of a witness is good and that he will tell the truth when he takes an oath to do so. For this reason, it has always been considered proper in cross-examination to interrogate the witness as to matters which clearly tend to disprove the legal assumption with which he is clothed. Such interrogation is admitted solely to test his credibility and can only be considered by the jury for that purpose.

To protect a witness, we have narrowed the scope of the cross-examination by statute, and if he admits his previous conviction, the examination can go no further. If he has been convicted more than once, that certainly also is pertinent on the question of credibility, and we have so held. Sulley v. State, 119 Neb. 783, 230 N. W. 846.

We concede that there is a division of authority in

other jurisdictions as to whether a military conviction of desertion can be used to impeach a witness. It is a case of first impression in Nebraska. Our statute specifically defines a felony as any offense which may be punishable by imprisonment in the penitentiary. We should test the offense by that definition. Desertion may be so punished. In fact, defendant Erving was sentenced to imprisonment for 2 years at hard labor. It is our conclusion that a conviction by a court-martial is a conviction for a felony within the Nebraska definition if the offense for which the conviction is had may be punished by imprisonment in a penitentiary.

The sixth assignment of error urges that the court erred in admitting the court-martial record without foundation. The bill of exceptions does not indicate that such specific objection was made. Exhibit No. 82 is the certificate of the acting chief of the litigation division of the Judge Advocate General's Department, and it is authenticated with the signature of the Secretary of the Army, by his administrative assistant. There is also attached the seal of the Department of the Army. The exhibit meets the test for the production of documentary evidence.

The seventh assignment of error is that the court erred in allowing the State to show that the defendant refused to answer questions put to him by the county attorney soon after his arrest, and that he wanted to see his attorney. The assignment does not specify to which defendant it refers. We assume the reference is to the interrogation of defendant Erving which is entered in the proposed amendments to the bill of exceptions by proposed amendment No. 7 which was accepted by the court. The testimony includes answers voluntarily given by the defendant to questions asked by the deputy county attorney until the defendant noticed the court reporter, when the following occurred: "Q. 'Anybody else?' A. 'What is he writing there?' (indicating) Q. 'All the questions I ask and all of your answers.' A. 'You

people are trying to mess me up. I haven't got nothing more to say. I want to see a lawyer.' Q. 'Let me take you back yesterday from noon on. Did you work yesterday afternoon?' A. 'I want to see a lawyer.' Q. 'Were you home at five o'clock last night?' MR. O'LEARY: Let the record show he refused to answer the question. Q. 'Were you home at six last night?' A. 'I would like to see a lawyer.' Q. 'Were you home at seven last night?' A. (No answer) Q. 'Can your wife verify you were home from ten last night until 6:30 this morning?' A. 'I still want to see a lawyer.' Q. 'Where were you Christmas Day?' A. (no answer) Q. 'Where were you the day before Christmas?' A. (no answer) MR O'LEARY: Let the record show he refuses to answer any further questions." The questions here asked covered answers which tended to impeach his alibi which he had given voluntarily to the questions asked until he observed the court reporter. While it would have been better practice to have left out this portion of the statement in the trial, we do not believe that its admission under the facts herein was erroneous. In any event, the record does not disclose that any objection was made to the reading of this testimony at the time it was offered. Objection to the admission of evidence cannot be considered by this court for some reason not properly and timely raised at the trial. Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868. When the testimony was included in the bill of exceptions by amendment, if the proposal did not include all of the record, the defendants should have pointed out the omission.

The eighth assignment of error is that the court erred in admitting into evidence articles taken from the home of the defendant without a search warrant. Here again, there is no specification as to the defendant involved nor are the specific articles identified in the assignment. The bill of exceptions herein consists of 13 volumes, and specifications of error should be specific. It is no part of the duty of this court to search a voluminous record

for the purpose of ascertaining if there is error in it. Minick v. Huff, 41 Neb. 516, 59 N. W. 795. The function of an assignment of error is to specifically point out the exact instance of the alleged error.

From the argument, we believe that the defendants are referring to certain 22-caliber bullets found in a drawer in the Erving home. When the police came to the Erving home, Mrs. Erving asked them if they had a search warrant, and she was told that they did not, but she made no objection to their entry or to their search. The manner of the search and the action of the officers, as detailed in Mrs. Erving's testimony, if true, would be such as to offend a sense of justice and could not be condoned. If the evidence obtained resulted in a conviction, and proper objections were made, the conviction would have to be reversed.

Subsequent to the trial of this case, the United States Supreme Court decided Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, which announced the rule that, as set out in the latter citation: "All evidence obtained by searches and seizures in violation of the Fourth Amendment of the Federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court." It is this rule that defendants urge upon us. This rule is now the law of the land and overruled those decisions which permitted the use of unconstitutionally-seized evidence in a trial in the state courts. However, to be available, as a footnote in Mapp v. Ohio, *supra*, observes, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected.

In Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51, we held: "In order that assignments of error as to the admission or rejection of evidence may be considered, the holdings of this court require that appropriate ref-

erence be made to the specific evidence against which objection is urged."

The receipt in evidence of the 22-caliber bullets found at the Erving home was a circumstance which might tend to connect defendant Erving with one of the murder weapons. However, shells of exactly the same type were found in Erving's car, so that he was connected with the shells and the weapon involved without this testimony, which at best could only be cumulative. The questioned evidence appears to be exhibit No. 39, which consisted of shells identified by one of the officers who searched the home as being shells found in a drawer in the Erving bedroom. In answer to a question on his direct examination, the officer said he did not have a search warrant. No objection was made to his testimony. On cross-examination, he was not questioned about his search. Exhibit No. 39 was offered in evidence later during the testimony of another officer who was present when the shells were found. The following is the record of the offer: "MR. DENENBERG: At this time the State offers in evidence, Exhibit No. 39. MR. O'SULLIVAN: Objected to as incompetent, immaterial, irrelevant, no proper or sufficient foundation laid. THE COURT: It will be received."

During the testimony of the same officer, exhibit No. 37, which consisted of four 22-caliber long rifle shells taken from Erving's automobile, was offered in evidence. That offer is as follows: "MR. DENENBERG: I offer in evidence, Exhibit No. 37. MR. O'SULLIVAN: That is objected to as incompetent, immaterial, irrelevant, and no proper or sufficient foundation laid. THE COURT: It will be received."

As suggested, the shells in exhibit No. 37 are exactly the same type of shells as offered in exhibit No. 39. The exhibits were properly identified and foundationwise were admissible. There can be no question that the objections as made were properly overruled. The objections did not in any manner point up the one now

being urged for the exclusion of exhibit No. 39.

The ninth and final assignment of error is as follows: "The court erred in refusing to permit the defendants to inspect statements given to the police and county attorney by the two principal witnesses for the state." This assignment refers to the motion of defendants to require the county attorney to furnish the counsel for defendants with a copy of all statements taken from the witnesses Donald Williams and Rudolph Williams, either by the county attorney or members of the Omaha police department. The stated purpose of the motion was to procure such statements for purposes of impeachment. Support for the motion was on information and belief that such statements were inconsistent with the testimony of the witnesses as given at the preliminary hearing.

Defendants rely on Jencks v. United States, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, which opened the files of F.B.I. agents touching events and activities to which they had testified at the trial. Defendants contend under the authority of the Jencks case it was a denial of due process not to sustain their motion for production of the statements. With this we cannot agree. It is not a requirement of due process under the Constitution. Actually, Congress, immediately after the Jencks case, by passage of Public Law 85-269, Eighty-fifth Congress (the Jencks Act, Title 18, U.S.C.A., § 3500), substantially curtailed the right of inspection announced in the Jencks case.

The question here presented is not an open one in this jurisdiction. We have held that in a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the State to produce written copies of statements and other documentary evidence for the inspection of the defendant's counsel before trial. Error may be predicated only for an abuse of discretion. See, Cramer v. State,

145 Neb. 88, 15 N. W. 2d 323; Linder v. State, 156 Neb. 504, 56 N. W. 2d 734.

Both of the witnesses in question were subjected to extensive cross-examination, and both admitted that they at first denied any knowledge of the murders, but later told their stories. Impeachment by contradictory former statements was therefore accomplished by cross-examination in which the inconsistency was pointed out and admitted. The statements themselves, if any had been transcribed, would be cumulative. There is nothing in the record to indicate that any statements were signed, verified, or read and approved by the witnesses as being a correct record of the statements. In fact, Donald Williams specifically negatives any signing or approval of any statement. At best, any statements in the prosecutor's file were nothing more than memoranda or the work product of the county attorney's office.

In Dinsmore v. State, 61 Neb. 418, 85 N. W. 445, the opinion indicates that after making a confession, a witness was examined, but not under oath, by the county attorney, and that the examination was taken down in shorthand by another person. The statement, if transcribed, was never seen or read to the witness or signed by her. Counsel for the defendant at the trial demanded the production of the statement, which demand was refused. We said, at page 436: "This refusal it is urged is a denial of the right of defendant to a full and fair opportunity to cross-examine the witness concerning the facts in the case. We can not see that it was. If the statement was ever transcribed, a fact not positively sworn to by any one, it was the property of the county attorney. It was nothing more than a brief of the evidence prepared by the county attorney for his own convenience in trying the case, or preparing it for trial. We can not imagine any reason for compelling the county attorney to turn over to counsel for defendant his private memoranda. The defendant had no right

to it, and the court was right in refusing to compel a surrender of it." The trial court did not abuse its discretion in denying the motion of the defendants.

For the reasons given above, the assignments of error are without merit. There being no prejudicial error in the record, the judgment of the district court is affirmed.

AFFIRMED.

TONY A. ZAGER, APPELLEE, V. JANETTE JOHNSON, APPELLANT.

116 N. W. 2d 1

Filed June 29, 1962. No. 35197.

1. **Automobiles: Municipal Corporations.** By the terms of statute the maximum speed limit permitted at the intersection involved in this action was 25 miles an hour.
2. ———: ———. By the terms of statute in force at the time of the accident involved here, where two motor vehicles approached an intersection at approximately the same time and within the maximum limit of speed provided, the driver of the one to the left was required to yield the right-of-way to the one to the right.
3. ———: ———. By the terms of statute a driver of an automobile having the right-of-way at an intersection forfeits such right-of-way if he is driving in excess of the limit provided.
4. **Trial.** Where different minds may draw different conclusions from the evidence in regard to negligence, the question is one for submission to a jury.
5. **Negligence: Trial.** In a case where contributory negligence is asserted as a defense the evidence may not properly be held to be sufficient to sustain a judgment as a matter of law and defeat a recovery by the plaintiff unless it shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with the negligence of the defendant.
6. **Trial: Damages.** A jury should be fully and fairly informed as to the various items of damages which it should take into consideration, together with the proper basis upon which each item is to be assessed.
7. **Trial.** Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and there-

fore liable to lead the jury astray in its consideration of the case, it is good ground for a new trial.

8. **Damages.** 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.
9. **Trial: Damages.** If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous.
10. **Evidence.** Life tables of expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded.

Fraser, Wenstrand, Stryker, Marshall & Veach, for appellant.

Haney & Walsh, William H. Mecham, and Robert D. Mullin, for appellee.

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

YEAGER, J.

This is an action for damages for personal injuries and damage to property instituted by Tony A. Zager, plaintiff and appellee, against Janette Johnson, defendant and appellant, growing out of the collision between a truck operated by the plaintiff and an automobile operated by the defendant in Omaha, Douglas County, Nebraska. There was a cross-petition filed by the defendant which was withdrawn at the time of commencement of the trial by stipulation of the parties. At that time it was also stated that the withdrawal was without prejudice to any right of the plaintiff to prosecute his action against the defendant.

By answer the defendant admitted the collision but denied that it resulted from negligence on her part and alleged that it was caused by the negligence of the plaintiff.

The case was tried to a jury and a verdict was returned in favor of the plaintiff for $10,000. Judgment was rendered on the verdict. From this verdict and judgment the defendant has appealed.

The brief of the defendant contains seven assignments of error on the basis of which it is asserted that there should be a reversal of the judgment. It does not appear that each of these requires separate consideration. By the first the defendant urges that a motion to dismiss the action at the close of the plaintiff's evidence should have been sustained. By the second it is urged that a like motion should have been sustained at the close of all of the evidence. The two charge that the evidence was insufficient as proof of plaintiff's pleaded cause of action. But one subject is involved, hence separate consideration is not required.

In most of the particulars there is no material dispute in the facts relating to causation. The accident happened at about 5:30 p.m., on June 4, 1958, within the intersection of Thirty-ninth and Washington Streets, in Omaha, Douglas County, Nebraska. Weather and street conditions were good. The width of Thirty-ninth Street from curb to curb is about 24 feet, as is also the width of Washington Street. Washington Street runs east and west, and Thirty-ninth Street runs north and south. There were no obstructions of view to the intersection either from the north or west. There is a slight incline of Washington Street into the intersection from the west, but Thirty-ninth Street is practically level.

The plaintiff approached and entered the intersection from the north and at all times until the actual collision took place drove with the left side of his vehicle about 2 feet west of the centerline of Thirty-ninth Street.

The defendant approached and entered the intersection from the west and at all times until the collision took place drove with the right side of her vehicle north of the south side of Washington Street, but south of the center.

The collision took place when the front end of the plaintiff's truck was approximately 3 feet north of the south line of Washington Street and to the west of the centerline of Thirty-ninth Street. The front end of the automobile of the defendant struck about the middle of the west side of the truck. The two vehicles came to rest, after striking an automobile stopped to the south, and after plaintiff's truck ran into a tree a short distance southwest of the point of collision. As a result of the collision the defendant's automobile was hooked onto the back end of plaintiff's truck and was dragged until the truck hit the tree.

The undisputed testimony as to the speed of the plaintiff is that he was at all times of concern moving at the rate of 20 to 25 miles an hour. This is not to say however that the evidence as a whole was not capable of inference, under the disclosed circumstances, of a rate of speed which could be said to be in excess of the rate testified to by witnesses.

There was testimony that the speed of defendant's automobile at the time was from 30 to 35 miles an hour. It may not well be said that this testimony was incapable of belief. There also was testimony, not incapable of belief under the circumstances disclosed, that she was moving at a lesser rate. Here was a disputed question of fact.

If the defendant was proceeding at a rate of speed in excess of 25 miles an hour she was operating her automobile in violation of law. See § 39-7,108, R. R. S. 1943. This section provided that a city or village might by ordinance increase the maximum speed above the 25 miles an hour limit, but there is nothing in the record to indicate that the city of Omaha did so. In fact it is stipulated that the speed limit was 25 miles an hour.

There is a material dispute as to which of the parties here approached or entered the intersection first. Under the terms of the statute in force at the time, under circumstances such as are presented here, it is provided

that if two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. See § 39-751, R. R. S. 1943. This same section however provides that the driver of any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have. This section has been amended but in respects not of significance in this case.

In the light of this it becomes clear that if the defendant was operating her automobile at a speed of not to exceed 25 miles an hour and she approached the intersection at about the same time as did the plaintiff she had the right-of-way and it was the duty of the plaintiff to yield to her. If however on entering the intersection she was exceeding 25 miles an hour she forfeited the right-of-way.

It is pointed out here that a violation of this statutory provision by an operator of a vehicle to the right does not transfer the right-of-way to the one coming from the left, but, if proved, only bars from consideration on a trial the question of right-of-way as an element of negligence.

These questions were in dispute and were substantially submitted to the jury under instructions for determination.

Other pertinent disputed questions of fact were presented by the parties for consideration and determination. There was testimony on behalf of the plaintiff the substance of which was that he approached and entered the intersection at a safe rate of speed in such manner and in the light of observations made of the intersection and of the approach of the defendant as would in the exercise of ordinary and reasonable care have permitted him to pass through the intersection with safety and without collision with the automobile of the defendant.

On the other hand there was evidence which was

capable of an inference that the plaintiff, without cause or justification, without heeding what was in plain view, and without exercising care for his own safety, negligently operated his truck into the path of the automobile.

These questions of disputed fact were required to be submitted to a jury. In Meyer v. Platte Valley Constr. Co., 147 Neb. 860, 25 N. W. 2d 412, it was said: "Where different minds may draw different conclusions from the evidence in regard to negligence, the question should be submitted to the jury. * * *." See, also, Pankonin v. Borowski, 167 Neb. 382, 93 N. W. 2d 41; Sekora v. Mangers, 171 Neb. 868, 108 N. W. 2d 240.

In opposition to the view that here were questions of disputed fact to be submitted to a jury, it is urged by the defendant that the plaintiff was shown, by the evidence to which reference has been made, to be guilty of contributory negligence in a degree sufficient as a matter of law to defeat a recovery. The controlling rule is stated in Meyer v. Platte Valley Constr. Co., *supra,* as follows: "* * * It is only where the evidence shows beyond reasonable dispute that plaintiff's negligence is more than slight as compared with defendant's negligence, that it is proper for the trial court to instruct the jury to return a verdict for defendant." See, also, Pankonin v. Borowski, *supra;* Sekora v. Mangers, *supra.*

The facts which, under law, were controlling were in dispute, and accordingly the questions in that area were required to be submitted to a jury. The court therefore did not err in overruling the motions to dismiss.

The third and fourth assignments of error deal collectively with different phases of instruction to the jury with regard to damages. Further they deal with the subject of whether or not, though the defendant was not entitled to a dismissal of the action, she is entitled to a new trial. The subjects will be considered without particular reference to the assignments.

By the instruction given by the court the jury was told, subject to other instruction with regard to the

effect to be given to contributory negligence if any was proved, that if its verdict was in favor of the plaintiff the jury would be required to ascertain the amount plaintiff had been damaged to his person and to his personal property, as well as the amount he had been obligated to pay for medical bills.

The jury was further told that in arriving at the amount it should consider loss of earnings, physical and mental pain, and suffering endured at and since the time of the accident and which he may endure in the future as the proximate result of the accident.

The instructions given in this area are not subject to criticism on account of any departure from abstract legal principle, but for the reason, as it is urged, that there is no evidentiary basis therefor. First, there is no evidence upon which to arrive at the damage which the plaintiff had sustained up to the time of trial or will sustain in the future. Second, it is urged that there is no basis for permitting the jury to assess damages on the basis of past and future pain and suffering.

As to the first, the record discloses that the damage to the truck of plaintiff was $775; that there was loss and damage to other property in about the amount of $206; that his total medical expense amounted to $75; that the plaintiff was off work about 3 weeks and he started work on his first roofing job after about 5 weeks; that he was required to employ help to perform work which he had previously done himself; and that this situation as to work obtained at the time of the trial. His business was that of a roofing contractor and the going rate for the work he performed was about $2.85 an hour. Prior to the accident he was able to work from 8 to 10 hours a day, but thereafter only 3½ to 4 hours.

The evidence of injury testified to by the plaintiff was that he spit blood two or three times; the calves of his legs were scratched and bleeding; his arms, chest, and the back of his neck bothered him; he had pain in his chest, arms, legs, back, and neck, and he had head-

aches; and at the time of trial he could not do such lifting as he did before and he had pain in his neck, lower back, knee, and elbow at times.

The doctor who examined the plaintiff in 1958 and again in 1961 testified that he found no broken bones. This testimony was based on his findings and a history given to him by the plaintiff. There is no material difference between the history and the testimony of the plaintiff covering the same subject. There was however a finding made in 1961 which did not appear in any finding in 1958. In 1961 he found some loose bodies in an elbow which he described as traumatic damage which limited use somewhat.

The doctor's attention was not called to the elbow in 1958. The record fails to disclose an opinion or conclusion of the doctor that this condition resulted from this accident. Also there was no other evidence from which a reasonable inference flows that it did so result.

From all of this it is clear of course that there was evidence of damage to property and doctor bills, but there was none from which a finding could be made as to damage in the operation of the business or of personal earnings of the plaintiff up to the time of trial. Also there was none as to how far or to what extent damage would extend into the future.

As to pain and suffering also, there was no evidence upon which to base a finding as to how long, or to what degree it would extend, if it would so extend, into the future.

Notwithstanding this lack of evidence as to damage and the lack of evidence as to duration of disability, the court instructed the jury to take these elements into consideration in arriving at the amount the plaintiff was entitled to recover. This was error on the part of the court of which the defendant has a right to complain.

In Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, this court said: "A jury should be fully and fairly informed as to the various items of damages which it

should take into consideration in arriving at its verdict. In this respect it is the duty of the trial court to instruct as to the proper basis upon which damages are to be assessed for each such item." See, also, Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N. W. 2d 224.

In Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813, it was said: "Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in their consideration of the case, it is good ground for new trial."

In Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254, it was said: "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."

In Patras v. Waldbaum, 170 Neb. 20, 101 N. W. 2d 465, it was said: "If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous." See, also, Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168; Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

In the light of what has been pointed out with regard to improper and insufficient instructions the defendant is entitled to have the verdict and judgment set aside.

By the fifth assignment of error the defendant urges that the court erroneously overruled a motion to strike certain evidence of plaintiff's doctor made after the completion of the introduction of evidence. This evidence described the condition of plaintiff's elbow at the time of examination made in 1961. In the light of what has already been said herein this is not evidence of causation by the accident, but only of the total condition at the time of examination. It was not objected to at the

time it was given. Under these circumstances it is difficult to see how the refusal to strike could be regarded as ground for reversal.

A mortality table was admitted in evidence on behalf of the plaintiff. This was assigned as error and considered under the sixth and seventh assignments of error. This evidence was erroneously received. This court said in Welstead v. Ryan Constr. Co., 160 Neb. 87, 69 N. W. 2d 308: "Life tables of expectancy may be properly received in evidence only when there is competent evidence that the claimed injuries are permanent." See, also, Lyons v. Joseph, 124 Neb. 442, 246 N. W. 859. As has been already indicated there is here no competent evidence of permanent injury.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY KENT, APPELLANT.

116 N. W. 2d 31

Filed June 29, 1962. No. 35200.

1. **Criminal Law: Continuances.** An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error.
2. **Evidence: Appeal and Error.** Affidavits used as evidence on the hearing of an issue of fact must be offered in evidence in the trial court and embodied in a bill of exceptions to be available to appellant in this court.
3. **Criminal Law.** Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
4. **Larceny: Evidence.** Under the doctrine announced and held in

this state, no presumption of guilt arises from the mere possession of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial.

5. **Larceny: Trial.** The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury, and it is improper for the court to instruct the jury as to the effect to be given, or the sufficiency of, the evidence, in whole or in part.

6. **Criminal Law: Appeal and Error.** This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellant.

Clarence A. H. Meyer, Attorney General, Melvin K. Kammerlohr, and Dwain L. Jones, for appellee.

Heard before CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

BROWER, J.

Stanley Kent, the defendant in the trial court and appellant herein, was charged in the district court for Buffalo County, Nebraska, with the crime of petit larceny. The information contained two counts, the first for stealing two 15-inch automobile tires of the value of $25 each, and two 1952 model Buick automobile wheels of the value of $5 each. The second count sets out that the defendant had previously been convicted of the crime of petit larceny and the offense in the information was his second offense.

The defendant will be so designated herein and the plaintiff, State of Nebraska, as the State.

The defendant entered a plea of not guilty and a trial was had to a jury which returned a verdict of

guilty. After proof of the previous conviction, defendant was sentenced to imprisonment in the Nebraska State Reformatory for not less than 1 nor more than 2 years. His motion for a new trial having been overruled, the defendant brings the matter here on appeal.

The defendant assigns three errors which, though otherwise worded, so far as are necessary for consideration by this court, can be stated and shall be considered as follows: That the trial court erred in overruling a motion for a continuance of the time of trial because five additional names of witnesses were endorsed on the information and the charge was changed 2 days before trial; that the amendments to the information so completely changed the charge and subject matter that the 1-day's preparation allowed the defendant denied him his constitutional rights of due process of law; and that the trial court erred in not dismissing the charge because the evidence was insufficient to sustain a verdict.

The defendant pleaded not guilty and waived preliminary hearing. He was bound over by the county court of Buffalo County on May 19, 1961, upon a complaint charging him with breaking and entering a motor vehicle, and his bond was fixed at $1,000. He was admitted to bail thereafter. An information was filed against him in district court on September 20, 1961, charging him with breaking and entering a 1953 Bel Air Chevrolet automobile with intent to steal property of value therein. The defendant appeared with counsel and pleaded not guilty. On October 7, 1961, an amended information was filed charging him with like breaking and entering a 1953 Bel Air Chevrolet automobile and a 1953 Buick automobile. On October 13, 1961, the county attorney secured leave of court to amend by interlineation; the defendant's counsel made a motion for a continuance because the amendment changed the issue; and the court granted a continuance to the week of October 23, 1961. On October 23, 1961, the State requested leave to file an amended information reducing

the charge from breaking and entering a motor vehicle to the charge of second offense petit larceny, and for leave to add the names of certain witnesses to the information, which was granted. The amended information charging the crime of petit larceny of the tires and wheels was then filed and served on the defendant. Five of the 10 witnesses' names endorsed on the amended information were not on the previous one. The defendant's counsel thereupon orally moved the court for a continuance of the trial because the amended information changed his proposed defense and in order to allow defendant's counsel further time to interview witnesses, which motion was denied by the court.

The trial was had on October 25, 1961. Before trial, defendant's counsel renewed the motion because no continuance was granted at the time of the amendment and the addition of the names had been permitted. The court overruled it and in so doing stated in the record that it was a case involving petit larceny; that it was only a reduction of the charge from that previously filed; and that it involved the same transaction. The cause thereupon proceeded to trial, resulting in the verdict and sentence set out.

In Hyslop v. State, 159 Neb. 802, 68 N. W. 2d 698, this court held: "An application for postponement of time of trial of a criminal case is addressed to the sound discretion of the trial court and, in the absence of abuse of discretion disclosed by the record, a denial thereof is not error."

Later, on November 10, 1961, the date of hearing of the motion for new trial, defendant's counsel filed an affidavit elaborating the reasons why the continuance should have been granted and the manner in which the defendant was prejudiced by its not being granted. This was never made a part of the bill of exceptions and cannot be considered by this court. Again, quoting from Hyslop v. State, *supra,* we said: "Affidavits used as evidence on the hearing of an issue of fact must be

offered in evidence in the trial court and embodied in a bill of exceptions to be available to plaintiff in error in this court."

The defendant was represented by the same counsel at least from September 22, 1961, to and through the time of trial. The evidence which will be discussed hereafter makes it plainly to appear that the defendant was apprehended in May 1961, because of his previous possession of the tires taken from a 1953 Buick automobile. He knew the reason for his arrest at the time. His counsel must have known of the issues finally tried from the beginning. It would appear that the trial court's remarks that the amended information was a reduction of the charge and concerned the same transaction were correct. Under the circumstances we cannot say the court's action in overruling the motion was arbitrary or an abuse of discretion. Neither, under the circumstances, was it error to allow the five additional names to be endorsed upon the information. We have held that it is within the discretion of the trial court to allow them to be endorsed pending trial. Shaffer v. State, 123 Neb. 121, 242 N. W. 364. In this instance they were added 2 days before trial. The defendant's assignments of error concerning the endorsement of the names on the information and the refusal of the court to grant a continuance are without merit.

At the close of the State's evidence the defendant moved for a directed verdict because the State had not proved a prima facie case against the defendant. It was overruled by the trial court and the defendant then introduced his evidence. The motion was not renewed at the close of all the evidence.

"Where a motion for a directed verdict is made at the close of the evidence of the State in a criminal action, the introduction of evidence thereafter by the defendant waives any error in the ruling on the motion. The defendant, however, is not prevented from questioning the sufficiency of the evidence in the entire

record to sustain a conviction." Henggler v. State, 173 Neb. 171, 112 N. W. 2d 762.

Defendant maintains that the evidence was not sufficient to sustain the verdict. In this respect he contends there is no evidence to show the defendant's implication in the larceny, except finding the stolen tires to have been in his possession thereafter. He cites Henggler v. State, *supra,* which he concedes is a burglary case and is not authority for his contention. Further defendant calls attention to Dobson v. State, 46 Neb. 250, 64 N. W. 956; Williams v. State, 60 Neb. 526, 83 N. W. 681; and Bassinger v. State, 140 Neb. 63, 299 N. W. 293, which he contends establish the rule that proof that a petit larceny was committed with evidence that some of the stolen property was discovered to have been in the possession of defendant is not alone sufficient to make a prima facie case of larceny. These cases hold that finding the defendant in possession of property which was taken in a larceny established by the evidence does not shift the burden from the State, but that the burden of proof continues to rest on the prosecution to prove its case beyond a reasonable doubt, and that instructions to the jury which in effect shift the burden of proof to the defendant on finding the property which was stolen in his possession are erroneous. The rules concerning the consideration of such evidence are set out in Williams v. State, *supra,* as follows: "Under the doctrine announced and held in this state, no presumption of guilt arises from the mere possession of stolen property; the inference to be drawn from such fact is alone for the jury when weighed in connection with all the evidence adduced on the trial. * * *

"The force and effect to be given the fact of possession of stolen property recently after the theft, and the sufficiency or insufficiency of such evidence, are solely for the jury, and it is improper for the court to instruct the jury as to the effect to be given, or the sufficiency of, the evidence, in whole or in part."

In the case before us there appears considerable evidence which the jury might have considered as tending to show the defendant's guilt in connection with, and in addition to, the proof of finding the stolen tires to have been in the possession of the defendant.

The tires and wheels were owned by Leonard McKean, a used car dealer of Kearney, Nebraska. They were on a Buick automobile which he had recently purchased and placed on a lot used by him to store cars at 1220 Fifth Avenue in that city. McKean went to this car lot on March 22, 1961, and found the front end of the Buick on which the tires and wheels in question had been left let down on the ground and the front tires and wheels gone. The hubcaps were lying by the car with the nuts that held the wheels on therein. The tires were comparatively new Atlas tires which had been purchased on November 29, 1960, by Howard Swartz from whom McKean had purchased the car. McKean testified the tires were worth $25 each and the wheels $5 each. Swartz had the guarantee agreements on the tires issued by Gordon Baker who operates a Standard Oil station at Elm Creek, Nebraska. The tires recovered were identified as those on the car by McKean and Swartz. The latter put them on the front end of the Buick automobile before trading it to McKean. On April 22, 1961, R. T. Nelson, chief of police of the city of Kearney, stopped a car driven by Wayne Wiemers from which he took the two Atlas tires later identified as those stolen. Wiemers was taken to the police station and he there stated he had purchased them from the defendant. Wiemers testified that he had purchased the tires about 3 weeks before from the defendant for $15 and that they were taken from defendant's car and placed on that of the witness in the presence of two other witnesses who testified also. A witness testified that he had previously noticed the tires on the back wheels of the defendant's car, that they appeared too large for that car, and the back of the car appeared to be higher than the front end

when he saw them on it. After Wiemers had related his story to the police the defendant was arrested by Lloyd L. Frank, sheriff of Buffalo County, Nebraska, on May 18, 1961, on a warrant issued April 25, 1961. Defendant was taken to Kearney by Frank. The sheriff testified that the defendant on this trip stated he had sold tires to Wiemers. He did not admit stealing the tires. McKean testified that on Easter Sunday, which from the evidence was April 2, 1961, the defendant came to his home and stated he wanted McKean to make a list and figure the amount of the things taken from the lot, and that he would pay for them. McKean had reported to the police the taking of other items also. The defendant did not admit he had taken anything. When the witness asked him if he had the wheels he answered he did not have them. When asked why he was there trying to pay for them if he didn't have them, he answered that he thought it would be cheaper. The lot where the car from whence the tires and wheels were taken was several blocks from the home of defendant, but there was an alfalfa field between, and each of the premises could be seen from the other. The defendant later took the stand in his own defense. The substance of his story with respect to obtaining the tires follows. He first saw the tires in question at Foote's Filling Station in Kearney. Defendant was then having tire trouble and his car was jacked up there in front of the garage part of the station property where his tires were being fixed. He walked into the cafe portion of the station. There was a man standing there, they became engaged in conversation, and the man asked defendant if he wanted to buy some new tires for his "wreck." Defendant went out and looked at them and they dickered for the price. Defendant finally purchased the tires for $20, the man throwing in four quarts of oil also which he had. Defendant was not sure whether the man had a car with a Nebraska or out-of-state license, but thought it was a Kansas car. It had a white license plate and

was a 1949 to 1951 green Mercury. The man gave him a receipt which was not introduced in evidence but from which the witness testified that the man's name as given him therein was Dan Weeks. The deal was made in the latter part of March or early in April 1961. The defendant stated that one of his tires was being repaired in front of Foote's Filling Station at the time of the purchase. This was about 11:30 or 12 o'clock at night and the repair work was being done by an elderly man, a filling station attendant at Foote's station whose name was not known to him. The purchase of these tires was not corroborated. Defendant admitted that he went to McKean and asked him to find out what had been taken and the sum of it. He stated however this was about the 20th or 21st of May 1961, while he was out on bond. He did this he said because he felt it would be cheaper than to defend the lawsuit.

There was testimony by defendant's father and brother substantiating the defendant's testimony of his working on his own car at his home until late on the night when the tires were taken, and thereafter his going to bed which tended to show an alibi.

The whole matter was submitted to the jurors who were the exclusive judges of the facts. There was ample evidence which, if believed by the jury, was sufficient to warrant the verdict it returned.

"This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873.

It follows that the judgment of the district court on the verdict of the jury should be affirmed.

AFFIRMED.

MARY C. CARD, APPELLANT, V. CLYDE F. CARD, APPELLEE.
116 N. W. 2d 21

Filed June 29, 1962. No. 35230.

1. **Judgments: Pleading.** Res judicata is ordinarily an affirmative defense. It is only when it affirmatively appears to exist from the petition itself that it affords a basis for sustaining a general demurrer.
2. **Divorce.** A divorce decree is ordinarily considered a final adjudication of the property rights of the parties, and may not be modified after 6 months from its rendition except when it lacks the attributes of a final judgment, where reservations are contained in it which lay the foundation for a modification, or where changed circumstances can be shown.
3. ———. A provision in a divorce decree that a gross award of alimony shall be paid in installments and that liability for such installments shall cease on the death or remarriage of the wife are not void as being against public policy.
4. **Judgments: Fraud.** In order to avoid a judgment on the ground of fraud in obtaining it, the facts constituting the fraud must be pleaded and proved.
5. **Pleading.** A demurrer to a pleading admits only such facts as are well pleaded. A pleading which alleges only a conclusion of law or fact does not state a cause of action and is subject to demurrer.
6. **Divorce.** An allegation that the termination of installments on a gross award of alimony are oppressive, unconscionable, and inequitable do not state a cause of action in a collateral attack upon a final judgment.
7. **Divorce: Attorney and Client.** A party to a divorce action will not ordinarily be required to pay attorney's fees for the benefit of the wife's legal counsel in a case involving the wife's collateral and unjustified attack upon a decree of divorce which has become final.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Robert L. Jeffrey and Richard L. Goos, for appellant.

Beynon, Hecht & Fahrnbruch, for appellee.

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

CARTER, J.

Plaintiff filed a petition seeking the modification of

a divorce decree to which she was a party. The defendant demurred generally to the petition. The trial court sustained the demurrer and granted time to further plead. Plaintiff elected to stand on her petition and the trial court dismissed the action. Plaintiff has appealed to this court.

The record shows that plaintiff obtained a divorce from the defendant on November 21, 1957. Prior to that date and on October 8, 1957, the parties entered into a written property settlement agreement. The trial court approved and incorporated the terms of the property settlement into its decree. No question arises concerning the division of the property of the parties, except the award of $33,875 to the plaintiff. With reference thereto, the decree states that in addition to the real and personal property which the said Mary C. Card is to have, "Clyde F. Card shall pay to Mary C. Card as permanent alimony, the sum of $33,875.00, which sum to be payable as follows: The sum of $5,000.00 shall be paid immediately upon the approval of this settlement by the Court and the granting of an absolute divorce. The balance of said sum shall be paid by the said Clyde F. Card to the said Mary C. Card in monthly installments of $137.50 each beginning on the first day of October, 1957, and continuing on the first day of each and every month thereafter to and including the first day of March, 1975; provided, however, that in the event of the death or the remarriage of the said Mary C. Card, all monthly payments not then paid nor due shall be forever cancelled and the said Clyde F. Card shall be wholly relieved of his obligation to make any further or other payments."

It is true that this court has condemned monthly installments as a proper method of allowing alimony without the fixing of the gross award. Such a method is not void, however. On appeal, on a trial de novo, this court has modified decrees to provide for an allowance of alimony in a fixed amount and permitted payment in in-

stallments where the financial circumstances of the husband required that this be done. See Metschke v. Metschke, 146 Neb. 461, 20 N. W. 2d 238.

The decree provided that the defendant should pay the plaintiff $33,875, said sum to be payable as follows: $5,000 upon the granting of the divorce and $137.50 each month thereafter, provided that in the event of the death or remarriage of the plaintiff the obligation of the defendant to make further installments ceased. The trial court made a division of property and in connection therewith made an allowance of a gross amount in the nature of monthly support. It is the contention of the plaintiff that the proviso terminating the monthly installments upon the death or remarriage of the plaintiff should in effect be deleted from the decree for several reasons which will be discussed hereafter.

It is contended that the proviso is against public policy. We think not. It fixes the termination date of the payments upon the total payment of $33,875, or upon the death of the plaintiff, or upon her remarriage, whichever first occurs. It is not an unreasonable restraint on marriage. It is a means of fixing the amount of alimony to be paid under the different circumstances therein set out. The decree is in the language of the property settlement agreement, which language is plain and definite, and easily understood. The parties as well as the court appear to have considered the fact that the support of plaintiff in case of remarriage devolves upon the new husband from which the prior husband should be relieved.

Plaintiff contends that she did not understand the language of the property settlement nor the similar language of the decree. As we have said, the language used was so simple and plain in meaning that we can give no credence to the contention that plaintiff did not understand exactly what it meant.

The petition asserts fraud in general terms. No facts are pleaded that even tend to support this allegation.

A demurrer does not admit conclusions of either law or fact. Dodson v. F. W. Woolworth Co., 118 Neb. 276, 224 N. W. 289. The allegations of fraud were clearly vulnerable to demurrer. Thomas v. Thomas, 33 Neb. 373, 50 N. W. 170, 29 Am. S. R. 483.

The petition alleges that the proviso of the decree relating to plaintiff's death or remarriage results in a forfeiture of her rights in the monthly payments, and are oppresive, unconscionable, and inequitable. There are no allegations of fact to support this assertion. The purpose of the provision relating to remarriage was to relieve the defendant from the support of his former wife if she should become the wife of another who would be charged with her support. We find nothing unlawful or inequitable in such a provision in a divorce decree, particularly when it is the result of a formal written property settlement. The decree has such finality that the law of res judicata applies to it and it may not be attacked collaterally after it has become final. The cases cited by the plaintiff were direct appeals and not collateral attacks as here. See, Holmes v. Holmes, 152 Neb. 556, 41 N. W. 2d 919; Swanson v. Swanson, 137 Neb. 699, 290 N. W. 908. In Young v. Young, 138 Neb. 294, 292 N. W. 923, this court stated: "A divorce decree is usually considered a final adjudication of the property rights of the parties, and may not be revised or altered after the expiration of six months from the date of its entry." See, also, Ziegenbein v. Damme, 138 Neb. 320, 292 N. W. 921.

Plaintiff contends, however, that res judicata is an affirmative defense and may not be determined on a general demurrer to plaintiff's petition. While this is ordinarily true, the rule is to the contrary when the petition sets forth the facts to which the rule of res judicata applies. Marsh-Burke Co. v. Yost, 102 Neb. 814, 170 N. W. 172; In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 293.

Plaintiff claims that section 42-324, R. R. S. 1943, au-

thorizes the trial court to grant the relief here sought. This provision of the statute states in part: "* * * the court, from time to time, on the petition of either of the parties and hearing thereon, may revise and alter such decree respecting the amount of such alimony or allowance, * * *." This statute was interpreted in Graham v. Graham, 135 Neb. 761, 284 N. W. 280, as meaning that a decree of divorce is res judicata as to all matters existing at the time it was rendered. In order to secure a revision of a divorce decree having such completeness and finality as to possess the attributes of a final judgment, new facts occurring since the decree was entered must be shown. Estoppel by previous judgment extends to all matters properly before the court which the parties might have litigated, unless changed conditions are pleaded and proved. See, also, Ziegenbein v. Damme, *supra;* Young v. Young, *supra.*

Unless the foregoing rule be correct, finality in divorce decrees could never be attained. It is only where a divorce decree lacks the attributes of a final judgment, or reservations are contained in it that lay the foundation for modification, or where changed circumstances can be shown, that a divorce decree, otherwise final, may be modified after 6 months from the rendition of the decree. In the instant case the petition fails to show that any of the factors exist which would authorize a modification of the decree. The general demurrer was properly sustained and the action dismissed.

The plaintiff assigns as error the refusal of the trial court to award attorney's fees to her under the provisions of section 42-308, R. R. S. 1943. She asks us to allow attorney's fees for services rendered in the trial court and this court as well. We do not think attorney's fees should be allowed the plaintiff in this case. Defendant, so far as the record shows, has complied with the divorce decree rendered in 1957 with respect to the division of property made and the alimony allowed. Plaintiff appears to have the means to pay her own

attorney. The suit is an attempt to modify a final judgment containing a financial settlement to which she agreed. A defendant will not ordinarily be required to pay attorney's fees under such circumstances. A party to a divorce action will not ordinarily be required to pay attorney's fees to the wife for the benefit of the wife's legal counsel in a case involving a collateral and unjustified attack upon a divorce decree which has become final. See, Smallcomb v. Smallcomb, 165 Neb. 191, 84 N. W. 2d 217; Sechser v. Sechser, 162 Neb. 486, 76 N. W. 2d 412; Eicher v. Eicher, 148 Neb. 173, 26 N. W. 2d 808. The trial court properly denied plaintiff's request for the allowance of attorney's fees and they are likewise denied in this court. The costs of the appeal are taxed to plaintiff.

The judgment of the district court being correct, it is affirmed.

AFFIRMED.

KEITH S. SCHWARTZ AND KENNETH P. SCHWARTZ, EXECUTORS OF THE ESTATE OF JOSEPH SCHWARTZ, DECEASED, APPELLANTS, V. B. R. HIBDON, FIRST AND REAL NAME UNKNOWN, DOING BUSINESS AS OIL FIELD DOZER SERVICE, ET AL., APPELLEES.

116 N. W. 2d 187

Filed June 29, 1962. No. 35266.

1. **Automobiles: Negligence.** Generally it is negligence as a matter of law for a motorist to drive a motor vehicle on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision.
2. ———: ———. Reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence.
3. ———: ———. The driver of the front motor vehicle owes no duty to the rear or trailing vehicle except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise,

he has a right to assume either that there is no other vehicle in close proximity to his rear or that, being there, it is under such control as not to interfere with his free use of the road in front of and to the side of him in any lawful manner.

4. ———: ———. Where one driving a motor vehicle is suddenly confronted by an emergency, requiring instant decision, he is only required to demean himself as an ordinary, careful, and prudent person would have done under like circumstances, and if he does that he is not held to be negligent.
5. ———: ———. The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it.
6. ———: ———. Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault.
7. ———: ———. Conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances.
8. ———: ———. A motorist overtaking and passing another motor vehicle must exercise vigilance commensurate with the surrounding circumstances.

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. Reversed and remanded.

Heaton & Heaton and Leon A. Sprague, for appellants.

Halcomb, O'Brien & Everson and Harry R. Meister, for appellees.

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

SPENCER, J.

This is an action for wrongful death as a result of a rear end collision. The trial court sustained defendants' motion for a directed verdict at the close of plaintiffs' evidence. Plaintiffs' motion for new trial was overruled, and plaintiffs appeal.

The action was brought by the appellants, who are the executors of the estate of Joseph Schwartz, deceased, for

the exclusive benefit of the next of kin who sustained pecuniary loss. The executors will be hereinafter referred to as appellants. The defendants and appellees are B. R. Hibdon, first and real name unknown, doing business as Oil Field Dozer Service, and Kenneth H. Thompson. They will be hereinafter referred to as Hibdon, Thompson, or appellees.

The parties stipulated that Hibdon was the owner of the equipment being driven by Thompson, and that Thompson was one of Hibdon's employees on September 28, 1960. There is no question but that at all times pertinent herein the relationship of master and servant existed. The equipment driven by Thompson was a 190 four-wheel International truck, which was pulling an eight-wheel Fruehauf lowboy trailer, which trailer was carrying an HD9 Allis-Chalmers tractor mounted with a bulldozer blade. The combined weight of the tractor and equipment was 36,000 pounds.

Thompson was the only eyewitness to testify. From his testimony we determine the facts to be that between 9 and 10 o'clock a.m. on September 28, 1960, Thompson was driving this equipment east on U. S. Highway No. 30 at about 40 miles per hour. When he was at a point he estimates to be 1,000 feet west of the intersection of highway No. 30 and a north and south county road 2 miles west of Potter, Nebraska, he observed Joseph Schwartz, hereinafter referred to as the deceased, driving a farm tractor pulling a pickup, approaching a stop sign on the county road. Thompson testified deceased did not bring the equipment to a stop at the stop sign protecting the highway, but, turning the equipment onto highway No. 30, he proceeded east. He further testified that deceased at all times drove the equipment to the right of the centerline; that there was nothing to obstruct his vision; and that he observed the deceased, who was traveling at a speed of 5 to 7 miles per hour, from the time he came onto the highway until the impact. The impact occurred at a point at least 700 feet

east of the intersection of highway No. 30 and the county road.

When the deceased came onto the highway Thompson slackened his speed until he was down to 20 miles per hour. There was a car between him and the deceased, which passed the deceased. After Thompson reached the intersection of highway No. 30 and the county road, a milk truck, which had been behind his truck, passed him and then passed the deceased. When it returned to its own lane of traffic in front of the deceased, Thompson looked in his rearview mirror and, not seeing anyone behind him, started to pull out to pass the deceased. He swung out at 20 miles per hour and started gaining speed. When he was a "couple feet" over the centerline, he again looked in his rearview mirror and saw a car in the westbound lane to his rear, overtaking him and attempting to pass, so he sounded his horn and cut right back. He was then 50 to 75 feet from the deceased. He could not stop so he headed for the ditch, and the left end of his front bumper caught the center of the tailgate of the pickup, pushing it loose and north across highway No. 30. The farm tractor rolled completely over and the truck came to a stop, with its front bumper on the rear wheels of the farm tractor.

It was Thompson's testimony that at the time of the impact the truck was practically off the pavement but the part which hit the pickup was on the pavement. The deceased had made an attempt to turn off the pavement onto the right shoulder. The shoulder on both sides of highway No. 30 was 10 to 12 feet wide.

The deceased was thrown off the tractor by the impact and had fallen on the pavement. He was unconscious at the scene and much of the time until his death in the hospital at Sidney, Nebraska, at 11:15 o'clock the next night.

Thompson, in his deposition before the trial, described his cutting back as follows: " 'Then I met the westbound traffic and let them clear, and the traffic behind me

pass, and by then I was down to approximately 20 miles an hour—I had to gear down—and I swung out to start to pass, checked the rear-view mirror first, and swung out to pass, checked the mirror again and a car come from behind, and I cut back in again and put on the brakes and pulled the air horn, and I saw I couldn't stop, and I cut for the ditch, and the shoulder there is about 12 feet wide and fairly gentle sloping to the ditch; I figured I could ditch the truck and trailer rather than hit the back of the pick-up, and about that time, evidently he had heard the air horn, and he cut to the right.' "

Thompson also testified that because of the bulldozer on the trailer he had a blind spot so that his vision to the rear was obstructed directly behind him for approximately 150 feet, but that a car would have to be in the exact position for him not to see it with one of his rearview mirrors. In this connection, we note that when Thompson saw the car attempting to pass, it was out in a passing position in the westbound lane behind him. It seems that if he was as alert as he testified, he should have seen the car when it came from the blind spot over into the westbound lane. His testimony is that it was only when a car was "tailgating him," to use his attorney's expression, that he could not see it. As soon as it moved to either side he could pick it up in one of his rearview mirrors.

The trial court specifically found that the appellants' evidence was "* * * insufficient to raise any issue of defendants' liability," discharged the jury, and sustained appellees' motion for dismissal at the close of appellants' case.

Before discussing this point, we will consider appellees' plea of contributory negligence. Appellees urge that the deceased was guilty of contributory negligence in failing to stop at the stop sign and in driving a slow-moving vehicle onto highway No. 30 in front of appellees' oncoming truck.

Clearly, any failure to stop at the stop sign could not have been the proximate cause of the collision. Accepting Thompson's statement, which from the respective speeds is patently on the conservative side, that his truck was 1,000 feet west of the intersection when the deceased came on the highway, yet the deceased was able to make the turn and to travel on his own side of the highway in full view of oncoming traffic for a distance of 700 feet. The fact that the car between appellees' truck and the deceased passed deceased without incident, and a milk truck which was behind appellees' truck was able to pass and to return to the right lane of traffic ahead of deceased, clearly negatives the failure to stop at the stop sign as being any part of the proximate cause.

Appellees also complain that the speed of the deceased's vehicle was too slow. It was undoubtedly the usual speed for the type of equipment involved. However, the speed estimate is Thompson's. The deceased at all times was in full view of Thompson, who was fully conscious of the speed at which the deceased was traveling. The testimony of Thompson is also that deceased's farm tractor was moving off the pavement when struck, evidently in response to Thompson's air horn when he started to cut back to the right lane.

As we view Thompson's testimony, there is no issue of contributory negligence in this record, so the question remains whether Thompson was guilty of negligence sufficient to create a submissible issue. We determine there is a question as to his negligence and the ruling of the trial court was in error. In an action where there is any evidence which will support a finding for a party having the burden of proof, the trial court cannot disregard it and direct a verdict against him. Dryer v. Malm, 163 Neb. 72, 77 N. W. 2d 804. We believe the question is not so much whether there was a submissible issue for a jury as whether Thompson was negligent as a matter of law.

The facts must be considered in the light of the rule

that generally it is negligence as a matter of law for a motorist to drive an automobile on a highway in such manner that he cannot stop in time to avoid a collision with an object within the range of his vision. See Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669.

Thompson was driving equipment weighing 18 tons. He knew deceased's equipment was traveling not to exceed 7 miles per hour. He knew he had a blind spot for 150 feet behind his truck. There was nothing to obstruct his front vision, and he was at all times able to see the movement of the deceased ahead of him. He had watched deceased travel 700 feet. At a speed of 7 miles per hour, this would take deceased at least 70 seconds. Thompson had driven the same truck and load on other occasions and should have known that equipment weighing 18 tons traveling at 20 miles per hour could not be stopped in 50 to 75 feet. Yet he attempted to pass at that distance without being certain that there was no car in the blind spot behind him or in so indicating his intention that a car behind him would make its presence known. He had a clear duty to exercise due care in attempting to pass the deceased. We do not believe he did. It is also evident he did not have his truck under reasonable control when he attempted to pass. We have said reasonable control by the operator of a motor vehicle is such as will enable him to avoid an accident involving another motor vehicle operated without negligence. Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290.

Appellees, as one of their propositions of law, quote the following from 5 Am. Jur., Automobiles, § 280, p. 656: "The driver of the front car owes no duty to the rear or trailing car except to use the road in the usual way, in keeping with the laws of the road, and until he has been made aware of it, by signal or otherwise, he has a right to assume either that there is no other automobile in close proximity to his rear or that, being there, it is under such control as not to interfere with his free use

of the road in front of and to the side of him in any lawful manner."

It seems to us that the appellees have confused their parties. It is not the driver of the car behind the truck who is involved in this action. The appellants are the personal representatives of the driver of the vehicle Thompson was trying to pass. They are the ones who are entitled to the benefit of the rule. This rule did not excuse Thompson when he acted on it to the detriment of the driver of the vehicle in front of him to whom he owed a duty to observe due care when he attempted to pass. To put it another way, if Thompson owed no duty to the unknown driver coming from the rear, how can that absolve him from his negligence in pulling back to the right and running into deceased.

Appellees also urge upon us the rule: "Where one driving an automobile is suddenly confronted by an emergency, requiring instant decision, he is only required to demean himself as an ordinary, careful, and prudent person would have done under like circumstances, and if he does that he is not held to be negligent." This is the sudden emergency rule we enunciated in Belik v. Warsocki, 126 Neb. 560, 253 N. W. 689. It is not applicable to the facts in this case. It may well be that when Thompson became aware of the car behind him, he was in an emergency situation from which he could not extricate himself. Yet the situation was one of his own making. It was brought on by his own actions and omissions. It was nothing to which the deceased contributed in any way. He cannot relieve himself of his duty to deceased by creating an emergent situation.

As we said in Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290: "The doctrine of sudden emergency may not be successfully invoked by a litigant unless there is evidence that such an emergency existed, that the party seeking the benefit of the doctrine did not cause the emergency, and that he used due care to avoid it." The sudden emergency here, if there was one, was brought about

by the failure of Thompson to use due care to avoid it.

Stanley v. Ebmeier, *supra,* is a case very similar to the instant case. It also involved a rear end collision. Briefly, the facts in that case are that plaintiff entered the highway from a private road and turned west. Defendants' oil truck was at that time about 1,000 feet east, also traveling west. Plaintiff proceeded at about 25 to 30 miles per hour. The defendant driver at the time was going about 40 to 50 miles per hour. At a point 1,767 feet west of where plaintiff entered the highway there was an intersection for which plaintiff slowed down and gave a signal of his intention to turn south. Plaintiff reduced his speed to 15 to 20 miles per hour and defendant reduced his speed to 30 miles per hour. A flat-bottomed truck and a Buick, both proceeding east, passed plaintiff east of the intersection. After defendants' oil truck passed the flat-bottomed truck, the driver turned to the left to pass plaintiff's pickup, saw the Buick coming toward him, then tried to miss both of them, but swerved to the north and ran into the plaintiff's pickup truck. The defendants pleaded contributory negligence of the plaintiff and a sudden emergency. We sustained a judgment for the plaintiff and said: "The findings of the jury favorable to appellee are supported by the evidence. If there is evidence which will sustain a finding for the litigant who has the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law."

In Johnson v. Schrepf, 154 Neb. 317, 47 N. W. 2d 853, we held: "Where the driver of a motor vehicle upon a public highway, in attempting to pass another vehicle from the rear, operates his vehicle in such a manner as to strike the other vehicle in passing, he is ordinarily guilty of negligence when the driver of the vehicle being passed is without fault." While in this case the driver changed his mind and did not pass, but turned back and struck the rear of the vehicle of the deceased, the reason for the rule is still applicable. In this case,

the deceased was without fault and there is nothing he could have done to have avoided the collision except not to be where he had a perfect right to be. Thompson's duty in passing the deceased was to be certain he had sufficient clearance to pass before attempting to do so. Sufficient clearance would require a sufficient stopping distance behind the deceased if he decided not to complete his act and to return to his former lane of traffic.

The crux of this case is that Thompson's view of part of the highway behind him was obstructed and he knew it. His duty therefore was greater than under normal circumstances. We have frequently held that conditions affecting the visibility of a motorist impose upon the driver the duty to exercise a degree of care commensurate with existing circumstances. Pierson v. Jensen, 148 Neb. 849, 29 N. W. 2d 625. The same reasoning should be applicable here. We hold that a motorist overtaking and passing another car must exercise vigilance commensurate with the surrounding conditions.

Appellees' motion for a directed verdict was sustained at the close of the appellants' evidence. The appellees' evidence is not before the court although Thompson was called as a witness for the appellants. The appellants argue that the evidence establishes that Thompson was guilty of negligence as a matter of law. That question was not and could not be presented to the trial court at that stage of the proceedings. Consequently, that issue is not before this court at this time so we make no determination in regard to that question.

There were errors in ruling on evidence with reference to the admissibility of the statement given by Thompson to the highway patrolman which we assume will not occur at the next trial, so they are not discussed herein.

For the reasons given above, we reverse the judgment of the trial court and remand the cause for a new trial in conformity with this opinion.

REVERSED AND REMANDED.

W. G. MCCUBBIN, APPELLANT, V. VILLAGE OF GRETNA, NEBRASKA, APPELLEE.

116 N. W. 2d 287

Filed July 6, 1962. No. 35165.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Trial: Appeal and Error.** The trial court is required to consider any competent and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of the findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.
3. **Injunctions: Municipal Corporations.** Courts will consider, among other things, whether an injunction would not destroy the sewer system of a city, and subject the public to serious inconvenience and danger.
4. **Eminent Domain: Municipal Corporations.** Property may be appropriated by a public corporation for the discharge from its sewage plant, but it is liable for any damage caused thereby.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Affirmed.

Eisenstatt & Lay, for appellant.

Wells, Martin, Lane, Baird & Pedersen, for appellee.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

CHADDERDON, District Judge.

W. G. McCubbin commenced this action against the Village of Gretna to permanently enjoin it from running the discharge from a sewage disposal plant erected by the village across his land described as the northeast quarter and the east half of the northwest quarter

of Section 35, Township 14 North, Range 10 East of the 6th P. M., in Sarpy County, Nebraska, which is located north and west of the village, which discharge, he alleges, contains excess water, refuse, and material which collected on the plaintiff's land causing a swampy area and creating offensive odors, attracts flies, mosquitoes, and insects causing an unhealthy condition, and prevents the plaintiff from moving farm machinery from one part of the farm to another. The plaintiff further alleges that the value of his farm has decreased and that the flow from the sewer plant is a nuisance.

The Village of Gretna in its answer alleges that said sewage disposal plant was built in accordance with plans approved by the Department of Health of the State of Nebraska and is free from odors; that its discharge from the sewer plant flows into a natural watercourse fed by springs; that the deposits on plaintiff's farm is caused by sediment from fields and barnyards in the natural drainage basin of the watercourse; that ground water level and improper farming operations of the plaintiff have caused the swampy area; that it has a perpetual easement granted by the former owner of the land; and that the damage to the land, if any, occurred before the purchase of the land by the plaintiff.

The parties agree that the matter of damages was a matter incidental to the equitable and injunctive relief sought so that it could be disposed of by the court without a jury.

The trial court found for the defendant and, among other things, found that the creek in question was a spring-fed watercourse; that the plaintiff was entitled to use it for the discharge from its sewer plant; that the treatment plant was properly constructed and efficiently operated; that there was no offensive odor, flies, or mosquitoes resulting from the discharge of the sewer plant; that such an operation was not a nuisance; that the defendant had acquired no right to use the watercourse

for all times and under all circumstances; that the former owner had been paid for constructing a ditch through his land; that plaintiff was in the same position as the former owner; that these findings apply only so long as defendant operates its present treatment plant within its capacity and in an efficient manner; and that if at a future date a change is made, the plaintiff could apply to the court for appropriate relief.

W. G. McCubbin will hereafter be referred to as plaintiff, and the Village of Gretna will hereafter be referred to as defendant.

In order that we may understand the problem before us we shall set forth certain matters of evidence as shown by the bill of exceptions. The evidence is not in conflict except in a few instances and, although this case is tried de novo in this court, the rule announced in Walla v. Oak Creek Township, 167 Neb. 225, 92 N. W. 2d 542, applies, which rule is: "There is a good deal of evidence relating to material matters that is in irreconcilable conflict. We have often stated that: 'Actions in equity on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.' Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786. See, also, Town of Everett v. Teigeler, supra; Mader v. Mettenbrink, supra; Keim v. Downing, 157 Neb. 481, 59 N. W. 2d 602."

The trial court, by agreement of the parties, viewed the premises at the time of the trial. This court in Walla v. Oak Creek Township, *supra,* said: "At the conclusion of the trial appellants' counsel requested the trial court to view the premises, which request the trial court granted. In view thereof the following has application: 'The trial court is required to consider any competent

and relevant facts revealed by a view of the premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.' Mader v. Mettenbrink, supra. See, also, Town of Everett v. Teigeler, supra."

Defendant in 1951 employed an engineering firm to design a sewer treatment plant. This firm designed such plant, the plans were approved by the Department of Health and the State of Nebraska, federal funds were obtained, the plant was built and completed on March 27, 1953, and began its operation soon thereafter. This is what is called a complete treatment plant which has an efficiency of approximately 90 percent. There has been no metering of the flow but the engineers estimated that the flow would be 15,000 gallons per day. The plant was designed so that the water from the plant would fill a tank, when the tank was full this water would be dumped, and there would be no flow until the tank refilled. At different times of the day the flow was more rapid than at other times. The plant at the time of the trial was utilizing approximately 20 to 25 percent of its hydraulic capacity and was being operated efficiently.

The water from the plant was drained into a waterway that was fed by springs and drained an area of land. After rains and after the snow melted a considerable amount of water ran down this waterway. The spring in this waterway was just east of the sewer plant. The water ran generally west and, after going through a culvert under the railroad track and the county road, entered the land of the plaintiff and flowed over the farm land for some distance, then into a gully, and on into the Elkhorn River. At the time this plant was built in 1953 this land was owned by Hugo Schnack who sold it to the plaintiff and possession was surrendered on March 1, 1959. There is some conflict in the evidence

about the flow of water during the summer when there was no rain. Schnack testified that he planted corn in the area from the east side of his land to the gully and, except for a few days after a rain, he could find a place to cross this waterway with farm implements, but after the installation of the sewer plant there were times when he could not go across it with farm machinery. Before the installation of the sewer plant the course of the water through the farmland would change due to debris coming down with the drainage water and sometimes there were deposits of 8 or 9 inches of silt, although there was evidence that several years before there was a well-defined channel. Some members of the village board called on Schnack and asked him what they could do to make it all right with him for the sewer going through his land. He said: "If you put me a ditch through there I will—and I don't have no damages from livestock maybe getting poisoned or any chemicals or any other damages, * * *. I don't want anything for it." The defendant tried to get the ditch dug and could not do so. Later Schnack employed a man to dig the ditch at a cost of $270, and the defendant gave him a check for $300. The defendant also asked him to sign an easement, which he refused to do, saying that he would rather give back the money than to sign the easement. The plaintiff purchased the land from Schnack but did not know that the water from the sewer plant was running across the place until March of 1959. At the time of the trial the land was in the soil bank with the area from the culvert under the road on the east side of the plaintiff's land to the gully planted to brome grass and alfalfa. It had been difficult for the plaintiff to plow this land to seed it and also difficult to mow, which was necessary under the soil bank agreement. There was some evidence that at some times there was an offensive odor from the water but about 2 months before the trial the defendant commenced using a chemical called Sol-Vax for this odor. There was much other testimony and many exhibits in-

troduced, all of which have been studied by this court. We think that this is a sufficient summary of the evidence for a decision by this court except to say that the plaintiff offered no testimony that there was any other way to dispose of the water from the sewer plant than to suggest that a lagoon system might have been used, and there was no showing that the soil was of the kind necessary to make such a system efficient.

After a motion for new trial was overruled the case was appealed to this court.

The first assignment of error is that the court erred in finding that there was no unlawful diversion of water by the defendant upon the plaintiff's land. This assignment is not good. The plaintiff's petition did not allege that the defendant unlawfully diverted water but at the close of the plaintiff's evidence the plaintiff moved to amend his petition by adding to the petition in several paragraphs the words, "unlawfully diverted," so that the petition would have read, "unlawfully diverted water," arguing that this would make the petition conform to the proof. This motion was overruled by the court. The overruling of this motion is not set out as an error in the brief of the plaintiff. Since the rules of this court provide that errors not assigned nor discussed will not be considered, the overruling of this motion by the court cannot be here considered. Trute v. Skeede, 162 Neb. 266, 75 N. W. 2d 672. Because of the overruling of the motion to amend the pleadings which was overruled the issue of "unlawfully diverted water" was not presented to the trial court and the plaintiff cannot assign an error which was not before it. Sleezer v. Lang, 170 Neb. 239, 102 N. W. 2d 435.

The other assignments of error, being five in number, will be considered together because they are all related and have to do with the right of the defendant to run the effluent from the sewer plant across the land of the plaintiff and whether the plaintiff had the right to revoke any

rights which the defendant had acquired after he, the plaintiff, purchased the land.

There is no assignment of error because the trial court failed to assess damages and what has been previously said in this opinion about assignment of error number one applies to the matter of damages so that it is not considered in this court.

In Richardson v. Kildow, 116 Neb. 648, 218 N. W. 429, the court said: "The writ of injunction is not wholly a writ of right, and may be withheld, in the discretion of the court, when it is likely to inflict greater injury than the grievance complained of; this principle is specially applicable where the interests of the public are involved." Also in Hall v. City of Friend, 134 Neb. 652, 279 N. W. 346, the court said: "Courts will consider, among other things, whether an injunction would not destroy the sewer system of a city, and subject the public to serious inconvenience and danger. * * * Under the facts in this case, the erection of a sewage disposal plant having been properly done, without negligence, it will be held to be a lawful exercise of power that equity will not restrain."

There is no doubt that the defendant had the right of eminent domain and could have obtained an easement over this land for the flow of the sewer effluent but instead it elected to pay the owner of the land for the digging of a ditch which was all he wanted and thereby acquired a right which could not be revoked or canceled by the owner. In Martin v. Fillmore County, 44 Neb. 719, 62 N. W. 863, the court said: "Land is appropriated when its corpus is seized and devoted to the improvement so as to deprive the owner of the use of the land. The nature of the estate in the land which is appropriated may possibly affect the amount of recovery, but does not affect the right to recover." See, also, Stuhr v. City of Grand Island, 120 Neb. 491, 233 N. W. 886. The plaintiff purchased this land with the effluent flowing through it which gave him notice that the defendant claimed

some right, even though he did not discover it until after the purchase, which indicates only that he might have been negligent in his inspection of the land.

The appropriation of this land for the operation of the sewer plant of the defendant was made, but only so long as the plant was used as constructed. Since the defendant acquired the right to run the sewer effluent from the plant then in operation, if the plant is enlarged or put to any other use, then the plaintiff would be entitled to any damage he might sustain by reason of the enlargement or the improper use of the plant, which is the finding of the trial court and which finding we think is correct.

In the light of these observations, we conclude that the judgment of the district court should be affirmed.

AFFIRMED.

ELMER SHAMBERG, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.
116 N. W. 2d 18

Filed July 6, 1962. No. 35191.

1. **Municipal Corporations.** Courts should give to language in city ordinances its plain and ordinary meaning.
2. **Statutes.** The distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from offending in like manner.
3. ———. A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed as modified.

Ralph D. Nelson, Henry L. Holst, and Hal B. Hasselbalch, for appellants.

Ginsburg, Rosenberg & Ginsburg and Norman M. Krivosha, for appellee.

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

SIMMONS, C. J.

Plaintiff brought this action for a declaratory judgment, an injunction, and equitable relief. The defendants are the City of Lincoln and its officers who are charged with the enforcement of its ordinances. The action was tried in the district court and resulted in findings and a judgment for plaintiff. Defendants appeal. We find for the plaintiff on the particular issue presented and direct an injunction.

The facts involved are not in dispute.

Plaintiff is a homeowner on South Fifty-sixth Street in Lincoln. His land slopes to the east. By excavation on the rear of the land, plaintiff built a standard size tennis court. He put up the standard 10-foot-high backstops and sidestops which are near the borders of his land on the east and the south. The backstops and sidestops are of meshed wire supported by iron posts and braces.

Before erecting the court and the stops, plaintiff secured the verbal approval of the city's building inspector's office to the effect that the city did not issue building permits for tennis courts.

The particular provision involved is section 2107, of ordinance No. 5636, of the City of Lincoln, Nebraska, which provides that: "No fence shall be erected to a height to exceed six feet, * * *." The above is but a part of one sentence out of one division of one group of provisions in what the city advises us is "a long, complex ordinance."

It appears that the backstops and sidestops affected the aesthetic sensibilities of plaintiff's neighbor to the east. Apparently, because of that complaint, the city's building inspector required reduction in the height of the stops from 10 feet to 6 feet. The building inspector measured from the ground level of the court to the

top of the stops and thereby found a violation of the 6-foot limit of the ordinance. Plaintiff, measuring from the grade level in front of his property, found the height to be well within the 6-foot limit.

The city elected to enforce its ordinance by misdemeanor proceedings in municipal court. For several days it apparently threatened, if it did not actually do so, to file a separate complaint for each day that the plaintiff did not comply with its construction of the section and remove the offending 4 feet of the stops.

The trial court made extensive findings and found that plaintiff's backstops and sidestops did not constitute any violation of section 2107 of ordinance No. 5636 and enjoined the defendants from prosecuting any action or actions against the plaintiff for the recovery of penalties under the ordinances of the city.

Defendants here complain that the judgment of the trial court was in error in finding that the tennis court's backstops and sidestops had no reasonable relation to public health, welfare, or safety; in not finding section 2107 was constitutional or was unconstitutional; in not finding that the backstops and sidestops were "a fence more than six feet high"; and in finding that they did not constitute a violation of ordinance No. 5636 of the city of Lincoln.

The broad sweep of the trial court's judgment is understandable in the light of the fact that the city apparently elected to prosecute for a violation of ordinance No. 5636 without limiting or pointing to the section above-quoted. However, the issue tried and decided was that of the applicability of section 2107 to plaintiff's tennis court backstops and sidestops.

We are urged to determine questions of constitutionality and a variety of other matters. At the beginning, we are confronted with the question, are the backstops and sidestops a "fence"? The ordinance does not undertake to define the term directly, so far as we are advised, and the entire ordinance is not before us.

We held in Foote v. County of Adams, 163 Neb. 406, 80 N. W. 2d 179, that: "Courts should give to statutory language its plain and ordinary meaning."

The same rule applies to a city ordinance.

What then is the plain and ordinary meaning of the word "fence" as used in the ordinance?

The word is defined in 36A C. J. S., Fences, § 1, p. 258: "A fence is an inclosing structure, composed of any material which will present a sufficient obstruction, about a field or other space intended to prevent intrusion from without or straying from within."

It is hardly to be said that a tennis ball is something "straying from within" although the purpose of the backstops and sidestops is to keep a tennis ball within the playing area. Substantially the same definition is found in 22 Am. Jur., Fences, § 2, p. 513, and in Webster's Unabridged Dictionary (2d Ed.), p. 674.

How did the city in the ordinance construe the term so far as tennis court "backstops" are concerned? In section 209 of ordinance No. 5636 of the City of Lincoln, it provided that a building was "any structure," etc. In section 246, it provided that a structure included "backstops for tennis courts," and in the same area here involved, it provided that no building should exceed 35 feet in height. Obviously, the city in enacting the ordinance did not consider a tennis court backstop to be a fence within the meaning of the ordinance but a structure subject to the code height for a building. Just as obviously, the plaintiff has not violated that provision. The city then, in section 2605, provided that anyone violating the code was guilty of a misdemeanor, with each day the violation existed constituting a separate offense.

We have held: "The distinction between a remedial and penal statute necessarily lies in the fact that the latter is prosecuted for the sole purpose of punishment, and to deter others from offending in like manner. A remedial statute, of course, is for the purpose of adjust-

ing the rights of the parties as between themselves in respect to the wrong alleged." School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24.

We have also held: "A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions." Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182.

It is not necessary to determine questions of constitutionality and other matters assigned.

We hold that plaintiff's structure is not a violation of the particular code provision here discussed and that defendants should be enjoined from enforcing or attempting to enforce the code provision against the plaintiff. The injunction should be so limited. Because of the particular language of finding and scope in the judgment, we modify the judgment of the trial court in accord with this opinion.

All costs are taxed to the defendant city.

AFFIRMED AS MODIFIED.

OMAR L. SEYMOUR, APPELLANT, V. JOURNAL-STAR PRINTING COMPANY, A CORPORATION, ET AL., APPELLEES.
116 N. W. 2d 297

Filed July 6, 1962. No. 35222.

1. **Workmen's Compensation: Appeal and Error.** An appeal in a workmen's compensation case is considered and determined de novo on the record in the Supreme Court.
2. **Workmen's Compensation.** A compensable injury within the meaning of the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.
3. ———. An accident within the meaning of the Workmen's Compensation Act is an unexpected and unforeseen event happening suddenly and violently and producing at the time objective symptoms of injury.
4. ———. The burden of proof is on the claimant in a work-

men's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

5. ———. Exertion which is no greater than that ordinarily incident to the employment cannot of itself constitute an accident and, if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.

6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

7. ———. The former decision of this court in Orchard & Wilhelm Co. v. Petersen, 127 Neb. 476, 256 N. W. 37, that in an action under the Workmen's Compensation Act, the report of an injury to an employee made by the employer may be introduced in evidence as an admission against interest, and in the absence of other evidence may, under the conditions, be sufficient to make a prima facie case for the claimant, is overruled.

8. **Workmen's Compensation: Limitations of Actions.** By the terms of statute controlling in this case as conditions precedent to the maintenance of action, the plaintiff was required to give notice in writing as soon as practical after the accident, make a claim for compensation within 6 months, and commence action within 1 year.

9. ———: ———. In case of latent injury, the time for commencement of action is extended to 1 year after the employee obtained knowledge that the accident caused compensable disability.

10. ———: ———. The limitation of the statute relates to the time when compensable disability became known, and not when the full extent of the disability was ascertained.

Appeal from the district court for Lancaster County: PAUL W. WHITE, Judge. Affirmed.

Robert V. Hoagland, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees.

Heard before SIMMONS, C. J., MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ., and CHADDERDON, District Judge.

YEAGER, J.

This is an action originally instituted by Omar L.

Seymour, plaintiff and appellant, in the Nebraska Workmen's Compensation Court, against the Journal-Star Printing Company, a corporation, and Globe Indemnity Company, a corporation, defendants and appellees, to recover workmen's compensation and other benefits recoverable under the workmen's compensation law, on account of alleged injuries which the plaintiff asserts that he sustained which flowed from an accident which occurred while he was employed by the defendant Journal-Star Printing Company.

The action was tried in the workmen's compensation court in which court the judgment was in favor of defendants and against the plaintiff. An appeal was taken to the district court where a like judgment was rendered. From this judgment an appeal was taken to this court. By stipulation of the parties the case comes to this court for consideration on the transcript of the proceedings of the workmen's compensation court, which transcript it was stipulated should be treated here as a bill of exceptions.

It follows therefore that the case is to be considered de novo on the record which is the transcript referred to in the stipulation. The following appears in Feagins v. Carver, 162 Neb. 116, 75 N. W. 2d 379: "An appeal to this court in a workmen's compensation case is considered and determined de novo upon the record."

In Jones v. Yankee Hill Brick Manuf. Co., 161 Neb. 404, 73 N. W. 2d 394, this court set forth criteria to be regarded in the determination of whether or not an accident has been proved and a right of recovery has been established within the meaning of the workmen's compensation law, as follows:

"A compensable injury within the Workmen's Compensation Act is one caused by an accident arising out of and in the course of the employment.

"An accident within the Workmen's Compensation Act is an unexpected and unforeseen event happening

suddenly and violently and producing at the time objective symptoms of injury.

"In order to recover, the burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.

"Mere exertion, which is no greater than that ordinarily incident to the employment, cannot of itself constitute an accident, and if combined with preexisting disease such exertion produces disability, it does not constitute a compensable accidental injury.

"An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence." See, also, Feagins v. Carver, *supra;* Murray v. National Gypsum Co., 160 Neb. 463, 70 N. W. 2d 394.

There are two major questions to be considered in this case. The first of these is that of whether or not the plaintiff has proved that he had an accident and a compensable injury within the meaning of the criteria set out.

The other is that of whether or not, if he did have such an accident and injury, he is barred of a recovery by lapse of time under limitations contained in the statute. These will be considered in the order stated.

For the further purposes of this opinion Seymour will be referred to as plaintiff and, since no reference to Globe Indemnity Company will be required in the discussion, when defendant is used the reference will be to the Journal-Star Printing Company.

The bill of exceptions contains no testimony adduced by the defendant. It follows of course that no testimony on behalf of the plaintiff was denied except as it stands denied by pleading. The insistence of the defendant is that the evidence of plaintiff falls short of proof by a preponderance, and particularly that he suffered an acci-

dent within the meaning of the workmen's compensation law.

In support of his claim the plaintiff testified that he was first employed by the defendant in June or July 1950, in work which was in part mental and in part physical; that this employment was continuous for about 6 years; that the physical part was extremely strenuous; that up to February 22, 1956, he was never off duty on account of back injury or difficulty; that at 7 p.m. his first job was to prepare and label sacks, placing the sacks on steel trucks at heights from 10 inches off the floor to shoulder high, and thereafter placing them on the dock for delivery to the terminal; that the sacks can weigh up to 100 pounds; that this is a daily operation and continues rapidly for from 1 to 1½ hours; that the work is heavier on 1 day of each week; that on this day he knew something happened and knew that he was uncomfortable, a fact which he communicated to two persons he worked with; that he did not know what happened, or when, whatever it was did happen; that he was aware of the feeling the rest of that night; that he continued his work until quitting time at 3:30 a.m.; that the next 2 days were days off and he also took the next 2 days off; that on Monday he consulted Dr. Roland F. Mueller who examined him, gave him a shot of fluid for muscle spasm, and prescribed physical therapy and a brace; that he was off work 7 or 8 days, after which he returned to work wearing the brace; that he reported the incident to the defendant; that he returned to work in March and continued to September 7, 1956; that he was wearing the brace at the time; that thereafter he worked for the Omaha World-Herald for 3 or 4 months in a similar capacity; that in 1957 he worked in this capacity at Denver; that during this entire period he was wearing the brace; that thereafter he continued to bear a brace; that during June of the year 1958, he came under the care of Dr. Philip E. Getscher; that physical therapy treatments were given in June and July, to which he

responded on a temporary basis but on discontinuance the symptoms would immediately return; that the true condition was revealed on December 10 or 11, 1959, and he went into surgery December 12, 1959; and that during the time from February 22, 1956, to June 1958, and thereafter, he to his own knowledge and belief suffered from what he said occurred on February 22, 1956.

One William D. Lehr, a fellow employee of the plaintiff, was called as a witness on his behalf. He gave the only testimony which appears in the record relating directly to the incident of the alleged accident. He testified only that Seymour complained that his back was hurt.

Dr. Roland F. Mueller testified as a witness on behalf of the plaintiff. This witness also, on January 16, 1960, made a report relating to the alleged accident, examination and treatment of the plaintiff, his diagnosis, his findings, and his opinion as to cause. This report is a part of the record, having been received without objection. To the extent of importance here this report and his testimony are in accord.

This testimony and this report disclose that on February 27, 1956, the witness examined the plaintiff at which time plaintiff related to him the incident which occurred on February 22, 1956; that he found considerable spasm present in the back muscles, some indication of slight nerve root radiation pain to the right side with slight difficulty in extending the right leg on the pelvis, and tenderness about the lumbosacral area of the back; that he advised moist heat, complete rest from work for several days, and physiotherapeutic treatment by massage and heat; that the physiotherapeutic treatment was continued from February 28, to March 3, 1956, inclusive; that on February 27, 1956, plaintiff was given an injection to relax muscle spasm; that he was advised to return to work on March 5, 1956; that he was also advised to have a back support fitted, which was done; that he was discharged on April 7, 1956, at which time

his back was almost normal although he was working with the back support; that the next time the witness saw him was on May 20, 1958, at which time he had a typical right sciatic nerve pressure syndrome, some loss of normal lumbar curve of the spine, there was only 50 percent of straight leg raising present, and reflexes were difficult to elicit; and that at that time it appeared that he had a disc syndrome with nerve root pressure.

This witness at this time informed the plaintiff as to the diagnosis of the condition which he found and directed him to Dr. Getscher, a specialist in the field of orthopedic surgery, who first examined him on June 7, 1958. In his testimony Dr. Mueller testified that, on the basis of the history given by the plaintiff, the injury was an "occupational injury," and that it was an accidental injury sustained "when he lifted that mail sack that he told me about."

Dr. Getscher testified as a witness in the case and, like Dr. Mueller, made a report which is a part of the record. Likewise, to the extent of importance here, it is in accord with his testimony. The report was made on March 7, 1960. The report in pertinent part contains a résumé of his testimony.

In the statement he pointed out that at the time the plaintiff became a patient of his he gave a history of what occurred on February 22, 1956, with information that he had been treated by Dr. Mueller and received moderate relief from pain in the lower back and in the right lower extremity, and he continued to have "periodic episodes of low back pain and sciatica on the right up until the time of my examination." In the statement it is pointed out that the first examination revealed that there was a ½ inch atrophy of the right thigh with muscle weakness and other infirmities not necessary to set out in detail here; that at this time the condition was tentatively diagnosed as a condition due to a ruptured intervertebral disc at the fifth lumbar interspace on the right side; that at that time it was recommended

that he receive additional physical therapy and intermittent traction to the lower back; that as a result of this treatment there was moderate improvement; that from the results of examinations made on November 30, 1959, and thereafter, plaintiff was caused to enter a hospital on December 11, 1959, where other studies were carried out which revealed a "herniated intervertebral disc at L5 on the right side"; and that on December 12, 1959, surgery was performed and the disc was removed. Recovery was very satisfactory and he was dismissed on December 20, 1959. This witness gave it as his opinion that after recovery from surgery the plaintiff would have a permanent disability of the body as a whole of approximately 10 to 15 percent.

From the evidence as summarized must flow the answer to the first question, namely, that of whether or not, within the definitions of law, the plaintiff has sufficiently proved by a preponderance of the evidence that he suffered an accident.

The rule that there must be proof of an accident is not satisfied by proof of probabilities or possibilities. It must, as has been pointed out, be established by competent evidence.

In this case there has been no evidence adduced in proof that, within the meaning of the workmen's compensation law, the plaintiff sustained an accidental injury. He is the only witness who gave testimony as to what occurred on February 22, 1956. The true effect of his testimony was to say that he did not know. He could say only that in the performance of the same kind of work performed in the same manner over a period of years he felt pain after which he lost a few days of time. There is no dispute about this.

It is true that two doctors testified on his behalf and gave it as their opinion that he suffered an accident. This however was based on history given them by the plaintiff which history was not different in any material respect from the evidence which came from the plaintiff.

It is urged that the testimony of the plaintiff satisfies the rules as to proof of an accident within the meaning of the decisions of this court. Reliance for this is placed on a comparison of the recitals here to the recitals contained in the opinion in Meierjurgen v. City of Lincoln, 132 Neb. 896, 273 N. W. 804.

If a comparison of these recitals could be said to have controlling significance, it could well be said that there is merit to the contention of the plaintiff in this respect. This however may not be done. The question of whether or not an accident had been proved was not, according to the opinion, presented there for determination. The opinion in that case makes this clear. It states: "The only question presented is one of fact, whether or not the disability results from an injury to the workman."

The plaintiff apparently seeks to avoid the operation of the legal rule to which reference has been made by, in substance, urging that the defendant, having adduced no evidence, may not be heard to assert that an accident was not proved. He relies on a rule stated in Orchard & Wilhelm Co. v. Petersen, 127 Neb. 476, 256 N. W. 37, as follows: "In action under compensation law, report of an injury to employee made by employer to the compensation commissioner may be introduced in evidence as an admission against interest of the employer, as to how, when and where the injury occurred, and, in the absence of other evidence, may be sufficient to make a prima facie case for claimant." In the case here the record discloses that the defendant, a short time after February 22, 1956, did so report and pay a small amount of compensation and another amount for medical services.

In the opinion however it is stated: "We think it may be conceded that such a report, in this state, may be sufficient to make a prima facie case, and, if there were no other evidence upon the subject, such a report may be sufficient to sustain a finding for the claimant. However, in this case, there is other evidence which tends to

discredit the facts recited in the report."

In the case here there was a denial of an accident and the evidence of the plaintiff was, within the controlling principles, insufficient as proof of an accident, and for this reason it must be said that the district court properly decided that the plaintiff was not entitled to an award of workmen's compensation.

In any event this rule, in the light of other matters of controlling significance which are pointed out herein, is of no moment in the determination of this case. Further the rule does not appear to be based on a sound approach to a consideration of the probative value of evidence, in consequence of which it ought, for the future, to be rejected. It is therefore overruled.

If it should be said that the plaintiff had proved an accident, there is another and controlling basis for denying any obligation. The reason is that, assuming that an accident and injuries were proved, notice of an accident and commencement of action did not occur within the limits of time provided by statute.

This case is controlled by sections 48-133 and 48-137, R. R. S. 1943. The sections were amended in 1961 by what is now referred to as sections 48-133 and 48-137, R. S. Supp., 1961, but the amendment requires no further reference here. By section 48-133, R. R. S. 1943, it is provided, in particulars applicable here, that the plaintiff could not maintain an action for compensation unless the plaintiff gave notice in writing as soon as practical after the accident, and unless a claim for compensation was made within 6 months.

By the decisions of this court it is held that if the employer had actual notice of the accident notice provided for by the statute was not required. See, Perkins v. Young, 133 Neb. 234, 274 N. W. 596; Krajeski v. Beem, 157 Neb. 586, 60 N. W. 2d 651.

The uniform holding of this court is that the failure to give notice of claim for compensation within 6 months is not a defense if the employee's accidental injury is

latent and progressive, and cannot with reasonable certainty be recognized at first as compensable. The applicable rule is that notice of claim given within 6 months from the time the employee acquires knowledge of a compensable disability as a result of the accident is sufficient under the statute. See, Flesch v. Phillips Petroleum Co., 124 Neb. 1, 244 N. W. 925; McCoy v. Gooch Milling & Elevator Co., 156 Neb. 95, 54 N. W. 2d 373; Webb v. Consumers Cooperative Assn., 171 Neb. 758, 107 N. W. 2d 737; Plambeck v. Natkin & Co., 171 Neb. 774, 107 N. W. 2d 734.

By section 48-137, R. R. S. 1943, it is provided that in case of personal injury, all claims for compensation shall be forever barred unless, within 1 year after an accident, the parties shall have agreed upon the compensation payable under the act, or unless, within 1 year after the accident, one of the parties shall have filed a petition for the purpose of having a claim for compensation adjudicated by the workmen's compensation court.

The limitation of this provision does not become applicable and under it compensation will not be denied if the injury was latent and did not result in compensable disability until after the time for commencing action, but it does become applicable after the expiration of 1 year from the time the employee has knowledge that the accident has caused a compensable disability. See, Plambeck v. Natkin & Co., *supra;* Webb v. Consumers Cooperative Assn., *supra.*

As has been pointed out the alleged accident with injury occurred on February 22, 1956. From the evidence it appears that the defendant had early notice of it. There must have been a claim for compensation within 6 months since compensation in the amount of $17.14 was paid on April 11, 1956, and $71 was paid on account of the occurrence not later than May 2, 1956. There is no other evidence of contact of the plaintiff or anyone on his behalf with anyone representing the defendant until this action was commenced in the

workmen's compensation court on April 25, 1960, and particularly there was no notice of injury and no claim for compensation.

The plaintiff was under the observation and treatment of Dr. Mueller from February 27, 1956, through April 7, 1956, on account of a strained back, considerable spasm of back muscles, slight nerve root radiation pain, and tenderness in the lumbosacral area, which according to the history recited by the doctor flowed from lifting a mail sack. It is apparent that the information as to his condition was made known to the plaintiff by the doctor. The plaintiff continued to work thereafter, for a time for the defendant, and then for other employers, until May 20, 1958, when he again consulted Dr. Mueller. In the interim he had continued to use a brace for his back. At no time during this period did the plaintiff make claim for or commence action to recover further compensation.

On May 20, 1958, when the plaintiff again consulted Dr. Mueller the doctor found a typical sciatic nerve pressure syndrome and some loss of lumbar curve of the spine with only 50 percent of leg-raising ability. At that time Dr. Mueller referred him to Dr. Getscher for orthopedic consultation.

On June 7, 1958, based on examination and history, Dr. Getscher diagnosed the condition substantially as it had been diagnosed by Dr. Mueller in 1956, except that he made a finding that there was a ruptured or herniated intervertebral disc. This examination and diagnosis was followed by the application of hot packs, massage, intermittent traction, and physical therapy. On December 12, 1959, an operation was performed and a herniated disc was found and removed. There was no evidence of other findings of disability except that attending the herniated disc.

The plaintiff continued to work obviously with knowledge of the diagnosis of Dr. Getscher made in June of

1958, without making claim or commencing action until April 25, 1960.

The date of the alleged accident and injury is certain and it is also certain that no notice of any kind or character was given prior to April 25, 1960. There may be some doubt as to whether or not the claimed condition was, within the meaning of law, latent up to June 7, 1958. There can however be no doubt about this after that date. The plaintiff's doctor and the plaintiff himself were informed from that time on that he was suffering from the results of a herniated disc which, if it flowed from an accident, was a compensable injury, but the plaintiff took no steps by notice or action until more than 1 year after the acquisition of that knowledge.

The plaintiff urges in substance that the bar of the statute as applied under the rule does not become effective until the total of the condition becomes known. This is not a correct interpretation of the law. Knowledge that there is a compensable disability, and not the full extent thereof, is the thing which controls. See, Dryden v. Omaha Steel Works, 148 Neb. 1, 26 N. W. 2d 293; McCoy v. Gooch Milling & Elevator Co., *supra;* Bame v. Lipsett, Inc., 172 Neb. 623, 111 N. W. 2d 380.

Not having taken the action necessary to permit him to obtain workmen's compensation the plaintiff may not be allowed to recover in this action.

The judgment of the district court is affirmed.

AFFIRMED.

EUGENE E. CULLINANE, APPELLEE, V. MILDER OIL CO., A CORPORATION, ET AL., APPELLANTS, IMPLEADED WITH RICHARD KNUDSEN, DOING BUSINESS AS CONCRETE FORM CO., APPELLEE.

116 N. W. 2d 25

Filed July 6, 1962. No. 35225.

1. **Trial: Juries.** It is the province of the jury to harmonize the

testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.

2. **Trial.** Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken.
3. **Negligence: Trial.** In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed is proper, the determination of the amount of damages is for the jury.
4. **Trial.** Where a party has sustained the burden and expense of a trial, and has succeeded in securing the verdict of a jury on 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.

Appeal from the district court for Douglas County: PAUL J. GARROTTO, Judge. Reversed and remanded with directions.

Cassem, Tierney, Adams & Henatsch and Morris J. Bruckner, for appellants.

A. A. Fiedler and Spielhagen, Matejka & Spielhagen, for appellee Cullinane.

Story, Pilcher, Howard & Hickman, for appellee Knudsen.

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

BROWER, J.

This was an action brought in the district court for Douglas County, Nebraska, for personal injuries sustained by the plaintiff and appellee Eugene E. Cullinane, in a collision between an automobile driven by the plaintiff and a truck operated by the defendant Donald E. Pettit while on the business of his employer, the defendant Milder Oil Company, a corporation, which was the owner thereof. These two defendants are the appellants herein. Richard Knudsen, doing business as Concrete Form Company, was the employer of the

plaintiff. He filed an answer asking subrogation to any judgment recovered by the plaintiff because of compensation paid to him under the Nebraska Workman's Compensation Act. He will not be referred to again. The other parties will be designated herein as they were in the trial court.

The trial resulted in a verdict for the plaintiff in the sum of $2,000. The plaintiff filed a motion for new trial which the trial court sustained. From the ruling granting the new trial the defendants have appealed to this court.

The pleadings of the parties adequately presented the defendants' negligence and the plaintiff's contributory negligence. Both issues were submitted to the jury under the instructions of the trial court. No objection to the instructions regarding the submission of the issues, or otherwise, is made by either party.

No reason was assigned by the trial court for setting aside the verdict and granting a new trial. Both parties have properly assumed the burden of assisting this court to a correct determination of the question presented. Biggs v. Gottsch, 173 Neb. 15, 112 N. W. 2d 396. In their briefs they agree that the trial court's ruling was premised on its belief that the verdict was so inadequate as to require a new trial. Plaintiff contends the trial court was correct in its ruling. The defendants maintain the verdict returned was within the discretion of the jury under the evidence and should not have been disturbed. The only question before us therefore is whether the verdict was so inadequate that the trial court could in its discretion set it aside.

The accident in which the plaintiff was injured occurred in the city of Omaha on March 14, 1959. He was taken in an ambulance to the Douglas County Hospital from the scene of the collision. There he was attended by his family doctor Joseph P. Drozda. The doctor testified the plaintiff had suffered severe head injuries and injuries to his right shoulder, cervical spine, lumbar

spine, and both legs. On the scalp there was a laceration extending from the forehead over the top to the back of the head. Sutures taken in his head wounds were long and large, the edges of the wounds being wide-spread with the skull protruding. Severe pain resulted in manipulation of the right shoulder and right knee and hip. X-rays taken of the skull and right shoulder disclosed no evidence of trauma or injury. There was a severe contusion of the right eye with hemorrhage under the skin and beneath the eyeball itself, making the eye appear a mass of blood. The patient was given medication for relief of pain, tetanus antitoxin, and antibiotics to counteract infection.

On March 15, 1959, he was transferred to St. Joseph's Hospital from which he was discharged on March 18, 1959. X-rays taken of the skull and the cervical spine disclosed no evidence of fractures or dislocations. While there antibiotics and medication to relieve pain and swelling from the wounds were continued. On the average of once a week until May 27, 1959, he called at the doctor's office where his wounds were dressed and the sutures removed. The cervical spine was given physical therapy in the form of ultra-sound. A Lewin collar made of a roll of bandage-type tissue was made to be wrapped about the neck, which could be worn, taken off at intervals, and re-applied by the patient. It was last worn on April 16, 1959. Medication for relief of muscle spasm was administered during the whole of this period but drugs for pain were gradually taken from him. On May 27, 1959, the patient told the doctor he was feeling well until he attempted to play ball with the children at which time his headaches and soreness in the neck were aggravated. In general he then stated he was getting along quite well. The weekly visits were discontinued on May 27, 1959, at which time the doctor stated the patient was relatively free from symptoms referable to his cervical spine injury. His head was completely healed, including the eye, although he ex-

perienced some headaches at infrequent intervals, and there were then no complaints with reference to the back.

On July 13, 1959, defendant again went to the doctor's office. He complained of pain in his hip which was very pronounced on motion, and of pain in his neck on manipulation. There was however no definite swelling. The tests made disclosed marked spasm, with pain radiating to his right foot. He was treated at the office for these complaints on July 13, 16, and 31, and on August 8 and 12, 1959. Medication was given to relieve the pain. He was given Endegia regularly applied by needle to the hip to stimulate healing and the reaction of bodily resistance to inflammation. The patient had an appointment elsewhere on August 14, 1959, and did not see the doctor that day because of it. He had been discharged on August 12, 1959, at which time the doctor stated he was relatively free of the symptoms of which he complained.

The plaintiff was not seen again by the doctor until January 25, 1960. His complaint was severe pain from the lower portion of his back radiating into the right foot and leg. The doctor found tenderness over the lumbar region in the small of the back. Leg-extension exercises elicited great pain along the course of the right sciatic nerve. There was diminished sensation in the sole of his right foot extending to the right fifth toe. He was given diathermy and medication for pain for muscle relaxes and was placed in traction at the doctor's office to help relieve the pressure on the spine. A pelvic traction apparatus was procured for home use, consisting of a girdle-type harness with straps running down the sides of each leg with ropes passing through a pulley to weights attached. He used this in bed at home and the doctor said he thought he would sleep in it at night. Six calls to the doctor's office were made between January 25 and April 11, 1960. On the latter day the treatment ended and the doctor testified the

plaintiff said at that time he was feeling better. There was then no diminished sensation in the foot. All nerve symptoms had disappeared. There was some soreness in the right hip which was the only finding at that time referable to his injury.

On September 26, 1961, the day before the trial, he was examined for the last time. The examination disclosed that leg-extension exercises were fully accomplished without pain, the right ankle reflex was sluggish, and there was neither lack of sensation nor aggravated sensitivity in any area. Leg measurement was equal, indicating no shrinking or atrophy of the leg. He walked with a good steady gait and complained of no symptoms except when he tried to do heavy work. On cross-examination the doctor testified he found nothing essentially wrong with the patient on this examination.

The doctor concluded from all his examinations and treatment that plaintiff's injuries were lacerations of the scalp, strain of cervical spine, contusion of right shoulder and both legs, lumbosacral sprain, with herniated disc in the lumbosacral area, which is the lower portion of the back. He gave it also as his conclusion that nerves which caused the lack of sensation in his fifth toe came from the first sacral nerve which had been injured, bruised, or compressed in the area between the fifth lumbar and first sacral vertebrae. The doctor, when asked to give his opinion as to whether plaintiff was suffering from any permanent disability, answered, "I think that Mr. Cullinane has had a — any permanent impairment, which would only be involved to the disc syndrome which would give him about five percent disability."

With respect to his working the doctor testified that according to his knowledge he wasn't able to work from the date of the accident to September 4, 1959, or from January 25 to April 11, 1960, but that he worked from September 4, 1959, until January 25, 1960. The patient

canceled an appointment with the doctor on September 4, 1960, because he was working at the Capehart project.

The plaintiff testified on his own behalf. At the time of the accident on March 14, 1959, he was regularly employed by Knudsen Construction, branch of the Concrete Form Company, as a supervisor. He received $100 a week and a bonus. Plaintiff was 35 years of age and had an expectancy of 32.59 years. He stated he was unable to return to work after the accident until the middle of the following August. After 2 weeks he stopped working and stated it was because he could not take a full day for one thing, and had headaches bothering him. After being idle 2 weeks, in which he looked for other type of work but failed to find it, he went into business for himself on about October 1, 1959. For this purpose he incorporated. His new business was construction work. It was the same type of business in which he was formerly employed. He was awarded a subcontract on the Capehart project at Offutt Airfield, which included all the masonry and concrete work on 216 units. Workmen were employed by him in the new business. The work was completed in January 1961. His compensation on the contract was $400,000. He testified he was in traction from the first part of January until the latter part of March 1960, and was unable to attend to business except for a short time when he had his employees come to his home to conduct his business. He stated he was out of work 4 or 5 months. He further stated that during the time of self employment he was home from January to April and that after the second week his business was at a standstill.

Plaintiff described the treatment quite briefly as the doctor had stated before. He testified he had scars on top of his head and from the right shoulder to the rib carriage. Plaintiff stated that from the time of the accident to August 1959, he was given treatments once or twice a week, depending upon the severity of the pain, and that he had headaches in the summer and fall of

1959; and that for a period of 4 months in 1960 he could not sleep and was under heavy medication because of severe pain. He was given therapy treatments by Dr. Paul Reichstadt about twice a week from June to August 1960, but there is nothing in the record to disclose what these were about. At the time of trial, on weather changes he stiffened up, had pain, couldn't drive long distances because of shoulder pain, and suffered from occasional headaches. When asked if he could lift heavy objects in his work, he testified, "I haven't lifted anything much heavier than a pencil since this accident."

Plaintiff's doctor, hospital, and ambulance bills were introduced in evidence. They totaled $345.50.

Defendant did not introduce any testimony with respect to damages and that outlined is the only evidence concerning them.

The plaintiff's contention is that his expense of sickness was $346.50; that he lost 23 weeks' time from work which at $100 a week was $2,300, making $2,646.50 monetary loss; and that nothing was awarded by the jury for pain suffered, or for 5 percent permanent disability.

The court's instructions to the jury on damages submitted all of these items to the jury for its consideration. The plaintiff's theory seems to be that because the defendant introduced no evidence tending to disprove the damages as given in the plaintiff's evidence, that the several items in that evidence had to be given credence by the jury in the full amount claimed by plaintiff and his doctor. Further, that the jury could not have arrived at the amount of its verdict by a reduction thereof because of any contributory negligence it might have attributed to the plaintiff; that unless the negligence of the plaintiff was found to be slight in comparison with that of the defendant, it could not have found for the plaintiff at all; and that if plaintiff's negligence was slight in comparison with the defendant's negligence, the verdict under the law could have been reduced only slightly, and the $2,000 awarded would still be inade-

quate and not that which should have been rendered under the court's instructions.

The plaintiff was in the hospital 4 days in all. X-rays disclosed no fractures or dislocations, evidence of trauma, or injury to the skull. He was able to go to the doctor's office weekly. On three occasions he was discharged from his doctor's care, at which times the symptoms for which he had then been treated had disappeared and he was considered in reasonably good condition. At each recurrence of trouble his symptoms differed considerably. Though his doctor found a 5-percent permanent disability, he found nothing essentially wrong on his last examination. The time he was off work, as testified to by the plaintiff and his doctor, did not correspond completely, and the time he was searching for a new position and preparing for self-employment was not clearly distinguished.

Even though defendant introduced no evidence in regard to the plaintiff's damages, the jury as trier of the facts had before it matters in evidence from which different inferences could arise.

In Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672, this court held: "It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.

"Triers of fact have the right to test the credibility of witnesses and to weigh their undisputed parol testimony against the facts and circumstances in evidence from which a conclusion may properly be drawn that the witness was mistaken.

"In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed is proper, the determination of the amount of damages is for the jury."

The jury was the sole judge of the facts presented by

the evidence. It found for the plaintiff but it had before it the task of considering the testimony of the witnesses and the credence to be placed upon it, and to reconcile it as best it could. It was not obliged to accept the plaintiff's or his doctor's testimony to the full extent of the damages claimed. It also had before it the question of the plaintiff's contributory negligence and the amount of damages the award could be reduced under the comparative negligence rule. Under such circumstances we do not feel a verdict of $2,000 is so inadequate as a matter of law that it should be set aside. Certainly it is not so inadequate as to indicate passion or prejudice.

" 'Where a party has sustained the burden and expense of a trial, and has succeeded in securing the verdict of a jury on 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.' " Biggs v. Gottsch, *supra*. See, also, Hert v. City Beverage Co., 167 Neb. 557, 94 N. W. 2d 27.

The plaintiff cites certain cases, where judgments on verdicts were held inadequate or were not in accord with the court's instructions that were set aside, which he considers decisive of this case. Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709, was a case where a minor who was a guest in an automobile sued the driver of the car in which he rode. A judgment of $24,000 was recovered but the jury added to its verdict, "We find slight negligence on the part of the defendant." This was held inconsistent because the verdict against the host driver should not have been returned because of slight negligence. The case does not involve inadequate damage and is clearly not applicable. Dolen v. Beatrice Restaurant Co., 137 Neb. 247, 289 N. W. 336, is a case where the plaintiff fell down the stairs in the defendant's place of business. The doctor bills were $994, and the plaintiff was quite severely injured. No contributory negligence was involved. A verdict of $700 was held so inadequate as to indicate passion and prejudice. Harper v. Young, 139

Neb. 624, 298 N. W. 342, was a case where a rural mail carrier was injured while his car was standing still at a mail box. No contributory negligence was involved. The doctor, medical, hospital bills, and loss of time aggregated $1,721.96, and a verdict of $1,225.66, was likewise set aside. In the cited case, plaintiff had permanent injuries to the head, neck, and left shoulder. His arm and hand tissue was atrophied and there was a limitation of movement and loss of hearing involved. Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259, and Schumacher v. Lang, 160 Neb. 43, 68 N. W. 2d 892, are both cases in which a guest sued the driver of the automobile in which the guest was not riding. Verdicts deemed inadequate were returned but on evidence clearly involving far greater damages and where no contributory negligence existed. These authorities cited by the plaintiff are all inapplicable to the case before us.

Undoubtedly there was sufficient evidence to sustain a higher verdict had it been returned. It is not however the province of this court to interfere with the verdict because its view of the evidence would warrant a greater one.

It follows that the judgment of the trial court setting aside the verdict and granting a new trial should be reversed and the cause remanded with directions to reinstate the verdict and enter judgment thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, ET AL., APPELLEES, V. FRONTIER AIRLINES, INC., A CORPORATION, APPELLANT.

116 N. W. 2d 281

Filed July 6, 1962. No. 35234.

1. **Contempt. The power to punish for contempt of court is a power inherent in courts of general jurisdiction such as the district courts of this state.**

2. ———. **The Legislature has no power to limit or interfere with the inherent power of district courts to punish for contempt of court.**
3. **Constitutional Law: Contempt. A statute relating to the violation of an injunction proposing to limit punishment for contempt to a specific fine not exceeding $200 and providing that upon the default of payment thereof a person may be committed to close custody until he shall fully comply with the requirements of the statute or be otherwise legally discharged constitutes an attempt to infringe upon an essential attribute of the judicial department which has the inherent power to punish for contempt of court; held, to be an invalid statute.**
4. ———: ———. **Section 25-1072, R. R. S. 1943, held to be an invalid and unenforceable statute.**

Appeal from the district court for Cherry County: ALBERT W. CRITES, Judge. Affirmed.

Marti, O'Gara, Dalton & Sheldon, for appellant.

Clarence A. H. Meyer, Attorney General, Homer G. Hamilton, and Rush C. Clarke, for appellees.

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

MESSMORE, J.

The State of Nebraska ex rel. Clarence S. Beck, Attorney General, and the Department of Aeronautics of the State of Nebraska, plaintiffs, filed a petition in the district court for Cherry County, praying that a temporary injunction issue enjoining Frontier Airlines, Inc., a corporation, hereinafter referred to as the defendant, from abandoning its air transportation route between the cities of Chadron and Lincoln, Nebraska, and the intermediate cities of Valentine, Ainsworth, and Norfolk, Nebraska, and from discontinuing the intrastate transportation by air for hire over and along such route and between the several cities thereon.

The defendant is a corporation organized and existing under and by virtue of the laws of the State of Nevada, and engaged as a common carrier in the business of the

transportation by air of persons and property for hire in various states, including Nebraska.

The plaintiffs' petition contained an allegation as follows: That the public convenience and necessity require that such service be not abandoned or discontinued, but carried on and continued. The area now and heretofore served by defendant is wholly without railroad passenger service, without adequate bus service, and without other commercial surface transportation service of any kind. The cities of Ainsworth, Valentine, and Chadron and the trade areas surrounding them are isolated from the rest of the State of Nebraska, and particularly from the trade, medical, educational, and cultural centers at Lincoln and Omaha, Nebraska. The roads and highways in the area are often completely impassable during the winter months. The area is also without adequate service for the transportation of property. Defendant has been and now is providing the only commercial transportation in the area along the route above described, except for a completely inadequate bus service, and the abandonment and discontinuance by defendant of the service heretofore furnished by it over such route will cause great and irreparable harm and injury to the people of Nebraska generally and particularly to the people of the northern half of Nebraska.

The plaintiffs' petition was filed on August 29, 1960. On the same day a temporary injunction was granted as prayed for in the plaintiffs' petition.

On December 23, 1961, the Attorney General of the State of Nebraska moved the court for an order directing the issuance of a citation against the defendant to show cause why it should not be proceeded against and punished for contempt of court. In this motion for citation the plaintiffs alleged that the defendant did, on or about December 22, 1961, knowingly, willfully, contumaciously, contemptuously, and with unlawful intent openly and publicly flout, ignore, and disobey the order of the dis-

trict court as contained in the temporary injunction, refused to continue to obey it, and did abandon and discontinue all of the above described service and transportation.

The defendant made answer to the motion for citation, admitting the cessation of service, but disavowing any willful, contumacious, or contemptuous disobedience of the injunction order, and prayed that it be found not to be in contempt and that it be discharged from the citation issued therein.

On January 2, 1962, a consolidated hearing was held upon the citation for contempt and the defendant's motion for suspension of the temporary injunction. The trial court dissolved the injunction for the following reasons: The Civil Aeronautics Board rendered an order deleting segment 13, which included the route as set out in the plaintiffs' petition, from the certificate of public convenience and necessity authorizing air transportation by defendant over its intrastate system, which became effective December 19, 1961; the authority of the defendant to furnish air transportation over the route and to, from, and between the cities referred to in the petition, is regulated and determined according to the federal certification; and Chapter II, section 3.7, of the Rules and Regulations of the Nebraska State Railway Commission, does not prohibit defendant from abandoning and discontinuing all service over and upon the aforesaid route segment.

On January 2, 1962, the trial court adjudged the defendant guilty of contempt of court and ordered that the defendant pay a fine of $1,000 a day for each day, beginning on December 21, 1961, and up to but not including January 2, 1962, for violation of the injunction issued by the court on August 29, 1960.

The defendant perfected appeal to this court as provided for in section 25-1912, R. S. Supp., 1961.

The defendant assigns as error that the trial court was

without authority to impose a fine in excess of $200 against the defendant herein.

Section 25-1072, R. R. S. 1943, involved in this appeal, provides as follows: "An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation. An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirements, or be otherwise legally discharged."

Article V, section 9, of the Constitution of this state, provides in part that the district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide.

The defendant relies on Eicher v. Tinley, 221 Iowa 293, 264 N. W. 591, as the leading case supporting its position. In the cited case a petition in equity was filed by the street railway company asking that a temporary injunction be issued enjoining Eicher and other defendants from interfering with the operation of the plaintiff's street railway system in Council Bluffs. A temporary injunction was granted as prayed for by the plaintiff by a judge of the district court. A hearing was had and a judgment and order of the trial court was filed, finding Joseph Eicher guilty of violation of the injunction and in contempt of court. He was ordered to be confined in the county jail for 90 days, and ordered to pay a fine of $300, and in case such fine was not paid before the last day of the 90-day sentence, he was to be held for an additional 90 days to satisfy the payment of the fine. Eicher took his case to the Supreme Court of

Iowa, setting forth the grounds for reversal, one of which was that the trial court had no right or power to impose upon the petitioner any greater penalty than a $50 fine and 1 day in jail. The respondent contended that a proper construction of provisions of the Code in regard to contempts did not limit the court to a penalty fixed by section 12543 which provides that the punishment for contempts may be by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of $50, and an imprisonment not to exceed 1 day, and all other courts are limited to a fine of $10; that a contempt arising out of the violation of an injunction is controlled by section 12539 of the Code, which provides that if the court finds that a contempt has been committed it may "punish it in the usual mode"; that by the words "in the usual mode" is meant, not the mode provided in section 12543, but the mode which the courts have an inherent right to exercise; and that if the provisions of section 12543 were meant to apply to contempts arising out of violations of injunctions, then the provisions of section 12543 are unconstitutional. The court said: "As a ground for this contention, respondent argues that the district court of this state was not created by statute, but by section 1, article V, of the Constitution, which recites that 'The Judicial power shall be vested in a Supreme Court, District Courts, and such other Courts, inferior to the Supreme Court, as the General Assembly may, from time to time, establish'; that the district court, having thus derived its existence from the Constitution, having the inherent right to punish for contempts committed against it, and being a part of the separate and coordinate judicial department of the state, is entirely independent of the legislative branch; and that this inherent right to punish for contempts against it, which is possessed by the district court, cannot be abridged or taken away from it by legislative enactment." The court went on to say: "We think it must be conceded that the power to punish

for contempts is an inherent right possessed by the courts, and that this right cannot be taken away from a constitutional court by the legislature. The question still remains, however, Is a statute limiting the punishment for contempt that may be inflicted by a constitutional court such an interference or abridgement of the court's inherent right that it is beyond the power of the legislature to enact?" The court further said, quoting from Drady v. District Court of Polk County, 126 Iowa 345, 102 N. W. 115: " 'There is no ground upon which to plant the assertion that here was an attempt on the part of the legislature to deprive the courts of their inherent power; on the contrary, the aim was to provide regulations for the exercise thereof. This, according to the better weight of authority, it might do, and, as we think, to a certain extent it must do.' * * * We find nothing in the language of the chapter in regard to contempts arising out of the violations of injunctions that leads us to the conclusion that the punishment for such contempts is not subject to the limitation provided by section 12543 of the Code, and we hold that the provisions of that section are applicable to the facts of this case. We reach the conclusion, therefore, that, while the respondent was justified, under the facts presented at the hearing before him, in imposing a punishment for contempt, he was acting illegally when he imposed on petitioner the fine of $300 and sentenced him to imprisonment for 90 days. The penalty imposed by the respondent should not have exceeded a fine of $50 and imprisonment should not have exceeded one day in jail. In so far as the order of the respondent violates the statute limiting the fine and imprisonment which he might legally impose, it should therefore be modified."

The Iowa Supreme Court held: "While the general assembly has no power to wholly deprive a constitutionally created court of its inherent power to inflict punishment for acts which are in contempt of such court, yet it may constitutionally impose a reasonable limita-

tion on such courts as to the punishment which may be imposed." In other words, the Iowa Supreme Court said that the statute limiting the penalties for contempt was simply a legislative prescription of the manner in which the court's jurisdiction should be exercised, and was constitutional because it was specifically authorized by the Iowa Constitution. The Constitution of this state places no such limitation, as does the Iowa Constitution, upon the jurisdiction of the district courts of this state to punish for contempt of court for violation of an injunction.

We are not in accord with the holding in the case of Eicher v. Tinley, *supra*.

We deem the language used in Opinion of the Justices, 86 N. H. 597, 166 A. 640, applicable to the instant case. The court said: " 'It is said by Blackstone, that the process of an attachment for a contempt, must necessarily be as ancient as the laws themselves. For laws without a competent authority to secure their administration from disobedience and contempt, must be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such attempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every judicial tribunal.' Tenney's Case, 23 N. H. 162, 166.

" 'The authority to punish contempt is a necessary incident, inherent in the very organization of all legislative bodies, and of all courts of law or equity, independent of statute provisions.' State v. Matthews, 37 N. H. 450, 453. To the same effect is Bates's Case, 55 N. H. 325.

"The constitution confers upon the legislature 'full power and authority to erect and constitute judicatories and courts.' Const. Pt. II, art. 4. The question now presented is whether this grant of power is broad enough to authorize the legislature to take from the judicial department of the government a power which has always, both here and elsewhere, been recognized as an

essential attribute of judicial tribunals. We are of opinion that it does not confer such power. The existence of the judiciary as one of the three essential parts of government is declared in terms. It is 'to be kept as separate from, and independent of' the legislature 'as the nature of a free government will admit.' Const. Pt. I, art. 37. If one of the essential attributes might be taken away from the judiciary, so might many or all of them; and our courts might be directed to proceed in accordance with regulations at variance with all known ideas of the functions of a court. The constitution creates no such supremacy of the legislative department over the judicial. * * *

"As before pointed out, it is the law in this state that the power to punish for contempt is an essential attribute of a court of general jurisdiction. It may not be entirely clear whether the legislature can regulate the exercise of this power, beyond the limit of reasonable sentence of the offender, which is implicit in existing law. If there is such power, it is manifest that it does not extend to fixing a limit which in many cases would not provide for more than a nominal sentence. Such is the proposal in this bill. While this feature of it preserves the form of power, it takes away the substance thereof. It is our opinion that authority to enact such a limitation has not been conferred upon the legislature."

In the above case the court was considering a legislative bill, and stated: "A provision, however, proposing to limit all punishment for indirect contempt to a specific fine of one hundred dollars and imprisonment not to exceed fifteen days would be an unconstitutional attempt to infringe upon an essential attribute of the judicial department. * * * The separation of powers effected by the constitution in the creation of the three departments of government is a vital limitation upon powers and not merely a convenient and variable assignment of duties."

In Eicher v. Tinley, *supra,* the court in analyzing the

above-cited case stated that it holds that a legislative body cannot place any limitation upon the punishment to be inflicted for contempt by a constitutional court.

In considering the language in Opinion of the Justices, *supra,* we conclude that it does hold in effect that the legislative body cannot limit or interfere in the punishment of contempt by a constitutional court such as the district courts of this state, because of the inherent power vested in the district courts to punish for contempt.

The rule applicable in this state is that the power to punish for contempt of court is a power inherent in all courts of general jurisdiction, such as the district courts of this state, independent of any special or express grant of statute. See 12 Am. Jur., Contempt, § 40, p. 418. We adhere to this principle.

In the instant case the defendant raises no question as to the reasonableness of the fine, but bases its contention squarely upon the proposition that the Legislature may limit the punishment for contempt of an injunction as provided for by section 25-1072, R. R. S. 1943.

There is no bill of exceptions in this case, therefore we are unable to discern any factual situation that may have warranted the trial court in finding differently than it did. As heretofore stated, the contention of the defendant is that the fine in any event should not exceed $200.

As stated in 17 C. J. S., Contempt, § 100, p. 144: "* * * if a series of acts constitutes but one contempt, or the same contempt is permitted to continue for several days, there cannot be separate punishment for each successive act or day." Applying the above to the instant case, the fine of $12,000 assessed against the defendant is but one fine.

We conclude that section 25-1072, R. R. S. 1943, is an invalid statutory enactment and is unenforceable in the instant case.

We further conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

RITA KNUTH, APPELLANT, V. BERNARD L. SINGER ET AL., APPELLEES.

116 N. W. 2d 291

Filed July 13, 1962. No. 35128.

1. **Automobiles.** The right to stop when the occasion demands is an incident to the right to travel.
2. **Appeal and Error.** A judgment will not be reversed for errors against a party not entitled to succeed in any event.
3. **Negligence.** Negligence is not actionable unless it is the proximate cause of injury.
4. ———. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred.
5. ———. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
6. ———. An alleged cause of an accident may be merely a condition and not the real cause. It is not sufficient if the negligence charged does nothing more than furnish a condition by which injury is made possible. If the condition causes injury through 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.
7. **Pleading: Trial.** A party may at any and all times invoke the language of his opponent's pleading, on which the case is being tried, on a particular issue, as rendering certain facts indisputable; and in doing this he is neither required nor allowed to offer such pleading in evidence in the ordinary manner.

Appeal from the district court for Hall County: WILLIAM F. MANASIL, Judge. Affirmed.

John A. Wagoner, for appellant.

Luebs, Elson & Tracy, Richard A. Huebner, Walter P. Lauritsen, and Harold A. Prince, for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, SPENCER, and BOSLAUGH, JJ., and CHADDERON, District Judge.

BOSLAUGH, J.

This is an appeal in an action for damages arising out of an automobile accident. The plaintiff, Rita Knuth, was a passenger in an automobile owned by Kenneth Bantam and operated by Richard Waldo at the time the accident occurred.

The accident happened at about 5 p. m., on March 23, 1956. It was a clear day, the sun was shining, and the pavement was dry. The accident occurred on U. S. Highway No. 34 approximately 3 miles west of Aurora, Nebraska. At that point the highway crosses a railroad right-of-way on an overpass. The entire overpass including both approaches is 3,000 feet long. The accident occurred near the west end of the overpass where there is a turnoff for a county road leading south from the highway. The turnoff is approximately 968 feet west of the center or highest point of the overpass. Near the turnoff the overpass is a two-lane highway and consists of concrete paving 20 feet wide constructed on an earth fill. There are shoulders 5 feet wide on each side of the pavement. A post and cable guard fence is located at the edge of each shoulder.

At the time the accident occurred the defendant, Ronald E. Oswald, was proceeding slowly or had stopped in the westbound lane just east of the turnoff near the west end of the overpass. Oswald was waiting for eastbound traffic to clear the intersection so that he could turn left onto the county road. The defendant, Sydney A. Diffendaffer, had been proceeding west behind the Oswald automobile and had stopped in the westbound lane of the highway just east of the Oswald automobile. The automobile operated by the defendant, Bernard L. Singer, and which was following the Diffendaffer automobile, collided with the Diffendaffer automobile. The plaintiff was injured when the Bantam automobile op-

erated by Waldo collided with the rear of the Singer automobile.

At the close of the plaintiff's evidence, the district court sustained the separate motions of the defendants Oswald and Diffendaffer for directed verdicts in their favor. The jury returned a verdict for the defendant Singer. The plaintiff's motion for new trial was overruled and she has appealed.

The assignments of error are that the trial court erred in directing a verdict for the defendant Oswald; in admitting evidence as to the speed of the Bantam automobile; in excluding admissions of the defendants Oswald and Singer; in giving certain instructions; and that the judgment is not supported by the evidence and is contrary to law. No error is assigned with respect to the direction of a verdict for the defendant Diffendaffer.

In determining whether the trial court was correct in directing a verdict for the defendant Oswald, all controverted facts must be resolved in favor of the plaintiff and she must have the benefit of every inference that can reasonably be deduced from the evidence. Lindelow v. Peter Kiewit Sons', Inc., *ante* p. 1, 115 N. W. 2d 776.

The amended petition alleged that the defendant Oswald was negligent in stopping his automobile suddenly, approximately 25 feet east of the turnoff, considering the nature and condition of the roadway and that the vision of westbound traffic crossing the overpass was restricted, and in failing to give a proper warning signal.

None of the persons riding in the Bantam automobile, including the plaintiff, testified as to the operation of the Oswald automobile. The defendant Diffendaffer, who was called as a witness by the plaintiff, testified that he saw the brake lights on the Oswald automobile, knew that it was either slowing down or stopped, and that he stopped approximately 8 feet behind the Oswald automobile. This was substantially the only evidence produced as to the operation of the Oswald automobile.

There was no evidence which would support a finding

that it was negligent for the defendant Oswald to stop in the westbound lane of traffic for the purpose of allowing traffic approaching from the west to clear the intersection so that he could turn left onto the county road. The right to stop when the occasion demands is an incident to the right to travel. Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N. W. 2d 669. See, also, Bauer v. Bahr, 240 Wis. 129, 2 N. W. 2d 698.

There is also no evidence that the defendant Oswald failed to give a proper warning signal of his intention to stop. The testimony of the defendant Diffendaffer, offered by the plaintiff, was that Diffendaffer saw the brake lights on the Oswald automobile.

Plaintiff offered part of a deposition of the defendant Oswald as admissions. This evidence was that the speed of the Oswald automobile was probably 15 or 20 miles per hour when it was 50 or 100 feet east of the turnoff; that the Oswald car never came to a complete stop on the overpass; that an eastbound automobile passed the Oswald car just before the defendant Oswald turned left onto the county road and that there were no other cars in the immediate vicinity approaching from the west at that time; that just before the defendant Oswald made the left turn he knew that there was another automobile about one car length behind him; and that after the defendant Oswald had started to turn left and was probably halfway around the corner, he heard the crash of the collision on the viaduct. This testimony did not tend to prove any negligence on the part of the defendant Oswald that the jury could have found was a proximate cause of the plaintiff's injuries.

There was a failure of proof as to any negligence on the part of the defendant Oswald that the jury could have found was a proximate cause of the plaintiff's injuries. Thus, it was proper for the trial court to direct a verdict for the defendant Oswald.

Before considering the remaining assignments of error,

there is a preliminary question which must be determined. The defendant Singer contends that there was no evidence of any negligence on his part that the jury could have found was a proximate cause of the plaintiff's injuries. If this contention is correct, the judgment must be affirmed. A judgment will not be reversed for errors against a party not entitled to succeed in any event. Muenchau v. Swarts, 170 Neb. 209, 102 N. W. 2d 129.

The amended petition alleges that as the Bantam automobile, in which the plaintiff was riding, reached the crest of the overpass, the defendant Singer's automobile collided with the Diffendaffer automobile; and that as a result of the collision with the Diffendaffer automobile, the Singer automobile was sitting in a diagonal position with the rear part across the centerline of the overpass roadway and the Singer automobile usurped the use of the roadway for the Bantam automobile. The amended petition further alleged that the defendant Singer was negligent in failing to maintain a proper lookout, particularly for the Diffendaffer automobile; in failing to maintain proper control over his automobile so as to be able to avoid a collision with the Diffendaffer automobile; in operating his automobile at a high and dangerous rate of speed; and in failing to drive his automobile within the range of his vision so as to be able to stop, turn aside, and avoid an accident, especially with the Diffendaffer automobile.

The allegations of negligence as to the defendant Singer consist basically of two charges of negligence. The plaintiff alleges that the Singer automobile collided with the Diffendaffer automobile because the defendant Singer operated it negligently, and that as a result of the collision the rear part of the Singer automobile projected into the eastbound lane of traffic and prevented the Bantam automobile from using the south lane of the highway.

The problem is one of proximate cause. Negligence

is not actionable unless it is the proximate cause of injury. Wagner v. Watson Bros. Transfer Co., 128 Neb. 535, 259 N. W. 373. Unless the alleged negligent operation of the Singer automobile and the resulting collision with the Diffendaffer automobile was a proximate cause of the later collision of the Bantam automobile with the Singer automobile, the plaintiff has no right of recovery as against Singer.

Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the injury would not have occurred. Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. Bramhall v. Adcock, 162 Neb. 198, 75 N. W. 2d 696. An alleged cause of an accident may be merely a condition and not the real cause. It is not sufficient if the negligence charged does nothing more than furnish a condition by which injury is made possible. If the condition causes injury through 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. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N. W. 2d 619.

The collision between the Singer automobile and the Diffendaffer automobile could not of itself be a proximate cause of the later collision of the Bantam automobile with the Singer automobile. If the Singer automobile had stopped behind the Diffendaffer automobile without colliding with it, the situation would have been the same so far as the Bantam automobile was concerned.

The other charge of negligence is that the rear part of the Singer automobile projected across the centerline of the highway and into the eastbound lane of traffic and prevented the Bantam automobile from using that

side of the highway. None of the witnesses testified as to how far the rear of the Singer automobile projected into the south lane of the highway. The evidence is that the Singer automobile was about 6½ feet wide. Kenneth Bantam testified that the Singer automobile seemed to have its left-hand wheels over on the south side of the road and the rear end "sticking over" the south side of the road; that the Singer automobile was right about on the centerline, about straddle of the centerline; and then the front end swung to the north just before it collided with the Diffendaffer automobile. Darlene Vosika, a passenger in the Bantam automobile, testified that she noticed that Waldo was turning to the left and applying the brakes as the Bantam automobile was going down the viaduct and that she glanced up and saw the rear of a car, the bumper part and the rear part, on the left-hand lane across the centerline. Waldo testified that immediately after the collision between the Singer automobile and the Diffendaffer automobile, the back end of the Singer automobile was across into the left-hand side of the road across the centerline. On cross-examination Waldo testified that he did not see the rear of the Diffendaffer automobile at the time the Singer automobile collided with it and that he supposed the impact occurred on the north half of the pavement or in the right lane.

Taking the view of the evidence most favorable to the plaintiff, it fails to show that the entire south lane and shoulder of the highway were blocked by the Singer automobile. At most only a part of the south lane was obstructed. The inference is that sufficient space remained to the south of the Singer automobile for the Bantam automobile to have passed to the left if it had been under control. So far as the use of the south lane of the highway is concerned, there is the further consideration of the eastbound automobile which passed the Oswald automobile just before the impact and the left turn made by Oswald onto the county road.

But if it is assumed that the rear of the Singer automobile projected into the south lane of the highway a sufficient distance to deny the Bantam automobile the use of the south lane and shoulder of the highway, that still was not the proximate cause of the plaintiff's injuries.

The plaintiff alleged that the Singer automobile collided with the Diffendaffer automobile when the Bantam automobile was at the crest of the overpass. This was a judicial admission that was binding on the plaintiff and it was a waiver of all controversy as to where the Bantam automobile was when the Singer automobile collided with the Diffendaffer automobile. Aye v. Gartner, 172 Neb. 162, 108 N. W. 2d 798. Thus, the plaintiff is not entitled to the benefit of any evidence which was contrary to her allegation.

Under the plaintiff's theory of the case as pleaded, the Bantam automobile traveled a distance of approximately 900 feet after the Singer automobile had collided with the Diffendaffer automobile, and before colliding with the Singer automobile. There was evidence that the turnoff near the west end of the overpass was not clearly visible to westbound traffic until it reached the center of the second section of the bridge. Therefore, the distance which the Bantam automobile had in which to stop was between 600 and 700 feet. Waldo testified that the speed of the Bantam automobile at the crest of the overpass was between 40 and 50 miles per hour; that he saw the top of the Singer automobile and the top of the Diffendaffer automobile at about the midpoint of the second span of the bridge; that he did not see any collision occurring at the time and was not aware of what the cars were doing; that he could have stopped the Bantam automobile but saw no need to stop; and that he was not aware of any condition or collision necessitating the use of brakes and he did not apply the brakes on the Bantam automobile until it had traveled some 300 feet or about half of the distance to the Singer automobile.

The position of the Singer automobile when the Bantam automobile was at the crest of the overpass was a condition. The failure of Waldo to see what was in front of him and operate the Bantam automobile so that he could stop in time to avoid a collision with the Singer automobile was a subsequent independent act of a third person and an efficient intervening cause. The negligence of Waldo and the alleged negligence of Singer were not concurrent. The proximate cause of the plaintiff's injuries was the negligence of Waldo.

The plaintiff had no right of recovery as against the defendant Singer. The motion of the defendant Singer for a directed verdict made at the close of the plaintiff's evidence and renewed at the close of all the evidence should have been sustained. Therefore, it is unnecessary to discuss the other errors assigned by the plaintiff.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, v. HARVEY MAHLOCH ET AL., APPELLANTS, IMPLEADED WITH CLAUS SCHRUM, APPELLEE.

116 N. W. 2d 305

Filed July 13, 1962. No. 35130.

1. **Pleading.** The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application.
2. **Eminent Domain.** In order to satisfy statutory requirement of attempt to agree with the owner prior to the institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it.
3. ———. The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate damages.

4. ———. **The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged.**
5. **Eminent Domain: Evidence. Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court to determine in the exercise of a sound discretion.**

Appeal from the district court for Douglas County: JAMES P. O'BRIEN, Judge. Affirmed.

Eisenstatt & Lay, for appellants.

Clarence A. H. Meyer, Attorney General, Harold S. Salter, and A. A. Christensen, for appellee.

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

BROWER, J.

This was a condemnation action brought by the condemner State of Nebraska, Department of Roads, to condemn certain lands to be used as a right-of-way for the interstate highway. The action was brought against the condemnees Harvey Mahloch, the owner thereof, and Alice Mahloch, his wife, who was joined because of her marital interest only, and Claus Schrum who had a mortgage thereon. The mortgagee has been paid the full amount of his mortgage and has no present interest in the action. The State of Nebraska, Department of Roads, will be referred to as the State or as condemner, and Harvey Mahloch and Alice Mahloch as the condemnees, and when condemnee is mentioned in the singular, it will refer to Harvey Mahloch.

The action was commenced in the county court of Douglas County, Nebraska, where the appraisers awarded the condemnee $29,447. The State appealed to the district court for said county. A trial to a jury resulted in a verdict of $22,479, upon which judgment was entered. Condemnees' motion for a new trial being overruled, they have brought the matter to this court on appeal.

At the trial of the case in district court the condemnees filed an amended and substituted answer which, in addition to a general denial and setting out certain allegations concerning value of the premises condemned, contained a denial that the State had attempted to agree with the condemnees by making a good faith offer and a reasonable attempt to induce the condemnees to engage in settlement negotiations and to accept such offer; and alleged that it had failed to negotiate in good faith, and set out for that reason the proceeding was void. On December 27, 1960, condemner filed a reply in the nature of a general denial to the allegations of the amended answer. Thereafter, condemner, on March 9, 1961, filed an amended reply to this same answer in which it was stated that the condemner in preparing for trial had ascertained that while negotiations were had, such do not appear sufficient to meet the requirements of law to vest the court with jurisdiction and that the whole proceeding should be declared void. It prayed for a dismissal without prejudice to the institution of further negotiations and proceedings; and that $14,000 already withdrawn by condemnee, under order of court pursuant to stipulation, be credited on any new award.

On March 13, 1961, the condemner made a motion to withdraw its amended reply and that the original reply of the condemner be reinstated. A hearing was had on the question of withdrawal of the amended reply, at the conclusion of which the trial court permitted its withdrawal and the reinstatement of the original.

It was thereupon stipulated by the parties that the issue of fact as to whether or not there had been a bona fide attempt to negotiate with condemnee and that issue only be submitted to the court without the intervention of the jury. A trial followed in regard to this issue before the court which held that an offer by condemner had been made in good faith and that there had been a bona fide attempt to agree. It found against the con-

demnee and refused to dismiss the proceedings.

A trial to the jury on the question of the amount of damages followed on March 14, 1961, with the verdict and judgment heretofore set out.

The condemnee maintains the trial court erred in permitting the State to withdraw its amended reply to the amended and substituted answer; in not dismissing the State's petition by reason of its filing the amended reply; in not finding the State failed to prove that it had negotiated with the condemnee prior to instituting the action; in instructing the jury that the condemnee had the burden of proving the value of the land condemned; in not admitting certain evidence of two sales of land offered by the condemnee; and in permitting the State's witnesses Grant Miller and Wayne Selby to introduce evidence of sales of other real estate and the sale prices thereof.

The condemner by this action took 9.94 acres of land out of a larger tract of 19.36 acres for the right-of-way of the interstate highway. The northern portion of the premises through which the main highway passed diagonally consisted of a rectangular tract of land approximately 850 feet east and west by 800 feet north and south. The southern portion was also a rectangle which adjoined the first premises at the northeast corner and extended west 450 feet along the south line of the first and south 500 feet, except there had been deeded off by condemnee's predecessor a tract of land 150 feet square in the southeast corner of the southerly portion upon which a filling station had been built. The south side of the condemnee's premises, as well as the filling station property, abutted Pacific Street extending from Omaha, Nebraska. The east line of the premises was on the section line on which One Hundred Eighth Street is located, but that street did not go through to Pacific Street either from the north or south and there was no cross street at this location. An access road connecting Pacific Street with the interstate highway took approxi-

mately 52 feet off the extreme south end of condemnee's premises abutting Pacific Street. The taking left 3.35 acres on the northwest corner of condemnee's premises with no present access, and 6 acres on the south side with access to Pacific Street restricted to one 20-foot entrance.

The action of the trial court in permitting the State on its motion to withdraw its amended reply and to reinstate the original was made after a hearing in which testimony was taken. The witness for the State in this instance was Roy Karr who testified that he was a buyer for the highway department during the times concerning the negotiations. He had been directed to buy certain real estate in connection with building the interstate system, including the condemnee's property. He went upon the property in question. He talked to Quinten Mahloch, condemnee's brother who lived nearby and learned from him that condemnee lived near DeWitt, Nebraska. He went to DeWitt to contact condemnee, taking an offer to purchase the property and the plans to show him. He also had a contract for condemnee to sign. He encountered condemnee in the hayfield about 3 or 4 miles from DeWitt and visited with him. In the month before trial he had been around Minden and Hildreth, Nebraska, and had had no opportunity to confer with the attorney who was to try the condemnation suit. Shortly before the hearing the attorney called him by telephone and they discussed the case. The witness informed the attorney that he had made the condemnee an offer. After this showing the condemner was permitted to withdraw the amended reply and reinstate the original one. Section 25-852, R. R. S. 1943, reads as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect,

or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." It is the contention of the condemnee that this section does not permit the amendments which were permitted by the court in the instant case because it changed substantially the claim or defense and that the wording of this section prevents such changes. As we read this section, the words "when the amendment does not change substantially the claim or defense," is further modified by the remaining portion of the sentence which reads, "by conforming to the pleading or proceeding to the facts proved." These two portions of the quoted section clearly refer to amendments made after trial, and not those before.

In Kleinknecht v. McNulty, 169 Neb. 470, 100 N. W. 2d 77, the questions involved in amending pleadings were considered and the cases of this court were there reviewed. The court in that case held: "The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application." In the cited case the court, in discussing section 25-852, R. R. S. 1943, further stated: "Defendants here invoke the rule relied on in Robinson Outdoor Advertising Co. v. Wendelin Baking Co., 145 Neb. 112, 15 N. W. 2d 388, that an amendment to a pleading may be made, which does not change the issues or affect the quantum of proof as to a material fact, at any stage of the proceeding.

"The rule is a permissive one. It defines one circumstance under which an amendment may be made at any stage of the proceedings. It does not hold that amend-

ments, after answer is filed, may be made only if they do not change the issues nor affect the quantum of proof as to a material fact.

"In the Robinson case the proposed amendment to the answer was offered while evidence was being received and for the purpose of conforming the answer to the proof."

In the case before us the withdrawal of the amended reply and the reinstatement of the original one was made in open court in the presence of opposing counsel after a showing that counsel for condemner had learned that the representative of the State had interviewed and made an offer to the condemnee. It was further shown that the condemner's attorney who tried the case had just learned of the facts which justified the change in the pleadings. The attorney who tried the case in this instance was not the one who filed the petition in the district court or the original proceedings in the county court. We find that the district court committed no abuse of its discretion and hence there was no error in permitting the withdrawal of the amended reply and the reinstatement of the original.

The condemnee contends in his next assignment of error that the action should have been dismissed because of the admissions which were made in the amended reply. This was apparently based on the hope that this court would not sustain the trial court in permitting the withdrawal of the amended reply. Having held that the trial court committed no error by permitting the withdrawal, the matters pleaded in the amended reply were no longer judicial admissions because they were not a part of the pleadings upon which the action was tried. It thereafter became, at most, merely an item to be considered with all the evidence with respect to the sufficiency of the negotiations between the condemner and condemnee.

The issue of fact as to the sufficiency of the negotiation involving the offer of the condemner made to the

condemnee was heard by stipulation of the parties to the court alone without a jury. Karr who carried on the negotiations with condemnee further testified that on this occasion he contacted and talked with the condemnee in the hayfield near DeWitt where he told the condemnee that the State wanted to purchase the land. Karr had with him a small plan of the area the State desired to purchase and he had a contract that condemnee could sign for the purchase of the premises. Karr was prepared to close the transaction if the condemnee would have agreed. They visited for some time. Karr offered condemnee $16,600 for the land involved and told him it was based on an appraisal given to him by the Department of Roads. The condemnee refused the offer. Thereafter, on September 16, 1958, the condemner wrote a letter to the condemnee which he received, stating that he had already been advised by Karr of the State's desire to purchase the premises, describing them; and that Karr had attempted to purchase it but no agreement could be reached. The State made a final offer to condemnee to purchase the premises for $16,600. Contracts for the sale to be signed were enclosed with directions as to signing and forwarding copies thereof. It ended by requesting he reconsider the offer and forward an executed contract, otherwise condemner would consider it necessary to secure title by eminent domain. Condemnee did not accept the State's offer, either in the field to Karr or by answer to the letter, nor did he make any counter-proposition at all.

The provisions of law setting forth the duty of the State towards the owners of lands which are to be acquired for public purposes, such as in the instant case, are set out in section 76-704, R. R. S. 1943. This section merely states that if the condemner shall fail to agree with the condemnee with respect to the acquisition of the premises, condemnation proceedings may be filed. It is not necessary that extended negotiations transpire.

An offer was made to purchase and it would appear to have been made in good faith and honesty. A reasonable bona fide attempt to have it accepted appears to have been made. Condemnee made no attempt to further negotiate. The trial court, then acting in place of a jury, found the offer sufficient. It appears to be sufficient under the rulings of this court. In Higgins v. Loup River Public Power Dist., 159 Neb. 549, 68 N. W. 2d 170, this court said: "In order to satisfy statutory requirement of attempt to agree with the owner prior to the institution of condemnation proceedings, there must be a good faith attempt to agree, consisting of an offer made in good faith and a reasonable effort to induce the owner to accept it."

The condemnee's assignment that the trial court erred in its instructions to the jury which placed the burden of proof on the condemnee as to his damages suffered by the taking cannot be sustained. The correct rule with respect to the burden in such cases is set out in Twenty Club v. State, 167 Neb. 37, 91 N. W. 2d 64, in these words: "The general rule in condemnation cases is that the burden of showing the damages which the landowner or lessee will suffer rests upon him while the burden is on the condemner to show matters which tend to reduce or mitigate damages." There was no error in the trial court's ruling.

The next exception to the trial court's ruling which condemnee assigns as error consists of excluding certain evidence with respect to the sale price of other lands on objections thereto. Errors are assigned with respect to two such rulings. The first is in regard to the refusal to accept exhibit 15, a certified copy of a deed from Quinten R. Mahloch, the brother of the condemnee, to one Samuel N. Wolf, and other evidence of the brother who offered testimony in regard to the sale price involved in this transaction. The sale was of a tract adjoining the condemnee's land. Previously, the brother who testified had owned both the condemnee's

land and the portion sold off the larger tract by the deed to Samuel N. Wolf. The sale, which was excluded from evidence, involved a small tract which aside from a portion occupied by the roadway was 150 feet square. It was bought for the purpose of erecting a filling station thereon. The sale took place in October 1956. At that time there were no zoning regulations covering the property in the locality where it or the condemnee's land lay. In September 1958, when the taking in condemnation occurred, there were zoning regulations in the area preventing the use of the land taken for any commercial purpose. The plot sold to Wolf abutted Pacific Street. There was considerable evidence by witnesses for the condemnee that the zoning regulations on application might be changed without difficulty to allow commercial development, and other testimony that other owners might object to such rezoning and changes which might be difficult or impossible to be made. In any event the zoning regulations prohibited commercial building at the time of the condemnation and under the circumstances there was nothing to show that the remaining 277.2 feet of the condemnee's land which abutted Pacific Street could be used for any commercial purposes. In Sump v. Omaha Public Power Dist., 168 Neb. 120, 95 N. W. 2d 209, this court said that: "The adaptability for uses which may be considered must be so reasonably probable and so reasonably expected in the immediate future as to affect the reasonable market value of the land at the time the land is taken or damaged." We cannot say that the trial court erred in excluding evidence of the sale price of this relatively small tract sold for a specific purpose when the evidence showed that at the time of condemnation similar commercial uses of condemnee's land were not available.

The other testimony in regard to a sale sought to be admitted by condemnee, which the court finally excluded after first receiving it, related to a tract of 11⅓ acres which adjoined the condemnee's land to the

east. The date of the sale was December 29, 1959, or 15 months after the condemnation. The interstate highway was then built or being built. The exhibits previously introduced show that an entrance and exit to Pacific Street was but a short distance from the land so sold. The condemnee's witness did not testify as to the condition of the zoning at the time this subsequent sale was made. It was not shown whether or not it was sold for a specific purpose. The witness had talked to the seller but not to the purchaser and had not ascertained the intended use. The condemnee's witness admitted that the impact of the building of the interstate highway with its access road connecting with Pacific Street, on which this land had a considerable frontage, had changed the condition although the witness testified it was hard to say whether it had changed for the better. The condemner's attorney argued that the conditions shown after the condemnation could not be shown because it would not have been possible for the condemnee or prospective purchasers of his land to be influenced in the value and price to be paid therefor by events which might occur in the future. Neither did the condemnee's witness who testified in regard to this particular sale give any measure or scale which the jury might have used in relating the value of condemnee's land at the time of the taking to this particular sale, though the witnesses admitted that the value of the land had risen in a considerable amount between the time of the taking and the later sale. Without holding that sales subsequent to the taking cannot be shown in the proper instance, we find that the exclusion of this sale under the circumstances and with the changed condition without any rule to relate the change in value to the time of the taking of condemnee's land was a matter within the sound discretion of the court. In Timmons v. School Dist., 173 Neb. 574, 114 N. W. 2d 386, this court held: "Whether evidence of an offer to sell is too remote in time to be admissible is for the trial court

to determine in the exercise of a sound discretion."

We now come to the last assignment of error which involves the reception of evidence of the witnesses for the State, Grant Miller and Wayne Selby, concerning sale prices of certain lands within the area of that of the condemnee. The assignment of error itself does not point out the particular sales in the testimony given, to which the condemnee objects. However, most of these sales are discussed in the condemnee's brief either in the evidence or argument. The testimony of the witnesses Grant Miller and Wayne Selby, who offered the evidence concerning the other land sold and the sale price thereof, includes several sales. The condemnee's brief says there were at least eight. The exact number depends on whether certain sales which appear to be made about the same time by the same parties, or one of them, in what would appear to be an effort to assemble a larger tract from several small ones, are to be considered as one or several sales. If every separate sale is considered there are more than eight.

The objections with respect to these sales are to the price of the land being given to the jury. Every objection, except in one instance, is confined entirely to that of no sufficient foundation laid. In that one instance the objection was finally sustained. This opinion would be unnecessarily and unjustifiably lengthened if we were to take up the several sales and the evidence concerning each in respect to foundation. We have carefully looked over the testimony of these witnesses who were fully qualified as real estate dealers, familiar with the area, and well versed in matters affecting land such as this with respect to its adaptability to suburban development and its location with reference to the growth of the city. In each instance they compared the land involved in the separate sales to that of the condemnee. The dates of the independent sales were given. A map was introduced in evidence showing the area west of Omaha in the vicinity of the plaintiff's land and showing

the principal streets leading westward from the city as well as the cross streets. The condemnee's land was located by markings thereon and most at least of the lands so sold and used in comparison were likewise located and marked thereon. Testimony in each instance was given as to its comparison with the land taken. In some instances the evidence was more detailed and extensive than in others. In addition to the testimony involving the particular tract separately, each witness when first questioned set out in considerable detail what was done by him to familiarize himself, not only with the condemnee's land, but those used in comparison and some of the things which he thought justified their comparison. When the testimony as to the particular tracts is considered with the general statements in regard to matters considered in making the comparisons, the foundation appears to be quite adequate. Indeed that given as to the separate tracts appears to be sufficient as to the character of the land, the date of the sale, and that it was bona fide between the buyer and seller.

The condemnee objects particularly as to the dates of the comparative sales which he contends were too remote. There are peculiar issues in the case that seem to justify the State in introducing evidence of sales over a more extended period than in a usual case in order to present its contentions to the jury. A witness on behalf of condemnee had previously testified that within a week or 10 days after the announcement on March 1, 1956, that the Western Electric Company plant was coming, land doubled in value almost overnight, and that the land in question upon which a filling station had been built was worth three times as much as before. The witness later testified that condemnee's land and surrounding property almost doubled or tripled in value overnight, and that this was the effect on all property from Ninetieth Street out as far as One Hundred Fifty-sixth Street in the western part of the Omaha vicinity

and was not confined to the land adjacent to the Western Electric Company plant. The condemnee's witness Wear testified the market changed with the announcement of the Western Electric Company plant and that it came as a complete shock.

The State's witnesses admitted a rise in real estate values in the vicinity but maintained it was not nearly as rapid as claimed by those of the condemnee. In certain instances where other land was compared and its value was given as of 1956, the witness testified that the values in the area were then advancing 2 percent a month and that this fact was taken into consideration by the witness when he gave his opinion as to the value of the condemnee's premises. The witness Selby testified he kept records of all sales in his office and verified them from the public records. Further he said that in studying the sales in the area for a considerable time he had concluded that there was very little increase in the value of land from 1954 to 1956, but that in 1956, 1957, and 1958, there was a constant rise in the selling price of land determinable by these sales and that the rate of increase could be projected therefrom. That the rate of increase was 1¼ percent per month from 1956 to 1957, and starting in 1958, it went up 2.4 percent each month. With this yardstick before it the jury was given the sale price of the lands compared by the witnesses during the period, some going back to the year 1954. The two theories were presented to the jury, the one that on the coming of the Western Electric Company plant the land values had suddenly risen two or three-fold, the other of steady but less pronounced raise. Under the circumstances of the two conflicting theories presented by the parties we cannot say the trial court abused its discretion in admitting the sale price of other lands compared by the witnesses during the whole period. The jury was given the conflicting evidence, both on this issue and that as to the adaptability of condemnee's land to commercial or residential development. It was al-

lowed thereafter to view the premises when it had these issues all before it. It was the exclusive judge of the evidence as to value. The questions of admission of the sale prices of other land and the sufficiency of the foundation for their admission were within the sound discretion of the court. Timmons v. School Dist., *supra*. We find no error of the trial court in the admission of the evidence concerning the other land and the sale price thereof.

The several errors assigned to the rulings of the trial court cannot be sustained and it follows the judgment should be affirmed.

AFFIRMED.

KENNETH NORDAHL, APPELLANT AND CROSS-APPELLEE, V. GORDON A. ERICKSON ET AL., APPELLEES AND CROSS-APPELLANTS.

116 N. W. 2d 275

Filed July 13, 1962. No. 35264.

1. **Workmen's Compensation.** Disability under section 48-121, R. R. S. 1943, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function.
2. ———. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.
3. ———. 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 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.
4. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.

Appeal from the district court for Butler County:

H. EMERSON KOKJER, Judge. Reversed and remanded with directions.

Kanouff & Brown, for appellant.

Cline, Williams, Wright, Johnson, Oldfather & Thompson, for appellees.

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

SIMMONS, C. J.

This is a workmen's compensation case. The plaintiff sought a permanent total disability award. The one-man compensation court awarded a 45 percent permanent partial disability to the right foot. Plaintiff refused to accept the award and had a hearing before the Workmen's Compensation Court, en banc. There he received an award of 45 percent permanent partial disability of his right foot, an award for the loss of a small toe on the left foot, and a 12 percent permanent partial disability to his body as a whole.

Plaintiff took the matter to the district court where, under our procedure, it became an error proceeding. Defendants cross-appealed, praying that the order of the compensation court be set aside. The district court found no error in the decision of the compensation court and dismissed both the appeals of the plaintiff and defendants.

Plaintiff appeals here where, under our procedure, the matter is for trial de novo on the record made before the compensation court. Defendants cross-appealed.

In effect, the plaintiff contends here, as he has throughout, that he is entitled to permanent total disability under the provisions of section 48-121 (1), R. R. S. 1943. Defendants, in effect contend for an award under the provisions of section 48-121 (3), R. R. S. 1943, and for the right foot only.

We find that the plaintiff is entitled to an award of permanent total disability. We reverse the judgment

of the trial court and remand the cause with directions to enter an award in accord with this opinion.

Plaintiff, at the time of the accident, was about 36 years of age. He was married and the father of two children whose ages are not shown. He weighed about 200 pounds. He quit school in the 10th or 11th grade. He was born and raised on a farm. All his life he had engaged in hard physical labor for a livelihood.

There is no suggestion in this case that plaintiff is malingering.

The accident here involved occurred September 3, 1958. Up until about 2 years prior thereto, he had lived and worked on a farm, first as a laborer, then in some sort of partnership with his mother. After marriage, he rented a farm and farmed for himself.

Twenty years or more, before this accident, he had broken a bone in the small toe of his left foot. It resulted in a "hammertoe." It, in no sense, was disabling. He also had had some lower back trouble for which he was examined at Mayo's some years before this accident. It was not disabling. It is not involved here.

Somewhere in this period, he and his family inherited a farm of 200 acres of which about 100 acres was pasture land and about 100 acres tillable land. The plaintiff's interest in the farm or whether it was owned free from encumbrance is not shown.

About 2 years before this accident, plaintiff quit farming and engaged in common labor in the construction industry. At the time of the accident, he was working as a carpenter, cement finisher, and anything they wanted him to do. He was working at the top of a grain elevator and above a shaft which was rectangular in shape and about 20 x 27 inches in dimension. The shaft was 180 feet high. Beneath it was an open space of some 18 feet to a concrete floor which at the time had debris of construction material on it.

A ladder on which plaintiff was standing worked loose and plaintiff fell, feet downward, the entire length

of the shaft and open area beneath. His size was such that he about fitted the shaft. He was able to slacken his fall by body and limb pressures on the sides. He was at all times fully conscious. He first struck the concrete floor on his feet, then his buttocks, and then his back. His body had multiple abrasions of the skin, particularly on his arms and legs from contact with the walls of the shaft. With the exception of his right hand, they do not enter into the problem here.

In view of the fact that the question here is whether he had a single permanent injury to the right foot or multiple injuries causing permanent injury to his body as a whole, we discuss each injury separately.

The physician and surgeon who cared for plaintiff throughout became defendants' expert witness.

Plaintiff's right ankle was obviously smashed as a result of the impact. Efforts were made to restore it and finally, after two or more operations, it was fixed permanently immobile. There is no dispute about that, neither is there dispute that his right leg is three-quarters of an inch shorter than the left. It is the above injury for which defendants admit liability under the provisions of section 48-121 (3), R. R. S. 1943, as a scheduled injury.

In addition to the above, plaintiff's expert witness testified that there was a "marked atrophy of the muscles of his right leg." This was not limited to a below the knee situation and we do not find it denied by defendants' expert witness.

The other of plaintiff's expert witnesses testified that plaintiff, in such movements as getting down on his legs, was awkward and there was some weakness or loss of co-ordination of the right side. He illustrated this by reference to his ability in getting down to replace "a nut in a machine or anything like that."

Defendants' witness makes no reference to this testimony and was not asked.

When doing work, plaintiff wears a steel brace from

his shoe to the right knee, as prescribed by defendants' expert witness.

We go now to the left foot. At the time of his first examination, the surgeon found a moderate swelling of the left foot with complaint of tenderness over the dorsum of the foot and some tenderness of the hammer toe. Shortly after the accident, the surgeon operated on and removed a bone from the hammer toe and found "probability" of reinjury to it in the accident. He testified, however, that he performed the operation as a favor to the plaintiff and undertook as a witness for defendants to remove injury to the left foot from plaintiff's disabilities caused by the accident. However, the surgeon prescribed, and plaintiff wears, an arch support on his shoe under the instep of his left foot.

Plaintiff testified that he could not walk barefoot in the house without pain in both feet. When he walks at all with a shoe on, he does so with the weight put on the big toe and heel of the left foot, to avoid pain.

As to the use of his feet, the undisputed evidence is that plaintiff could not stand on his feet for more than 10 minutes without pain often followed by edema. Walking, particularly on rough sufaces, about the farmyard is a constant source of pain and danger.

Plaintiff's right hand, and particularly the index finger, received the worst of the abrasions in the fall. No bones were broken. The testimony is that plaintiff's right hand has lost some of its strength, there is a numb area in the heel of the hand, and misplacement of bones in the wrist. Plaintiff has complained to the doctors of pain in that wrist every time he uses it, and concededly, it has a restricted use. There is also some evidence of pain in the right arm area. Plaintiff is a right-handed man.

At the time of his first examination, plaintiff complained of tenderness throughout his back. He has continuously complained of tenderness in his upper back between his shoulder blades and in his neck. We will

make further reference to this in connection with his use of a farm tractor.

He can neither lift nor carry articles of much weight.

Such then is the present condition of a man who, prior to this accident, could do the hardest of hard common labor, and, in his own language, there were few who could follow him. Defendants would have us find that he has only a permanent injury to his right ankle.

We have no difficulty in finding that he has a disability to his body as a whole. Plaintiff's expert witness so testified. In a report to the insurance carrier, defendants' expert witness so stated. The divergence of views here seems to be that plaintiff's expert witnesses find subjective symptoms of pain and disability, whereas defendants' witness undertook to limit his ratings to objective symptoms only.

Plaintiff's expert witness fixed the disability to the body as a whole as a 25 percent permanent partial disability. The question then arises as to how much compensation plaintiff is entitled.

We have held: "Disability under section 48-121, R. S. Supp., 1953, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function. * * * In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof." Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700.

As we stated the question in Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492: "What, then, is the evidence as to plaintiff's ability to perform labor and to earn an income in his particular line of work or in any other for which he is fitted?"

There is no contention here that plaintiff is employable as a common laborer, carpenter, or cement finisher, being the work in which he was engaged when injured.

The defendants contend here that plaintiff is a trained, experienced farmer and can do that work. This is not

based upon any evidence of employability as a farm hand. He operates a farm, owned by himself and family and, apparently, had done so in the years 1960-1961. The evidence is that it is not a profitable operation because of the necessity of employing labor. His herd of cattle has increased from 25 to 70, with no evidence as to whether they are encumbered or free from debt. The sole evidence as to plaintiff's activity in this regard is that he, apparently, accompanies some shipments of cattle to the market at Omaha and sells them.

Plaintiff's wife and children do the chores, attend the cattle, and work in the fields. At the time of this hearing in July 1961, plaintiff was employing four hired men.

Plaintiff's tillable ground is devoted to row crops, partly irrigated. Some of the work in connection with it is done by tractor. Defendants stress the testimony of plaintiff that he did about 75 percent of the tractor work in 1961 and less in 1960. But that is not the whole story. The question is as to how and to what extent, he was able to do it. The undisputed testimony is that he could drive the tractor for 2 or 3 hours and then was required to rest. He was unable to use his right foot in manipulating the tractor brake, etc. He sat sideways when that was necessary and did the foot work with his left foot. If he was pulling a following implement requiring that he look back and turn to do so, he immediately had pain in his neck and upper back, and sometimes a locking of the neck. The amount of work which plaintiff was able to perform in hours, days, or seasons is not shown. There is no showing of employability as a farm laborer except insofar as he works for himself, when able, and to the extent above-shown. On occasion, where necessity required, he would sometimes work as many as 8 hours a day with the tractor, followed by spending the next day in the house.

We think the evidence shows that plaintiff is not employable.

Our comment in Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262, is applicable: "He is, therefore, what is called an 'odd lot' man, the nondescript in the labor market, with which industry has little patience, and rarely hires. Work, if he finds any that he can do, is casual and intermittent. He is utterly unable to do the work he did before this accident. Under these facts, we think we are justified in finding that in his present handicapped condition he is entitled to an award for total disability under the Nebraska Compensation Act."

We quoted from the above case in Rapp v. Hale, 170 Neb. 620, 103 N. W. 2d 851, as follows: "'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 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. * * * A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.'"

We find that plaintiff is permanently and totally disabled and entitled to compensation as such under the provisions of section 48-121 (1), R. R. S. 1943.

We do not undertake to tabulate the period of the beginning of compensation payments. We anticipate that the parties will be able to do that without difficulty.

The judgment of the trial court is accordingly reversed and the cause remanded with directions to enter judgment in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

I do not agree that the record in this case sustains a finding that plaintiff was totally and permanently dis-

abled. The case involves schedule injuries and other claimed injuries to other members, and a further contention of permanent injury to the body as a whole.

We have few cases in this state in which the relation of a schedule injury to injury to the body as a whole has been considered. The opinion of the majority appears deficient in the consideration of this problem.

The plaintiff sustained an injury to his right foot which, standing alone, would be compensated for as a schedule injury as defined in subdivision (3) of section 48-121, R. R. S. 1943. There is no medical evidence in the record that the injury to the right foot constituted more than 40 to 50 percent permanent disability of the right foot.

The evidence shows that plaintiff's physician removed a hammertoe from his left foot which was a condition that did not result from the accident. There was some evidence of injury to the top of the left foot. Examination by X-ray showed no fracture, but revealed an arthritic condition which had developed over a period of time before the accident, No objective symptoms of injury to the left foot were found. No doctor testified as to any amount of permanent disability to the left foot.

There was evidence of some injury to the right wrist. An orthopedic physician testified that the distal end of the ulna lies dorsal-ward from the usual relationship with the radius. There was no evidence of fracture. There is medical evidence that this condition is occasionally seen as a natural development in a normal wrist. There is no medical evidence that the wrist condition was the result of the accident and plaintiff's doctor made no separate permanent disability rating as to the right hand and wrist. In fact, the medical experts considered the condition of the right wrist of no importance.

Plaintiff asserts that he suffered injury to his back. He was treated at the Mayo Clinic for lower back discomfort in February 1958, prior to the accident. No objective evidence of traumatic injury to the back was

found and no doctor attempted to fix any percentage of permanent injury to the back or to the body as a whole resulting from the claimed back injury. There was evidence of tenderness in the shoulder blade and dorsal spine area. The medical evidence is that this was caused by an osteoarthritic condition and the use of crutches during the period of convalescence, without any indication of permanency. There is some medical evidence that plaintiff would suffer pain in his back in the future. The disability from such pain is not rated nor is there medical evidence that it was the result of the accident.

I think the provision of subdivision (3) of section 48-121, R. R. S. 1943, providing total and permanent disability for the loss of two feet means a complete loss of use of such two members. What then if one or both members under subdivision (3) have not been injured to the extent of permanent total loss of use. Under such circumstances I think the rule stated in Radford v. Smith Bros., 123 Neb. 13, 241 N. W. 753, applies. The announced rule in that case is that a claimant for compensation who has sustained injury to both legs and both hands is entitled to recover such proportion of compensation allowed for total disability as the extent of loss of the several members bears to the total loss of two such members. See, also, Frost v. United States Fidelity & Guaranty Co., 109 Neb. 161, 190 N. W. 208; Johnson v. David Cole Creamery Co., 109 Neb. 707, 192 N. W. 127; Schlesselman v. Travelers Ins Co., 112 Neb. 332, 199 N. W. 498; Ashton v. Blue River Power Co., 117 Neb. 661, 222 N. W. 42. Under the foregoing rule the plaintiff is entitled to recover permanent partial disability benefits under subdivision (1) in the proportion that the extent of his loss to such members would bear to the total loss of two such members.

A traumatic injury to the back resulting from the accident would raise a question that we do not have before us, as I view the evidence. There is no evidence that the back injury was caused by the accident, al-

though it is one that could well have been lighted up by the accident in view of its nature. The evidence of back injury was subjective only. No objective symptoms were found, other than the preexisting osteoarthritic condition previously mentioned. An injury to a back based only on the complaints of pain by the claimant should not be accepted as proven in the absence of medical support. Magnolia Pipe Line Co. v. Smith, 167 Okl. 316, 29 P. 2d 569.

There is no medical proof that the claimed injury to the right wrist or to the back was the result of the accident and, what is more important still, there is no medical proof that such injuries result in any disability chargeable to the accident. The burden of proof is on plaintiff to prove these facts. The plaintiff testifies that he was able to do 20 percent of his tractor work in his farming operations during the first year following the accident and that he was able to do 75 percent of it the second year. This is a clear indication of physical improvement and a confirmation of the medical evidence finding partial permanent disability only. As I view the record, the case should be determined as a two-member injury requiring an award of partial permanent disability under the rule announced in Radford v. Smith Bros., *supra,* and other cases announcing the rule of that case.

The Workmen's Compensation Act provides that the loss of use of two feet shall constitute total and permanent disability and shall be compensated for according to the provisions of subdivision (1) of section 48-121, R. R. S. 1943. It does not authorize the granting of total permanent disability where the use of one or both injured members are not wholly disabled. This court has held on many occasions that it is immaterial whether or not industrial disability is present in a schedule injury. Bronson v. City of Fremont, 143 Neb. 281, 9 N. W. 2d 218. Since the competent evidence before the court in the present case relates to the injury of two

schedule members, the matter of industrial loss and employability is not material. Paulsen v. Martin-Nebraska Co., 147 Neb. 1012, 26 N. W. 2d 11. The plaintiff is therefore entitled to an award of permanent partial disability calculated under the rule of Radford v. Smith Bros., *supra*. See, also, Paulsen v. City of Lincoln, 156 Neb. 872, 58 N. W. 2d 336. The failure of the majority to apply the rule of that case affords the basis of this dissent.

Assuming a compensable injury to the back, a basis for an additional award exists. A 40 to 50 percent disability of the right foot, a lesser unrated disability to the left foot, and an unrated disability to the back based on subjective symptoms not supported by medical evidence do not in my opinion support a finding of permanent total disability.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1962

STATE OF NEBRASKA, APPELLEE, V. JAMES EARL GOFF, APPELLANT.

117 N. W. 2d 319

Filed October 5, 1962. No. 35316.

Criminal Law. An appeal in a criminal action will not be dismissed because the notice of appeal fails to state the nature of the offense and the sentence imposed as required by section 25-1912, R. S. Supp., 1961.

Appeal from the district court for Dakota County: JOHN E. NEWTON, JUDGE. On motion to dismiss appeal. Motion to dismiss overruled.

Mark J. Ryan, for appellant.

Clarence A. H. Meyer, Attorney General, and Cecil S. Brubaker, for appellee.

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

BOSLAUGH, J.

The defendant was convicted and sentenced for possession of narcotics in violation of section 28-470, R. R. S. 1943. Within the time prescribed by statute the defendant filed a notice of appeal in the office of the clerk of the district court which failed to "state the nature of the offense and the sentence imposed" as required by section 25-1912, R. S. Supp., 1961. The State has moved

to dismiss the appeal for the reason that the notice of appeal failed to comply with the statute.

It is necessary that this court know the nature of the offense and the sentence imposed before a suspension of the execution can be ordered in a proper case. For that reason section 25-1912, R. S. Supp., 1961, requires that a statement of the nature of the offense and the sentence imposed be included in a notice of appeal filed in a criminal case.

The statute, which formerly applied to only civil actions, was amended in 1941 to simplify the procedure for perfecting an appeal from the district court to this court. It provides that no step other than the filing of a notice of appeal and the payment of the docket fee (or the filing of an affidavit of poverty as provided in section 29-2306, R. S. Supp., 1961, in lieu of the payment of the docket fee) shall be jurisdictional. We do not believe that a defendant in a criminal action should be denied a review of his conviction and sentence in this court because of a failure to comply with a procedural requirement relating to a suspension of execution of the sentence.

The motion is overruled.

MOTION TO DISMISS OVERRULED.

ELLA P. COKER, APPELLEE, V. ALFRED M. COKER, APPELLANT.
117 N. W. 2d 320

Filed October 12, 1962. No. 35192.

Divorce. In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment in a divorce action which has become final can or should be modified.

Appeal from the district court for Douglas County: LAWRENCE C. KRELL, Judge. Reversed and remanded.

Young, Holm, Miller & McEachen, for appellant.

Wear, Boland, Mullin & Walsh, for appellee.

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

SIMMONS, C. J.

This appeal involves another and somewhat narrow segment of the marital difficulties between the parties above-named. One phase of the case reached us and was determined in Coker v. Coker, 173 Neb. 361, 113 N. W. 2d 329.

In the opinion in the above case, we set out essential parts of the property settlement agreement entered into by the parties which was approved by the trial court, and incorporated in and made a part of the decree of divorce. It will not be repeated here.

Pursuant to that agreement, a home was selected in California and paid for by the defendant. Plaintiff moved there with substantially all of the household furniture. Plaintiff and the minor daughter established a residence there.

Plaintiff later decided that she wanted to return to Omaha and live there. That precipitated the controversy decided in Coker v. Coker, *supra*.

While defendant's appeal was pending, plaintiff shipped the household goods to Omaha and placed them in storage. She surrendered the keys to the house to an agent of the trustee who sold it and has the proceeds in trust.

For a short time, she and the daughter resided with a friend in Omaha. Defendant objected to his daughter being there. Plaintiff and the daughter then moved to a motel, where they lived close to a tavern and swimming pool, and ate in a public cafe. Defendant objected to that. Plaintiff then advised defendant that she could rent an apartment near a private school. Defendant objected to that because of traffic hazards.

A controversy arose about visitation privileges accorded the defendant and this present litigation arose.

Defendant refused to pay the rent on an apartment in Omaha until the appeal above-cited was determined. Defendant, for business reasons, wanted to live in California and wanted his daughter there.

We find no evidence in the record as to the rent which plaintiff was paying at the motel. So far as we can determine from this record, they are still living there.

Hearings were had on this matter on August 2, 1961, and subsequently on August 9, 1961, at which time the parties submitted their cause and rested.

On August 15, 1961, without any showing as to who was present besides the court and plaintiff's counsel, the court was advised that plaintiff had found an apartment which "she feels" would meet with defendant's approval at a monthly rental of $235 and that she was going to sign a one year's lease "right now." Whether the lease was ever signed or whether plaintiff moved into the apartment with her daughter does not appear.

On the basis of that record, the trial court signed an order requiring the defendant to pay or cause the trustee (who is not a party here) to pay the rental of $235 a month beginning August 1, 1961, and to continue until the further order of the court or until housing was furnished "in accordance with the property settlement agreement" or until otherwise ordered by this court. The court also allowed an attorney's fee for plaintiff's counsel.

On August 7, 1961, by letter, the plaintiff's counsel submitted the addresses of three houses in Omaha which she deemed suitable, and asked defendant to select one in accord with the property settlement. The "asking price" of two of the three was substantially more than had been received by the trustee from the sale of the property in California. Defendant's counsel refused to act until this court had decided Coker v. Coker, *supra*.

Defendant's assignments of error here are two. One, that the court erred in ordering the defendant to pay the rental on the apartment. Two, that the court erred in ordering the defendant to pay the rental without

evidence as to its reasonableness. The allowance of attorney's fees is not assigned as an error although discussed in the brief.

The quesions presented here were decided in Coker v. Coker, *supra.*

We there held that the decree in the divorce case was binding on both of the parties and not subject to modification in the absence of a showing of a change of circumstances.

The specific holding was: "In the absence of evidence showing a change in circumstances, there is no basis upon which the judgment in a divorce action which has become final can or should be modified."

Obviously, the trial court proceeded on the theory that in its own language at the beginning of the hearing, "* * * we are completely beyond the provisions of the agreement at this point." Counsel stated that the question was one of securing temporary housing "until we can enforce the original decree." The court concurred. It appears throughout, until the decree when the trial court ordered the $235 a month payments to begin on August 1, 1961, there being no lease in existence or contemplation at that time, the payments were to continue "until housing is furnished in accordance with the property settlement agreement." The court assumed the right to modify the property settlement agreement, by requiring the defendant to pay more than he agreed to pay.

The agreement specifically sets out the procedures to be followed "in the event a second home is acquired." Those procedures have not been fully followed. No mention of rental of a home is found in the agreement. For aught that appears, it would increase the defendant's financial burden beyond the terms of the obligations assumed in the property settlement.

We find no justification for the decree of the trial court in the above matter. The decree is reversed and the cause remanded for proceedings within the frame-

work of the original decree and property settlement agreement and in the light of our decision in Coker v. Coker, *supra*, as to the rights of the parties.

The attorney's fees allowed plaintiff in the trial court will not be disturbed. No further allowance is made. All costs are taxed to the plaintiff.

REVERSED AND REMANDED.

IN RE ESTATE OF MARY LORETTA POLLY, DECEASED.
MABLE V. COOK, APPELLANT, V. DONNA KETCHMARK ET AL., APPELLEES.

117 N. W. 2d 375

Filed October 12, 1962. No. 35215.

1. **Wills.** In a will contest upon the ground of undue influence the burden is upon the contestant to prove by a preponderance of the evidence (1) that testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of undue influence.
2. ———. In a will contest, where undue influence is alleged, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testator, but the result of undue influence exercised upon him.
3. ———. Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, mental condition, as shown by the evidence, and opportunity afforded designing persons for the exercise of improper control.
4. ———. In making proof, a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts.
5. ———. The declarations of a testator are admissible to show his state of mind and consequent susceptibility to undue influence.
6. ———. While it is a generally accepted view that the mere existence of confidential relations between a testator and a

beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, the relationship between the two may be considered with all of the other facts and circumstances in the case in determining undue influence.

7. **———. The fact that a will is unnatural or unreasonable in the distribution of property is a circumstance to be considered by the jury in connection with other evidence bearing on the question of whether the will is the result of undue influence.**
8. **Evidence: Appeal and Error. When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to this court for review.**

Appeal from the district court for Greeley County: WILLIAM F. MANASIL, Judge. Affirmed.

Harold E. Connors and Ernest A. Ondracek, for appellant.

E. L. Vogeltanz, for appellees.

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

MESSMORE, J.

This action arose as a result of Donna Ketchmark, Julia Warwick, Roy Hughes, Walter Hughes, Frank Hughes, Veda Connor, John Hughes, Alice Noski, Irene M. Lewis, Reuben Hughes, Ray Hughes, Tom Hughes, Verna Peterson, and Carlton Hamilton, nephews and nieces of the deceased, and Mr. and Mrs. Boyd McKenzie, objecting to the allowance for probate of the last will of Mary Loretta Polly, deceased. The trial court for Greeley County submitted to a jury the issue of whether or not the will was the result of undue influence exercised over the deceased by Mable V. Cook, a niece of the testatrix. The jury found that the last will of Mary Loretta Polly, dated October 16, 1959, was not a valid last will and was null and void. The proponent then filed a motion asking the court to render judgment notwithstanding the verdict. The proponent also filed a

motion for a new trial. Both of the above motions were overruled. The proponent perfected appeal to this court.

At the close of the contestants' evidence, the proponent moved the court to dismiss the objections of the contestants for the reason that the evidence was insufficient to go to the jury on the issues raised by the contestants' objections. The proponent made the same motion at the close of the case. At the close of the proponent's evidence, the contestants moved the court to declare that the last will of the testatrix be held invalid for the reason that the proponent failed to make a prima facie case as to the validity of the will. The motions made by the proponent and the contestants were overruled.

The proponent's assignments of error may be summarized as follows: That the verdict is contrary to the law and not sustained by the evidence, and that the trial court erred in giving instruction No. 12 on its own motion to the jury.

"In a will contest upon the ground of undue influence the burden is upon the contestant to prove by a preponderance of the evidence (1) that testator was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of undue influence." Benge v. Sutton, 169 Neb. 769, 100 N. W. 2d 857.

"In a will contest, where undue influence is alleged, that question should be submitted to the jury when the facts and circumstances proved, together with inferences fairly deducible therefrom, are such that reasonable minds might conclude that the will was not the free and voluntary act of testator, but the result of undue influence exercised upon him." In re Estate of Strelow, on rehearing, 120 Neb. 242, 233 N. W. 889.

"Undue influence is usually surrounded by all possible secrecy. It is almost always difficult to prove by

direct and positive proof. It is largely a matter of inferences from facts and circumstances surrounding the testator, his life, character, mental condition, as shown by the evidence, and opportunity afforded designing persons for the exercise of improper control." In re Estate of George, 144 Neb. 887, 15 N. W. 2d 80.

"In making proof, a contestant is not limited to the bare facts that he may be able to adduce, but he is entitled to the benefit of all inferences which may be legitimately derived from established facts. * * * The declarations of a testator are admissible to show his state of mind and consequent susceptibility to undue influence. * * * While it is a generally accepted view that the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary has exercised undue influence over the testator, the relationship between the two may be considered with all of the other facts and circumstances in the case in determining undue influence." In re Estate of Bowman, 143 Neb. 440, 9 N. W. 2d 801.

The fact that a will is unnatural or unreasonable in the distribution of property is a circumstance to be considered by the jury in connection with other evidence bearing on the question of whether the will is the result of undue influence. See, In re Estate of Bowman, *supra;* In re Estate of Bainbridge, 151 Neb. 142, 36 N. W. 2d 625.

It is permissible not to strive to separate each fact supported by evidence offered as proof of undue influence and allocate it under one or more of the four essential elements requisite to establish the exercise of undue influence, but to view the entire evidence offered by the contestants as proof of this issue and rest the decision upon whether or not the evidence as a whole is of such a substantial nature as to contain some proof of each of the essential elements, and to require that the issue of undue influence be submitted to and determined

by a jury. See In re Estate of Bainbridge, *supra.*

For convenience we will refer to Mary Loretta Polly as Mrs. Polly and to Mrs. Mable V. Cook as Mrs. Cook.

It will be noted by the evidence that Mrs. Polly at times is referred to as Aunt Rett.

Mrs. Polly was a widow, 87 years of age, and a resident of Scottsbluff. She had a son, Harry Graham, who contributed to her support. On July 26, 1959, her son died. Mrs. Polly inherited from his estate. Mrs. Polly continued to live in Scottsbluff until September 1959. In that month she fell, and was taken to a hospital. While in the hospital she wrote to Mrs. Cook, a niece who lived at Greeley, and to Emmett Hughes, a nephew who lived at Burwell, asking them to come and see her. It appears from the record that Mrs. Polly had several nephews and nieces whom she had not seen for a number of years. Mrs. Cook testified that she had corresponded with Mrs. Polly for about 10 years. Mrs. Cook asked her son to take her to Scottsbluff on September 18, 1959. Mrs. Cook, Emmett Hughes, and his wife, Monia Hughes, left for Scottsbluff with Mrs. Cook's son Pat. They arrived early in the morning. Emmett Hughes and Pat Cook returned home, and Mrs. Cook and Mrs. Hughes remained in Scottsbluff. They went to the hospital to see Mrs. Polly and were informed that she could leave the hospital if she had someone to take care of her. She was released from the hospital on September 20, 1959, and returned to her apartment in Scottsbluff with Mrs. Cook and Mrs. Hughes.

Prior to the arrival of Mrs. Cook and Mrs. Hughes, Mrs. Polly had consulted an attorney with reference to making a will and about the inheritance she had received from her son. On September 22, 1959, Mrs. Polly requested her attorney to come to her apartment and prepare a will. The same evening the attorney and his wife returned to the apartment and the will was signed by Mrs. Polly and witnessed by the attorney and his wife as attesting witnesses. This will provided in sub-

stance that one-tenth of the estate was bequeathed to Emmett Hughes; an undivided one-tenth was bequeathed to Mrs. Cook; an undivided one-fifth was bequeathed to the sons and daughters of Mrs. Polly's sister Nora Hughes who were living at the time of the death of the testatrix; an undivided one-fifth to the sons and daughters of Mrs. Polly's sister Sadie Hughes who were living at the time of her death; an undivided one-fifth to the sons and daughters of her brother Mark Hamilton who were living at the time of her death; and an undivided one-fifth of her estate to her good friends Mr. and Mrs. Boyd McKenzie of Scotts Bluff County or the survivor of them. The will nominated and appointed Boyd McKenzie as her executor. This will was executed on September 22, 1959.

Mrs. Polly was not entirely satisfied with the will and called her attorney for the purpose of making some changes in it. The next day, September 23, 1959, Mrs. Polly, Mrs. Hughes, and Mrs. Cook left by train for Grand Island where they stayed overnight. The next day Mrs. Cook and Mrs. Polly proceeded to Greeley and Mrs. Hughes went to her home at Burwell.

A few days later Mrs. Polly requested that a lawyer come to see her at Mrs. Cook's home. The lawyer complied with this request. He and Mrs. Polly went into a little apartment that Mrs. Polly was occupying. As a result of a conversation with the lawyer, Mrs. Cook was appointed conservator of the property belonging to Mrs. Polly on September 30, 1959.

Thereafter, in the lawyer's office another will was drawn. The lawyer and his wife signed this will as attesting witnesses, and this is the will in controversy here. This will provides in substance that Emmett Hughes receive an undivided one-tenth of the property of the testatrix; $100 is bequeathed to James Booth; and all the rest and residue of the property, real, personal, and mixed, is bequeathed to Mable Cook, a daughter of a deceased sister of the testatrix. The will also stated

that the testatrix well realized that she had a living sister and numerous other relatives, but it was her wish that none of them should take under this will, and that the testatrix had not forgotten them but intentionally omitted them from any share of her estate. This will was prepared and executed on October 16, 1959. This will, which was signed "Mrs. Retta Polly" for the reason that Mrs. Polly said she signed her name that way, was signed in the lawyer's office. There is testimony by the wife of the attorney who prepared the will to the effect that at the time Mrs. Polly signed this will she was competent to make a will and that she said that was the way she wanted her property disposed of.

Mrs. Cook gave as her opinion that Mrs. Polly was competent to make a will on October 16, 1959, and testified that she never had any discussion with Mrs. Polly about the disposition of her property.

On cross-examination Mrs. Cook said she had not seen her aunt, Mrs. Polly, for possibly 27 years; that she received $100 a month for her aunt's board and room; and that there were other expenses besides that amount for such things as drug and doctor bills.

A doctor testified that he first met Mrs. Polly on November 15, 1959, at Mrs. Cook's home, and consulted with her. At that time Mrs. Polly asked Mrs. Cook to leave, and said she wanted to consult privately with the doctor. The doctor consulted with Mrs. Polly for 10 or 15 minutes. He next saw her on January 5, 1960, at Mrs. Cook's home and talked to her privately for 10 or 15 minutes. He testified that there was nothing unusual about Mrs. Polly's mental condition, that she was normal and physically well preserved for her age, and could carry on her own business.

Another doctor testified by deposition that he had known Mrs. Polly as a patient from May 1960, until her death on January 26, 1961; that he attended her at his office eight times and at the hospital on three occasions; and that her complaints were of a urinary tract dis-

order, lung difficulty, and throat trouble. The doctor gave as his opinion that Mrs. Polly was showing some signs of senility; however, considering her age, he felt she was quite alert, attentive, and capable of forming an opinion. She was independent, and agreed with things she liked and not with things she disliked. The doctor further testified that in November 1960, following physical complications, there was a definite decrease in her mental agility. On cross-examination this witness testified that Mrs. Cook always came to the office with Mrs. Polly; that sometimes Mrs. Cook would come into the office and sometimes not; and that his conversations with Mrs. Polly were mostly about her illness.

Mrs. Emmett Hughes testified that she had corresponded with Mrs. Polly for at least 18 years. As a result of this correspondence, she decided to go to Scottsbluff because she had received mail from Mrs. Polly stating that she was in the hospital and wanted to see Mrs. Hughes. She went to Scottsbluff, visited Mrs. Polly, and stayed, as heretofore set out in the evidence adduced by Mrs. Cook. In October 1959, she visited Mrs. Polly at the Cook home. At that time Mrs. Polly seemed pretty alert, and part of the time she seemed to be satisfied and then acted as though she was not satisfied. She next saw Mrs. Polly on November 8, 1959, because she and her husband had been hearing that Mrs. Polly wanted them to come and see her and take her away from the Cook home. When they saw Mrs. Polly she said she wanted to go, but she wanted to see her banker and her lawyer before she left, and she asked them to come back in the middle of the week and she would be ready to go home with them. This witness further testified that she saw Mrs. Polly in the latter part of December 1959. At that time Mrs. Polly wanted Mrs. Hughes and her husband to take her away, to get her an attorney, and get her out of the Cook home, and she stated that she was a prisoner in her own apartment; that the doors were all locked and she could not go in or

out as she pleased; and that she did not get to see anybody. This witness further testified that she had a conversation with Mrs. Cook who told this witness that Mrs. Polly could not go because Mrs. Cook was her conservator and Mrs. Polly would have to stay with her at all times. The same conversation occurred a couple of times. On one occasion Mrs. Polly put on her coat and got as far as the car to go home with this witness and her husband, but she was not allowed to go. The Cooks moved to Grand Island on September 10, 1960. Mrs. Hughes further testified that they received a letter from Mrs. Cook from Grand Island. They never saw Mrs. Polly in Grand Island, but did talk to her over the telephone. Mrs. Polly wanted to leave there, and Mrs. Hughes said: "Aunt Rett, are you satisfied or do you want us to get you out of there?" She heard another voice on the telephone talking to Mrs. Polly and recognized the voice as that of Mrs. Cook who told Mrs. Polly to say yes she was satisfied. Mrs. Hughes asked Mrs. Polly if she still wanted them to get her attorney, and Mrs. Cook told Mrs. Polly to say no. Thereafter Mrs. Hughes and her husband were unable to contact Mrs. Polly. They called the hospital and were told that Mrs. Polly had been left at the hospital with instructions that no visitors were to be allowed. Mrs. Hughes further testified that the last time she was at the Cook home to see Mrs. Polly, Mrs. Polly wanted to go home with her and her husband, and tried to get into the car, but Mrs. Cook said she had to iron, and took Mrs. Polly back into the house.

Emmett Hughes testified that Mrs. Polly told him when they were in her apartment that she needed help; that she didn't want to stay with Mrs. Cook any more; that she did not have any money and did not know where her money was; that she wanted to get an attorney; and that she wanted to go home with him. She went to his pickup truck, but Mrs. Cook told her she could not go as they had a date with the doctor the next day. Con-

sequently, this witness did not take Mrs. Polly with him.

Bertha Hamilton testified that she visited Mrs. Polly in May 1960, and Mrs. Polly told this witness that she had made a will in Scottsbluff, and that all of her nephews and nieces and the children of this witness were named in the will. The daughter of this witness was present at the time her mother had a conversation with Mrs. Polly about the execution of the will in Scottsbluff, and corroborated her mother's testimony as above stated.

Donna Ketchmark testified that she had a conversation with Mrs. Polly, her aunt. She was visiting her aunt and wanted to leave, but Mrs. Polly wanted to talk to her. When this witness tried to depart, Mrs. Polly jumped up real quick and said: "Oh, Donna, get me out of here, get me away from these people." This witness said: "Aunt Rett, I don't like to talk about things in here, could you come someplace else, and she said, they won't let me leave the house." Mrs. Polly tried to go home with this witness, but she was not permitted to do so. Mrs. Polly told this witness she wanted a lawyer, and that she wanted to go to Scottsbluff. This witness testified that Mrs. Polly did not seem to know where she was or what house she was in. On one occasion Mrs. Polly went for a walk with this witness. At that time Mrs. Polly said that she was tired of that woman (meaning Mrs. Cook) telling her what to do; that she wanted to go home with this witness; and that she wanted a pickup truck and an attorney. She said: "Oh, Donna, I am afraid it is too late. * * * I am afraid they got my money * * * we have got this money back here and I could have a trust deed because if I signed any papers to get my money back here, I did not know what I was doing, * * *." This witness further testified that she had difficulty in getting Mrs. Polly to return to the Cook home. On another occasion Mrs. Polly objected to being watched by persons around the Cook home, stated she was unable to carry on a conversation in private with

any person, and asked this witness to take her away from the Cook home. She told this witness to drive up the street with her automobile and she would come out. At that time Mrs. Cook did not want Mrs. Polly to come out, but she did. Mr. Cook came out with his cane and ordered this witness off. This witness said she could talk to her aunt on the street, and Mr. Cook said that he would get the law.

Mrs. Cook testified on rebuttal that Mrs. Ketchmark angered her; that she opened the door and Mrs. Ketchmark pushed Mrs. Cook aside and said she wanted to talk to her Aunt Rett; that she used bad language and talked loud; and that Mr. Cook told her that if she didn't use different language she could leave and she said she would leave when she got ready. Mrs. Cook further testified that Mrs. Polly was upset by this incident.

There is evidence on the part of Mr. and Mrs. Boyd McKenzie to the effect that they were acquainted with Mrs. Polly and visited her quite often in Scottsbluff. They took her to and from church and did other favors for her. They were friendly with her and liked her very much. Mrs. Polly called on them several times for certain things that she would like to have done, and they complied with her requests.

As heretofore set out, there is evidence to the effect that Mrs. Polly was not permitted to be with any of her other relatives for any period of time without being observed by Mrs. Cook or members of her family; that on at least two occasions she requested the services of an attorney to help her get out of the Cook home because she was being dominated by Mrs. Cook and was under her control; and that in the spring of 1960, according to the testimony of Mrs. Hamilton and her daughter Mrs. Peterson, Mrs. Polly stated that she had remembered her nephews and nieces in her will, meaning the will that was executed at Scottsbluff. There is evidence that in this will she included two friends of

hers living in Gering who had done many favors for her for a period of 5 or 6 years and who were eliminated from the will here in controversy. There is evidence that Mrs. Cook was practically a stranger to her aunt, Mrs. Polly, and was appointed conservator of her property within a few days after Mrs. Polly arrived at the Cook home, and then 16 days thereafter Mrs. Polly executed the will here in controversy.

The evidence in its entirety was for the jury to consider on the issue of undue influence.

The proponent predicates error on the trial court giving instruction No. 12. This instruction is as follows: "In a will contest, the fact that a will is unnatural, unreasonable or unjust in distribution of testator's property is a circumstance to be considered by jury in connection with other evidence bearing on question whether the will is the result of undue influence."

Under the evidence and the circumstances developed in this case, we conclude that this instruction is not prejudicially erroneous.

The proponent contends that there was abuse of discretion on the part of the trial court when he addressed the jury and then questioned Emmett Hughes. No objections were made by the proponent to the questioning of this witness by the trial court at any time. The questions propounded to this witness were to the effect that he was not contesting this will and had no interest in the outcome of this case. We find no prejudicial error as contended for by the proponent.

The proponent contends that the trial court committed error in not permitting a witness to testify to a conversation when an attorney was present. On direct examination Roy Hughes stated that while he and other of the contestants were in Grand Island with Mrs. Cook and Mrs. Polly at the home of Mrs. Cook's daughter, Mrs. Polly made the remark: "I need help, get me out of here." Mrs. Cook testified on rebuttal that after they were there Mrs. Polly asked to contact her attorney

and did so by telephone, and as a result her attorney came to Grand Island a day or two later and had a conversation with Mrs. Polly in the presence of Mrs. Cook. The trial court sustained objection to this conversation on the grounds that it was a privileged communication between the client and attorney.

In Short v. Kleppinger, 163 Neb. 729, 81 N. W. 2d 182, the court said: "Communications between attorney and client made in the presence of others do not constitute privileged communications within the meaning of sections 25-1201 and 25-1206, R. R. S. 1943. It is only communications which are confidential that are protected."

The proponent made no offer of proof as to what the conversation was.

This court has held in Bland v. Fox, 172 Neb. 662, 111 N. W. 2d 537: "When on direct examination an objection to a question is interposed by the adverse party and sustained, there must be an offer of proof of the facts sought to be put in evidence by the question in order to present the ruling to this court for review."

We believe the contention of the proponent is without merit. In any event, there was no prejudicial error in the ruling of the trial court on this evidence.

In the light of the evidence and the authorities heretofore cited, we conclude that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

THOMAS R. KARPISEK ET AL., APPELLEES, V. CATHER & SONS CONSTRUCTION, INC., ET AL., APPELLANTS.
117 N. W. 2d 322

Filed October 12, 1962. No. 35245.

1. **Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining

the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

2. Nuisances. Where one's business operation as conducted materially and injuriously affects the comfort and enjoyment and property rights of those in the vicinity it becomes a nuisance and may be enjoined.
3. ———. If a private person suffers special and peculiar damage to himself and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction.
4. ———. In order for a private individual to maintain an injunction suit to abate a public nuisance the injuries sustained by the plaintiff must differ not merely in degree but in kind from those suffered by the members of the community.
5. ———. The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance; and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief.
6. ———. It is proper to take into consideration all the injuries and losses caused by the nuisance, such as the depreciation in the market or rental value of plaintiffs' property, the discomfort, annoyance, and inconvenience in the use thereof.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed as modified.

Charles W. Phillips and Lawrence E. Murphy, for appellants.

Davis, Thone, Bailey & Polsky, for appellees.

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

BROWER, J.

This is a suit in equity brought by the plaintiffs Thomas R. Karpisek and Clara A. Karpisek, who are husband and wife, against the defendants Cather & Sons Construction, Inc., and Robert H. Cather, Howard J. Cather, and Howard B. Cather, individually and jointly, in the district court for Lancaster County, to enjoin

them from operating an asphalt plant, and for damages.

Plaintiffs' petition alleges they own two residential properties in Havelock, now Lincoln, Lancaster County, Nebraska, described as Lot 11, Block 39, and Lot 2, Block 66 therein; that Cather & Sons Construction, Inc., is a corporation of which Howard B. Cather is president, Howard J. Cather is vice president, and Robert H. Cather is secretary-treasurer; that the individual defendants are the owners of Block 37, Havelock, in said city of Lincoln on which the asphalt plant is situated and in its operation all the defendants are individually and jointly interested. It sets out that the plant is located approximately 300 feet from plaintiffs' premises; that operations commenced in the spring of 1960 and except in winter it is run during certain parts of the week, and that while operating it emits large amounts of dust, silicon dioxide, and residue which contaminates and pollutes the air around plaintiffs' residence, causing annoyance and damage in several respects pleaded, and which are mentioned hereafter in the discussion of the evidence. It alleges this constitutes a nuisance. The petition prays for damages to plaintiffs' property and that the nuisance be enjoined.

Defendants' answer admits that the individual defendants own the real estate upon which the asphalt plant is located, are officers of the defendant corporation, and that all the defendants have an interest in the operation of the plant. They allege that the plant is located in an industrial area and that it was not operated so as to constitute a nuisance. The rest of the answer is in effect a general denial.

A trial was had in the district court which resulted in a judgment for $150 damages and a permanent injunction enjoining the defendants from operating said plant in such a manner that particles of sand, silicon, or other material coming from the operation are carried onto any part of the plaintiffs' premises.

From an order overruling their motion for a new

trial, the defendants have appealed to this court.

Defendants assign as error, so far as necessary to the determination of the matters presented, that the trial court erred in finding for plaintiffs contrary to the law and the evidence; in finding the plaintiffs to have been damaged in the sum of $150; in finding defendants' acts constituted a nuisance, for which plaintiffs were entitled to injunctive relief; and in finding that when the wind was from the south, southwest, or southeast, particles of gravel and silicon were carried into the atmosphere surrounding plaintiffs' properties.

An examination of the evidence discloses that the defendants' plant is erected on their land directly south of the Burlington Railroad tracks. It is zoned for industrial purposes only. South and east of their premises is an area zoned for residential, school, church, park, and playground purposes where plaintiffs' property is located. Plaintiffs' residential property is about 300 feet south of the asphalt plant facing south on Morrill Street which is paved. Their other premises directly across Morrill Street to the south and facing north are rented.

Manufacture of asphalt requires the asphalt to be mixed with crushed gravel. The gravel is piled on the premises near the plant. The asphalt is heated to a temperature between 270° and 315°. The gravel is then lifted up and tumbled through a dryer which heats it to 300° or 350°. There is an exhaust stack leading from the dryer. A fan located in it pulls off the dust and steam that is taken from the gravel in drying. Some sand must be added to the mixture as a stabilizer. After going through the dryer the aggregate goes through a bin where it is measured and drops into a mixer containing hot asphalt. It is then placed in trucks and hauled away.

Defendants maintain, and introduced evidence tending to show, that dust from unpaved streets and parking lots in the locality surrounding the plaintiffs' prem-

ises, and not the asphalt plant, caused the pollution of the air over the plaintiffs' property. They claim it was colored differently than any emission from the plant. However, it plainly appears that when the defendants' plant started operations in the spring of 1959, there were dust problems. From the stack, and to a certain extent from the two ends of the dryer, dust escaped. This arose in part because of the softness of the mix. At any rate too much dust was escaping.

In May 1961, after complaints had been made from the neighboring householders, a cyclone dust collector was added and in August 1961, a wet wash dust collector was installed.

Before the installation of the wet wash dust collector, plaintiffs' suit was started in June 1961. Although there is some conflict and dispute in the evidence, it seems clearly to substantiate that previously to that time dust settled over a considerable portion of the residential district within at least 2 or 3 blocks of the defendants' asphalt plant. It covered the yards with dust to an extent that plaintiffs could not use the out-of-doors and it was annoying if they attempted to do so. On sweeping a porch or walk an accumulation of a considerable quantity of dust could be obtained. A witness testified he was ashamed to have visitors. It infiltrated their homes and clothing, and settled on the floors, bedding, furniture, and rugs. Windows had to be kept closed. The washings hanging on the line were soiled and cars which were washed had to be rewashed. Buildings that were painted had sand blown on them. The sides of other homes had to be scrubbed because the substance was sticky. Children couldn't play out-of-doors. Their eyes teared and became red and burned. It irritated their throats. A complaint was filed on May 15, 1961, against the defendant corporation in the municipal court of Lincoln for the operation of its plant because of the emission of dust and silica detrimental to public health constituting a public nuisance. On the

trial it was found guilty and fined $100 and costs. The matter was appealed to the district court but when this case was tried the fine had been paid by the company.

After the installation of both the cyclone-type dust collector and water wash, which was procured at a cost of approximately $6,000, the testimony is in irreconcilable conflict as to whether the plant continued to discharge the substances. The defendants' witnesses, including experts on air pollution and the individual defendants and employees, testified the discharge was eliminated. The witnesses for the plaintiffs, however, stated that though there was an improvement it was still quite annoying. An expert for defendants testified he could feel particles hitting his eyes when 50 to 75 feet from the plant. Others living at a greater distance from the plant stated they were still bothered by the same material which got onto their washing and covered the tops of the cars. One said he washed his car and had to do it over again because of it. A newly painted board exposed for a short period had fine particles collected thereon which the plaintiffs' witness testified came from the plant.

In this action the trial court heard and observed the witnesses and its decision indicates it placed credence on the testimony of the plaintiffs' witnesses with respect to the continuance of the discharge of the annoying substance from defendants' plant. "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." Olson v. Fedde, 171 Neb. 704, 107 N. W. 2d 663.

Because the evidence is so conflicting and irrecon-

cilable in this particular, this court is constrained to follow the decision of the trial court holding that the condition continued even after the installation of the devices to alleviate it.

The plaintiffs' evidence clearly shows the comfort and enjoyment of their own premises have been substantially interfered with. Where one's business operation as conducted materially and injuriously affects the comfort and enjoyment and property rights of those in the vicinity it becomes a nuisance and may be enjoined. Sarraillon v. Stevenson, 153 Neb. 182, 43 N. W. 2d 509, 18 A. L. R. 2d 1025.

The operation of an asphalt plant was held in City of Omaha v. Hugh Murphy Construction Co., 114 Neb. 573, 208 N. W. 667, to constitute a nuisance and its continued operation under conditions much as disclosed here was in that case enjoined. In that case the action was maintained by the city of Omaha.

The defendants in the case before us maintain that in the instant case the action is brought by a private individual; that the nuisance complained of is a public one; and that a private individual cannot maintain the action in such a case. Under the evidence in this case if it be conceded without deciding that the nuisance is a public one, this court has repeatedly held in such cases that if a private person suffers special and peculiar damage to himself and independent of any damage sustained by the public at large, a court of equity will grant him relief by injunction. Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513.

Defendants assert that this rule does not apply to the instant case because of the past decisions of this court. They cite to this effect Ayers v. Citizens Ry. Co., 83 Neb. 26, 118 N. W. 1066, Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808, and other cases holding that in order for a private individual to maintain an injunction suit to abate a public nuisance the injuries sustained by the plaintiff must differ not merely in

degree but in kind from those suffered by the members of the community.

The defendants' argument in this respect seems to be that the residents of the homes and buildings within a radius of several blocks of defendants' plant have suffered the same annoyance and interference with their property as the plaintiffs. They claim the only difference is that those whose premises are closer to the alleged nuisance have suffered more in degree and those further in a lesser degree only. This argument we cannot accept. Patently much of the larger community, including portions of the area shown on the photographs introduced by the defendants, suffered nothing whatever from the material emitted from defendants' plant. That more than one, or in fact a considerable number closer to it, had the use and enjoyment of their property curtailed and restricted in the manner described does not mean that each of them have not received injury which differed in kind and not merely in degree from the community generally. If the holding urged were the rule, any nuisance affecting more than a small part of a community would have to be borne without injunctive remedy on behalf of those materially injured unless the public authorities act. "The number of the persons who are specially injured by a nuisance does not affect the right of action for such injury or make their injury identical with that of the public at large, but any of such persons may maintain an action for the nuisance; and the fact that several persons join in a suit to abate a public nuisance does not show that each of them may not have sustained such special injury as entitles him to relief." 66 C. J. S., Nuisances, § 79, p. 835.

We conclude the operation of the defendants' plant constituted a nuisance and that the plaintiffs suffered special injury from that operation which was peculiar to them and different in kind from that sustained by the public at large. Under the circumstances the plain-

tiffs could properly bring the action, and the trial court's judgment granting the injunction was proper. It is to be noted it did not enjoin the operation of the plant if it could be run without particles of sand, silicon, or other materials being carried onto any part of plaintiffs' premises.

Defendants' assignment of error that the damages were improperly allowed is without merit. The plaintiffs both testified that the annoyance and inconvenience hitherto set out affected them and their family and that of their tenant. The dust penetrated and settled on everything in their yards. Thomas Karpisek said at times it was one-sixteenth of an inch deep. He stated he painted his home and it settled on the paint and he was only able to get a portion of it off. Plaintiffs' rental property across from the home was bought in October 1960. Since then it was rented for $75 and but for debris from defendants' plant could have rented for $90. He stated his home property had depreciated in value several thousand dollars. The damages allowed were adequately proved and are in fact quite nominal. It is proper to take into consideration all the injuries and losses caused by the nuisance, such as the depreciation in the market or rental value of plaintiffs' property, and the discomfort, annoyance, and inconvenience in the use thereof. 66 C. J. S., Nuisances, § 170, p. 974. See, also, Walling v. City of Fremont, 138 Neb. 399, 293 N. W. 226.

The defendants assign as error that the trial court in its findings found that when the wind is from the "south, southwest, or southeast" particles of gravel and silicon were carried onto the plaintiffs' premises. An examination of the evidence discloses that the plaintiffs testified that their premises were subject to the debris when the wind was from the "north, northwest, or northeast" instead of a southerly direction. The testimony of other witnesses whose premises were northerly from the plant was to the effect they and not the plaintiffs were bothered by the southerly winds. The evi-

dence however clearly shows the injunction granted was justified and that the direction of the wind which caused the silicon to be carried onto the plaintiffs' premises was erroneously recited in the judgment. The other findings justified the judgment in any event. This case having been tried here de novo, the record in that respect, however, should be corrected.

In all other respects the judgment should be affirmed. The costs should be borne by the appellants.

AFFIRMED AS MODIFIED.

SKY HARBOR AIR SERVICE, A CO-PARTNERSHIP, ET AL., APPELLANTS, V. AIRPORT AUTHORITY OF THE CITY OF OMAHA, APPELLEE.

117 N. W. 2d 383

Filed October 19, 1962. No. 35178.

1. **Landlord and Tenant.** In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property.
2. **Contracts.** The meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it.
3. ———. General and specific words, capable of analogous meaning, when used together, take color from each other so that general words are restricted to a sense analogous to the less general.
4. ———. A practical construction put upon a contract by the parties cannot control the express, unambiguous provisions of the instrument.

Appeal from the district court for Douglas County: ROBERT L. SMITH, Judge. Affirmed.

Shrout & Foley, for appellants.

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Edward M. Stein, Sebastian J. Todero, and Frederick S. Geihs, for appellee.

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

BOSLAUGH, J.

This is a proceeding under the Declaratory Judgments Act for the construction and interpretation of a written lease. The plaintiffs are Sky Harbor Air Service, a partnership, and Robert E. O'Connor, its receiver. The defendant is the Airport Authority of the City of Omaha, Nebraska.

The defendant has the control and management of Eppley Airfield. Sky Harbor Air Service is engaged in a general aviation business at Eppley Airfield. It conducts a business described as a fixed base operation upon property leased from the defendant. As such it sells airplanes, parts, and gasoline; stores and repairs airplanes; teaches flying; runs a charter service; and does everything generally in the aviation business except manufacturing.

The lease in question was executed on March 9, 1956, by the city of Omaha as lessor and Sky Harbor Air Service as lessee. In 1959 the defendant succeeded to the rights and obligations of the city under the lease. On June 21, 1961, Robert E. O'Connor was appointed receiver for Sky Harbor Air Service which had been dissolved as of March 31, 1961, by a judgment of the district court for Douglas County, Nebraska.

The controversy between the parties concerns the liability for repairs to the buildings and ramps upon the leased property. The buildings involved are an office building and two hangar buildings. The ramps are the grounds adjacent to the buildings which have been surfaced with a thin asphalt coating. The repairs which became necessary were the result of the normal exposure of the property to the weather. The district court held that it was the duty of the lessor to replace or repair damage by the elements only where the action of the elements was sudden, unexpected, or unusual and that the plaintiffs were liable for the repairs in question. The plaintiffs' motion for new trial was overruled and they have appealed.

In the absence of an express covenant or stipulation a lessor is not bound to make repairs to leased property. Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648. Thus, the question is whether the lessor assumed the duty that otherwise rested upon the lessee.

The lease in question contained the following provisions:

Article III, paragraph 1: "Lessee agrees, at its own expense, to cause the lands demised to be maintained in a presentable condition consistent with good business practice."

Article III, paragraph 8: "Lessee agrees, at its own expense, to cause to be kept and maintained all structures on the leased premises in good repair during the term hereof except as provided for in Article V, paragraph 8."

Article V, paragraph 8: "Lessor shall replace or repair any land, building or structure totally or partially damaged by fire, the elements, floods, tornadoes, or any other casualty of any kind whatsoever, or by any act of a public enemy, or by any act of God. In connection herewith, Lessor covenants to carry fire insurance and other necessary insurance. In the event that the lands demised, or any or all of the structures or buildings thereon, become untenantable for any reason, or in the event that the airport is rendered unusable to Lessee because of conditions thereof, for any reason, the Lessee shall not be liable for any rental during the period which said land, structure, or building is untenantable, or said airport is unusable."

The plaintiffs concede that paragraphs 1 and 8 of Article III place a general duty of maintenance and repair upon the lessee, but contend that paragraph 8 of Article V creates an exception with respect to any damage caused by the elements. The plaintiffs construe paragraph 8 of Article V to be a covenant by the lessor to assume the duty of maintenance and repair of all damage caused by the natural forces of nature, ordi-

nary as well as extraordinary. The effect of such a construction would be substantially to nullify the obligation of the lessee to keep and maintain all structures in good repair because most of the repairs that become necessary are the result of the action of the weather upon the property.

Unless otherwise qualified, paragraphs 1 and 8 of Article III place the duty of maintenance and repair of all damage, including that resulting from fire, acts of God, floods, tornadoes, and similar unusual occurrences, upon the lessee. We think that the purpose of the first sentence of paragraph 8 of Article V is to relieve the lessee from the burden of repairing the damage resulting from such unusual occurrences and not to excuse the lessee from the burden of repairs made necessary by the normal action of the weather upon the property. See 32 Am. Jur., Landlord and Tenant, § 795, p. 678.

The word "elements" is used with fire, floods, tornadoes, acts of a public enemy, and acts of God. The meaning of a doubtful word may be ascertained by reference to the meaning of the words associated with it. Behrens v. State, 140 Neb. 671, 1 N. W. 2d 289. General and specific words, capable of analogous meaning, when used together, take color from each other so that general words are restricted to a sense analogous to the less general. O'Gara Coal Co. v. Chicago, M. & St. P. Ry. Co., 114 Neb. 584, 208 N. W. 742. Thus, "elements" as used in paragraph 8 of Article V of the lease refers to a sudden, unexpected, or unusual action of the elements.

The plaintiffs produced evidence showing that before the defendant assumed control of Eppley Airfield, the lessor maintained and repaired the buildings and ramps at its expense. The plaintiffs contend that this evidence established a practical construction of the lease by the parties and that it is binding upon the defendant.

The interpretation or construction of an indefinite or ambiguous contract by the parties may be shown, but

a practical construction put upon a contract by the parties cannot control the express, unambiguous provisions of the instrument itself. James Poultry Co. v. City of Nebraska City, 135 Neb. 787, 284 N. W. 273. The lease in question in this case is not so indefinite or ambiguous that a practical construction by the parties is controlling.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

LAURA OMEY, APPELLEE, V. LEROY G. STAUFFER ET AL., APPELLANTS.

117 N. W. 2d 481

Filed October 19, 1962. No. 35229.

1. **Trial: Appeal and Error.** A failure to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not, is prejudicial error.
2. ———: ———. Instructions which are inconsistent and tend to mislead and confuse the jury are erroneous and prejudicial.
3. ———: ———. An instruction on the burden of proof which fails to inform the jury as to what its verdict should be in the event the evidence is equally balanced or preponderates in favor of the defendant is prejudicially erroneous.
4. **Automobiles: Municipal Corporations.** A municipal ordinance which decreases the speed limit from that otherwise prescribed by statute is effective only when appropriate signs giving notice thereof have been erected. § 39-7,108, R. R. S. 1943.
5. **Automobiles: Trial.** An instruction relating to the duty to give an appropriate signal before turning a motor vehicle from a direct course upon a highway is incomplete if it fails to instruct as to the signals which are authorized and required.
6. **Trial: Appeal and Error.** The giving of an oral instruction to the jury in regard to the principles of law applicable to the case and to the evidence, without a waiver of the statutory requirement that it be in writing, is reversible error.
7. **Infants.** The guardian ad litem of an infant litigant is entitled to an allowance of reasonable compensation for his services to be taxed as costs.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Reversed and remanded.

Munro, Parker & Munro, C. Morris Gillespie, and Baylor, Evnen, Baylor & Urbom, for appellants.

Richard A. Dier, for appellee.

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

BOSLAUGH, J.

The plaintiff, Laura Omey, commenced this action against the defendants, LeRoy G. Stauffer and Henry C. Lubeck, to recover damages resulting from injuries which she received when she was struck by an automobile operated by Stauffer. The jury returned a verdict in favor of the plaintiff and against both defendants. Their motions for new trial were overruled and both defendants have appealed.

The accident happened on December 28, 1960, in Kearney, Nebraska, near the intersection of Twenty-fifth Street and Avenue I. The plaintiff was walking to the west on the sidewalk on the north side of Twenty-fifth Street. The defendants were both driving east on Twenty-fifth Street. Twenty-fifth Street is a four-lane arterial street and is U. S. Highway No. 30 at the place where the accident happened. Between intersections the eastbound traffic lanes are separated from the westbound traffic lanes by a concrete median strip. Most of the surface of the street was icy and covered with packed snow.

Lubeck intended to stop at a place of business on the north side of Twenty-fifth Street and made a left turn at the intersection of Avenue I. Stauffer, who was behind the Lubeck automobile, turned to the left to avoid a collision with the Lubeck automobile. Stauffer lost control of the automobile he was operating. It slid through the intersection, across Twenty-fifth Street, and onto the sidewalk where it struck the plaintiff who was

a pedestrian. The plaintiff was struck at a point approximately 200 feet east of the intersection.

From our examination of the record we have determined that the judgment must be reversed and the cause remanded for a new trial. For that reason, only those errors assigned which require a reversal or which are likely to occur upon the retrial are discussed in this opinion.

The defendants' principal assignments of error relate to instruction No. 1 which was as follows:

"You are instructed in this case to return a verdict for the plaintiff, Laura Omey, for the damages she sustained in the accident of December 28th, 1960, when she was struck by a car driven by the defendant Leroy G. Stauffer.

"You have two duties in this case. The first is to fix the liability upon either the defendant Leroy G. Stauffer individually, or the defendant Henry C. Lubeck individually, or upon both of them jointly. The second is to fix the amount of damages sustained by the plaintiff.

"If you find from the greater weight of the evidence that the sole proximate cause of the accident was the negligence of the defendant Leroy G. Stauffer in any one or more of the following particulars:—

> "1. That the defendant Stauffer drove his car too fast for the condition of the highway,
>
> "2. That the defendant Stauffer did not maintain a reasonable and proper lookout for either the defendant Lubeck's automobile or for said plaintiff,
>
> "3. That the defendant Stauffer did not maintain reasonable and proper control of his car at a time when defendant Lubeck was signaling and preparing to make a left turn on 25th Street,

than (then) your verdict will be against the defendant Leroy G. Stauffer only.

"If you find from the greater weight of the evidence that the sole proximate cause of the accident was the negligence of the defendant Henry C. Lubeck in any

one or more of the following particulars:—

"1. That the defendant Lubeck made a left turn from the right lane of traffic on a four-lane street,

"2. That the defendant Lubeck failed to approach said intersection in the lane of traffic nearest to the center line before he made his left turn, contrary to the ordinances of the City of Kearney,

"3. That the defendant Lubeck turned to the left without continuously giving a signal of his intention to turn to the left for the last fifty feet his vehicle traveled before turning.

"4. That the defendant Lubeck turned his vehicle from the direct course of travel on the street when such movement could not be made with reasonable safety,

"5. That the defendant Lubeck failed to maintain a proper lookout,

then your verdict will be against the defendant Henry C. Lubeck only.

"If you find from the greater weight of the evidence that both of the defendants were guilty of one or more of the acts of negligence charged against them as set forth foregoing, which negligence combined to produce plaintiff's injuries, then the parties so concurring in such negligence and bringing about the result are jointly and severally liable for the injuries so proximately caused regardless of the degree of negligent participation of each defendant, and if you so find then your verdict must be against both the defendant Stauffer and the defendant Lubeck."

Instruction No. 1 is subject to criticism on several grounds. It does not state clearly whether proximate cause is the only issue submitted to the jury or whether the negligence of the defendants is also submitted to the jury. In this respect the instruction was confusing. By directing the jury to return a verdict for the plaintiff but at the same time instructing it that it could find for either one of the defendants, the instruction was in-

consistent. If the jury had a right to find for either defendant, then it necessarily had the right to find for both defendants but the instruction did not permit such a finding. In effect, the court instructed the jury that one or both of the defendants were guilty of negligence as a matter of law which was the proximate cause of the plaintiff's injuries, but that it was up to the jury to decide which defendant or whether both defendants were guilty of the negligence which was the proximate cause of the plaintiff's injuries. This was erroneous and prejudicial.

The trial court did not give a general instruction on the burden of proof. Instructions Nos. 1 and 8 referred to the greater weight of the evidence and that term was defined in instruction No. 2. There was no instruction as to the finding to be made if the evidence was evenly balanced or preponderated in favor of one or both defendants. An instruction on the burden of proof which fails to inform the jury as to what the verdict should be in the event the evidence is evenly balanced or preponderates in favor of the defendant is prejudicially erroneous. See, Fitzsimons v. Frey, 153 Neb. 124, 43 N. W. 2d 531; Kristufek v. Rapp, 154 Neb. 343, 47 N. W. 2d 923.

The trial court instructed the jury that an ordinance of the city of Kearney, Nebraska, established a speed limit of 35 miles per hour on Twenty-fifth Street from Avenue A to Avenue T. Complaint is made because the trial court failed to instruct the jury that the ordinance contained a further provision limiting the speed of motor vehicles to 15 miles per hour while traversing intersections.

The evidence is that the speed limit posted on Twenty-fifth Street was 35 miles per hour. Although local authorities are authorized to increase or decrease speed limitations within their respective jurisdictions from those otherwise prescribed by statute, subdivision (5) of section 39-7,108, R. R. S. 1943, provides that a de-

crease shall be effective only when appropriate signs giving notice thereof are erected. Under the circumstances of this case we think it was proper for the trial court to omit any reference to the provision of the ordinance relating to the speed limit while traversing intersections.

The trial court also instructed the jury in reference to the requirement that an appropriate signal be given before turning a vehicle from a direct course upon a highway. The court failed to instruct as to the signals which are authorized and required by the statute. See §§ 39-7,115, 39-7,116, and 39-7,117, R. R. S. 1943. In the absence of an instruction as to the signals which are authorized and required by the statute, the jury would be unable to make an intelligent finding as to whether there had been a compliance with the statute.

The trial court submitted three forms of verdict to the jury. One form permitted a finding as against the defendant Stauffer only. A second form permitted a finding as against the defendant Lubeck only. A third form permitted a finding as against both defendants. Apparently the jury was not satisfied with the forms of verdict which were submitted because some of the members of the jury wanted to fix the damages as between each defendant.

A statement dictated into the record by the district judge at the hearing upon the motions for new trial shows that the jury during its deliberations twice requested a different form of verdict. On each occasion the trial court orally informed the jury that the form of verdict which had been requested could not be given to it. On one occasion the trial court told the jurors that they had deliberated for 6 hours, that they should try to arrive at a verdict, and that they were as capable as anyone else of making a decision in the matter. The above took place at the door of the jury room with the trial court standing in the courtroom and the jury in

the jury room. It took place out of the presence of the parties, their attorneys, and the court reporter.

Our statute requires that all instructions to the jury be in writing unless the requirement is waived in open court. § 25-1111, R. R. S. 1943. The statute further provides that no oral explanation of any instruction shall be allowed. § 25-1115, R. R. S. 1943. In Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 74 A. L. R. 5, the jury had been furnished two forms of verdict, one permitting a finding against one defendant and the second permitting a finding against both defendants. During its deliberations, the jury requested permission to apportion the damages as between the two defendants. Out of the presence of the defendant who appealed, or his counsel, but in the presence of the court reporter, the trial court advised the jury that if it found against both defendants it could not apportion the damages. This court held that the remarks of the trial court amounted to an oral instruction which was prohibited by the statute and was reversible error. See, also, Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59, in which it was held that an oral instruction to the jury out of the presence of the parties or their attorneys as to the manner of preparing a verdict, as to the intent of the court as to the content of a form of a verdict in blank supplied, and the effect of it with the blank or blanks filled out and returned by the jury was reversible error.

The defendants complain that instruction No. 9 was erroneous in that it permitted the plaintiff to recover an amount greater than her actual loss. The instruction permitted the plaintiff to recover the difference between the amount she would have been able to earn if she had not been injured and the amount she will be able to earn in the future. The defendants argue that the amount which the plaintiff actually earned since the accident should be excluded from the amount which the jury might find that the plaintiff will be able to earn. Although the amount involved was relatively small, the

instruction should have been worded so that any recovery was limited to the loss sustained.

The trial court appointed Robert A. Munro as guardian ad litem for the defendant Stauffer who is a minor 16 years of age. After the trial had concluded, the guardian ad litem made an oral application in open court for an allowance of fees as compensation for his services as guardian ad litem. After hearing evidence in support of the application the trial court made no allowance of fees to the guardian ad litem.

The appointment of a guardian ad litem in this case was proper. The statute provides that the defense of an infant must be by a guardian for the suit. § 25-309, R. R. S. 1943. It is the duty of every attorney to act as the guardian of an infant defendant when appointed by the court and as such he is entitled to such compensation as the court shall deem reasonable. § 7-113, R. R. S. 1943.

The matter of the appointment and the compensation of a guardian ad litem for a minor defendant in a case such as this is discussed fully in the opinion of this court in Peterson v. Skiles, 173 Neb. 470, 113 N. W. 2d 628. The trial court was in error in not allowing reasonable compensation for the guardian ad litem in this case to be taxed as costs.

The judgment of the district court is reversed and the cause remanded for a new trial and for further proceedings in conformity to this opinion. The guardian ad litem is allowed a fee of $200 for his services in this court to be taxed as a part of the costs.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. CARL NORWOOD, APPELLANT.

117 N. W. 2d 373

Filed October 19, 1962. No. 35257.

Appeal and Error. Under the provisions of section 29-611, R. R. S. 1943, there are no exceptions to the right of appeal provided for therein where the appeal is taken within the time and in the manner and form required in the statute.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Reversed and remanded.

William G. Line, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

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

SIMMONS, C. J.

This is an appeal from an order of the district court dismissing an appeal from the county court in a misdemeanor case.

We reverse the judgment of the district court and remand the cause.

The cause is here on a transcript.

The difficulty here is that the transcript does not present the record upon which the appellant and appellee rely.

The transcript shows that the defendant was complained against in county court for driving a motor vehicle while under the influence of alcoholic liquor, which allegedly occurred on July 4, 1961. There was also an allegation that it was a second offense. Complaint was filed July 7, 1961. July 7, 1961, defendant filed an appearance bond. July 18, 1961, defendant filed a request for trial by jury. August 16, 1961, the county attorney selected a jury. August 18, 1961, the matter came on for trial on a plea of not guilty. The same

day, the jury brought in a verdict of guilty. The matter was then continued to August 22, 1961, "for determination of prior offenses." The court found the defendant was guilty of a prior offense. Defendant was sentenced to 5 days in jail, his driver's license suspended for 1 year, and that he pay a fine of $300 and costs "and stand committed until said fine and costs are paid and said sentence is served." A mittimus was issued and delivered to the sheriff.

August 28, 1961, defendant gave notice of appeal and appeal bond was fixed and furnished in the sum of $500.

The county judge certified that the above was a true and correct record "of all proceedings had and done" in the action. He "transmitted" seven exhibits which he certified were all the original papers in the action. They do not appear in the transcript.

The State moved for a dismissal of the appeal for four reasons. It alleged (1) that defendant had been found guilty of second offense driving while under the influence of alcoholic liquor, sentenced, fined, and his driver's license suspended (this, obviously, is not a reason for dismissal); (2) that on August 22, 1961, the defendant surrendered his driver's license which was forwarded to the Department of Motor Vehicles by the county judge (nothing appears in the transcript to sustain that allegation); (3) that on August 22, 1961, defendant began serving the 5-day jail sentence which was completed on August 27, 1961; and (4) that on August 28, 1961, defendant "began laying out" the $300 fine imposed.

As to reasons (3) and (4), this record shows only a mittimus issued on August 22, 1961, and an appeal bond furnished on August 28, 1961.

On December 7, 1961, the motion came on for hearing in the district court, was submitted to the court, and sustained. It is from that order that defendant appeals.

The first assignment of error is that the court erred in considering the allegation that defendant had sur-

rendered his driver's license. On the record which we have here that assignment is sustained.

The second assignment is that the court erred in considering the allegation that defendant had served the 5-day sentence. On the record which we have here that assignment is sustained.

The third assignment is that the court erred in considering the allegation that the defendant "began laying out" the fine on August 28, 1961. The only thing the record shows here is that on that day defendant gave notice of appeal and furnished a required bond.

The defendant and the State argue the question as to whether the service of a part of a judgment in a criminal case results in a waiver of the right of an appeal.

The difficulty is that there is no record here which presents that question. For anything that appears in this record, defendant did not serve a split second in the jail of Dodge County, nor pay the costs nor any part of the fine. We see no reason for determining a question which is without a record to sustain it.

In Benson v. State, 158 Neb. 168, 62 N. W. 2d 522, 42 A. L. R. 2d 991, there was a plea of guilty and a sentence on the plea. Three days later defendant attempted an appeal when denied leave to withdraw his plea of guilty and have a trial. His motion was denied. He relied upon section 29-611, R. R. S. 1943, which is as follows: " 'The defendant shall have the right of appeal from any judgment of a magistrate, including justices of the peace, municipal judges and county judges, imposing fine or imprisonment, or both, * * *.' " We held that there were no exceptions to the right of appeal declared by the statute and that a conviction based on a plea of guilty was no bar to an appeal from the conviction. It would seem that a conviction based on a plea of not guilty should not be a bar.

We further held in Benson v. State, *supra:* "The statute granted the defendant the right of appeal if he perfected his appeal within 10 days. He did so in man-

ner and form required by statute. It follows therefore that no grounds existed for quashing the appeal."

That rule is a determination of the questions presented by this record.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

LEONARD A. ANSON ET AL., APPELLEES, V. JAMES R. GRACE ET AL., APPELLANTS.

117 N. W. 2d 529

Filed October 26, 1962. No. 35173.

1. **Pleading.** Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment.
2. **Fraud.** To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby.
3. **Contracts.** The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit.
4. ———. Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile.
5. **Tender.** However a tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good.
6. **Contracts.** Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself.

Appeal from the district court for Douglas County: JOHN E. MURPHY, Judge. Affirmed.

Joseph C. Byrne, for appellants.

Shrout & Foley, for appellees.

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

YEAGER, J.

This is an action by Leonard A. Anson and Christine Anson, plaintiffs and appellees, against James R. Grace and Sharon L. Grace, defendants and appellants, to strictly foreclose a written contract to sell and convey certain real estate, alleged to be in default. In the action the defendants filed an answer and counterclaim in statement of a cause of action in rescission of the real estate contract.

A trial was had to the court at the conclusion of which the cause of action of plaintiffs was sustained but strict foreclosure was denied. Instead foreclosure was adjudicated by the terms of which the defendants were granted the right to pay the balance due pursuant to the terms of the contract, and in the event of failure so to do the property was ordered sold as upon execution. The pleaded counterclaim of the defendants was dismissed.

A motion for new trial was duly filed by the defendants. This motion was overruled. From the judgment the defendants have appealed.

By the petition of the plaintiffs, to the extent necessary to state here, it was pleaded that a contract was entered into on October 15, 1959, whereby the plaintiffs sold to the defendants a certain lot with improvements thereon in Lakoma Heights in Douglas County, Nebraska, for $10,700 with payments as designated in the contract, which contract was in default. The petition was filed on December 15, 1960. The prayer was for foreclosure as indicated and the recovery of costs and disbursements.

To the petition the defendants filed what is termed "Answer and Counterclaim." In this pleading there is

no specific or general denial of the factual statement contained in the petition. In other words, there is no denial of the existence of the contract or that the payments required by its terms had not been met. This pleading was an affirmative statement of a cross action against the plaintiffs. It was filed on January 16, 1961.

By this pleading it was alleged that the contract of sale was obtained through fraud and misrepresentation made to defendants by plaintiffs as follows: That the plaintiff Leonard A. Anson was a homebuilder by occupation and that the house on the premises was constructed according to standard practices and existing specifications required by law; that the water supply for the house was located on the property and was designed, constructed, and located so as to provide a continuing supply of pure water and in accordance with standard practices and according to existing specifications required by law; and that the septic system located on the property was designed, constructed, and located so as to efficiently accommodate the sewage and waste products and according to standard practices and existing specifications required by law.

It was further pleaded that on discovery of the true conditions the defendants caused a notice of rescission to be served on the plaintiffs. A copy of this notice is attached to the pleading. It is dated November 29, 1960. This notice in pertinent part here is as follows: "You are hereby notified that the undersigned intend to and do hereby rescind the land contract entered into between yourselves and theirselves on the 15th day of October, 1959, for the purchase and sale of the following property, to-wit: * * * and that the undersigned hereby offer to reconvey such property to you and to restore everything of value which they have received from you, and to surrender the possession of said properties, and to do and perform all acts and things which might be necessary or proper in order fully to restore to you all the properties and things of value received from you, as fully

and completely as if said contract had never been made, upon the condition that you restore the moneys and things of value received as consideration for said purchase and sale, together with compensation for improvements made upon the property in reliance upon the contract."

It was alleged that the defendants converted the basement into an apartment which improvement was of the value of $1,950, and made repairs and other improvements at the cost of $449.98, the total of which was $2,399.89 (sic); that there had been paid as a down payment on the contract $2,000; that monthly payments in the amount of $909.48 had been made; that $237.33 had been paid on account of taxes; and insurance premiums in the amount of $68.26 had been paid.

The defendants prayed that the land contract be decreed to be void and rescinded; that they receive restitution of all payments made pursuant to the terms of the contract; and also that they receive the total of the money expended for the reconstruction of the basement, repairs, and improvements of the home. The total amount prayed for was $5,614.96.

It is pointed out here that neither by pleading nor evidence is it made to appear that the defendants by their notice of rescission or otherwise ever tendered back to plaintiffs the property in its condition at the time the notice was given; and likewise no offer was made to restore it to its original condition and return it.

It is true that the defendants left the premises about the time the rescission notice was given, but there is nothing to indicate that this was intended as a return or surrender of the property. The pleadings and the total effect of the evidence given by the defendants at the trial are to the contrary.

This observation at this point is deemed expedient in the determination of what was presented by the pleadings and the manner in which the case was presented for consideration at the trial.

The action, as indicated, was commenced by the filing of a petition. Also as pointed out, the defendants filed their answer and counterclaim. In that pleading there was no response to the cause of action contained in the petition. They did however set forth affirmatively a cross action the pertinent parts of which have been summarized.

Inexplicably the plaintiffs never filed any kind or character of pleading in response to this pleaded cross action. As the record stood and throughout the trial, here was an action and a cross action to neither of which was there a pleaded response. No question was raised as to this and the evidence of the parties was adduced, and the judgment rendered at the conclusion of the trial is here for review. The parties to the action obviously treated the affirmative defense to the action as denied.

The rule to be applied therefore is as follows: "Where during the trial of a cause both parties treat an affirmative defense as denied, it will be so considered in this court, although the plaintiff filed no reply either before or after judgment." Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251. See, also, Central Constr. Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817; Dinkel v. Hagedorn, 156 Neb. 419, 56 N. W. 2d 464.

As pointed out there is no allegation in denial of the cause of action pleaded by the plaintiffs. This presents no problem here since the evidence of plaintiffs sustains their right to the relief prayed and granted by the decree unless that right is defeated by sufficient proof of the pleaded cross action.

In effect the plaintiffs have denied the alleged fraud and misrepresentation; they have denied that there was within the meaning of appropriate legal principles a valid rescission by the defendants; and they have denied that the defendants were entitled to receive a judgment for damages if there has been a valid rescission.

In considering the question of fraud and misrepre-

sentation the burden of proof is on the party or parties making the charge. The rule has been stated on numerous occasions. With particular reference to false representation as a basis for rescission it is stated in Russo v. Williams, 160 Neb. 564, 71 N. W. 2d 131, as follows: "To maintain an action for rescission because of false representations the party seeking such relief must allege and prove what representations were made; that they were false and so known to be by the party charged with making them or else were made without knowledge as a positive statement of known fact; that the party seeking relief believed the representations to be true; and that he relied and acted upon them and was injured thereby." See, also, Caruso v. Moy, 164 Neb. 68, 81 N. W. 2d 826; Wegner v. West, 169 Neb. 546, 100 N. W. 2d 542.

The substance of the allegations of fraudulent representations has already been set out. As to the first there is no evidence which within the meaning of the controlling principles proved the representations to be fraudulent. One of the occupations of Leonard A. Anson was that of a homebuilder. He did build the dwelling. There is evidence of a general character as to the construction of the building, but no representation that it was done according to standard practices and existing specifications required by law. The effective conclusion of the trial court that this specification was not sustained by sufficient evidence was not erroneous.

As to the second representation it may be said that the evidence discloses that the water supply came from a well located on the property. There is no evidence of representation either that it would provide a continuing supply or that it was constructed in accordance with standard practices or existing specifications required by law. It cannot be here said that the trial court erred in denying the defendants a recovery based on this specification.

As to the remaining specification, there were conver-

sations relating to the septic system. The gist of these conversations in this area, as testified to by the defendants, was that Leonard A. Anson said that he had never had trouble and he didn't see why the defendants should have trouble, and that he was sure that the tank was sufficient. It cannot be said that the trial court erred in its conclusion that this specification was not sufficiently proved.

In the light of this it must be said that rescission of the contract in question on account of the fraud alleged was properly denied.

There is another reason under undisputed facts and established principles of law for the denial of the relief sought by the defendants under their cross action. That reason is that there was no valid and recognizable rescission by the defendants.

Certain basic principles, as follows, must have received adherence in order that it may be said that a right of rescission has been established:

"The rescission of a contract must be in toto and the parties must be placed in status quo so far as the circumstances will permit.

"Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile.

"However a tender may not be regarded as valid or sufficient, even if it appears that it would have been futile, unless it is made to appear that at the time the tender was made there was a present and immediate ability to make the tender good." Bennett v. Emerald Service, Inc., 157 Neb. 176, 59 N. W. 2d 171. See, also, Caruso v. Moy, *supra;* Wegner v. West, *supra.*

Another principle is as follows: "Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself." Wegner v. West, *supra.*

There was within the meaning of these principles no valid rescission made by the defendants. It is true that they declared a rescission, but there was no rescission of

the contract in toto, and no placement of the plaintiffs in status quo to the extent permitted by the circumstances.

The defendants never tendered or surrendered to the plaintiffs the property which was the subject matter of the contract in its condition at the time of the notice of rescission or thereafter, and never did offer to restore the property to the condition it was in at the time of the contract of sale and to return it. All that they ever did was to make a conditional offer of reconveyance stated in pertinent part as follows: "* * * and that the undersigned hereby offer to reconvey such property to you * * * upon the condition that you restore the moneys and things of value received as consideration for said purchase and sale, together with compensation for improvements made upon the property in reliance upon the contract."

For this reason also, that is, that within the meaning of law there was no valid rescission, the relief prayed by defendants was properly denied.

In view of the conclusion that the defendants have failed to sufficiently prove a right of recovery it does not become necessary to discuss the elements to be considered in arriving at what a recovery should be if a right had been established.

The plaintiffs adduced evidence sufficient, if not challenged and in the absence of a sufficiently established defense, to sustain the right to foreclose and for the amounts found by the court to be due. The defendants did not by pleading or evidence contest the amounts. The plaintiffs have not by cross-appeal raised any question in relation thereto. It is further true that the plaintiffs have accepted and do not complain of the character of the foreclosure decreed although it departs from the character prayed for in the petition.

In the light therefore of what has been disclosed by the record, the judgment of the district court should be, and it is, affirmed.

AFFIRMED.

MYRTLE ROACH, APPELLANT AND CROSS-APPELLEE, V. MELVIN ROACH, APPELLEE AND CROSS-APPELLANT.

117 N. W. 2d 549

Filed October 26, 1962. No. 35177.

1. **Divorce.** In fixing the amount of alimony and property settlement in a divorce action the court will take into consideration the estate of each party at the time of marriage, their respective contributions since marriage as well as the duration of the marriage, and the conduct of each party leading up to the divorce.
2. ———. The court may also consider the wife's loss of interest in her husband's property, and in her social standing, if any is shown, and to which party the decree was granted, their respective ages, earning ability, and condition of health, and all other pertinent facts and circumstances, and award alimony in such an amount as appears fair and equitable between the parties.
3. **Officers: Attorney and Client.** The purpose of section 23-1206, R. R. S. 1943, is to protect the public by making certain that the duties of county attorney are not influenced by private interest. Where a conflict of interest is not shown, the statute has no application.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed as modified.

Robert M. Harris and Martin, Davis, Mattoon & Matzke, for appellant.

W. H. Kirwin, for appellee.

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

CARTER, J.

Plaintiff, Myrtle Roach, by an amended petition, sought a divorce from the defendant, Melvin Roach. The trial court granted a divorce to the plaintiff and made a division of property and other allowances to the plaintiff. The plaintiff has appealed, asserting that the allowance of alimony and the division of property is wholly inadequate. The defendant has cross-appealed, asserting that the trial court erred in allowing an at-

torney's fee to plaintiff's counsel in view of section 23-1206, R. R. S. 1943.

The parties were married on June 3, 1933. Two children were born of the marriage, both of whom are of age and married. The evidence is sufficient to sustain the granting of a divorce and there is no issue raised on that question by this appeal. The parties moved to Kimball County in 1947 where they engaged in farming and ranching. They purchased a farm in Kimball County containing 640 acres, which is referred to in the record as section 15. The defendant also held a school land lease on the adjoining section 16 which appeared to be in default of the amount due thereon at the time this suit was tried. In 1948 they acquired a second farm of 640 acres in Kimball County which is referred to in the record as section 23. In 1958 the parties purchased a tract of land in Banner County containing 5.29 acres on which they operated a night club or dance hall, which is designated in the record as Lost Park.

On April 29, 1960, the parties sold section 15 to Arthur and Melva Heim for $25,600. Melva Heim is a daughter of Myrtle and Melvin Roach. The contract provided that the purchasers were to assume the $8,000 mortgage on the land and the balance of $17,600 was to be paid in annual installments of $1,000 commencing in 1968 and bearing interest at 2 percent per annum. The installments were to be divided equally between Myrtle and Melvin Roach when paid.

In April 1960, the parties sold a one-half interest in Lost Park to Eldon and Carol Garver for $5,000, Carol Garver being a daughter of Myrtle and Melvin Roach. The purchase price was to be paid in annual installments of $500, all of which were to be paid to Myrtle Roach.

Oil was discovered on section 23, which resulted in the drilling of 9 producing wells. The royalties at one time produced a much larger income than at the time of trial, but they had materially decreased because of oil depletion at the time the case was tried. The mar-

ket value of these royalties and the mineral interests reserved in sections 15 and 23 are not important here in view of their equal division between the parties by the trial court, which this court will not disturb.

During their farming operations the parties acquired much farm equipment consisting of tractors, trucks, plows, drills, combines, and other farm machinery. There is evidence that a part of this machinery was sold to Eldon Garver for the sum of $7,500. It is contended by Garver that this sale contract was terminated by mutual agreement. It is admitted that two tractors one of which is included in this sale agreement were sold for $6,315.92 and the proceeds applied in part to the payment of a joint note signed by Myrtle and Melvin Roach and other items of expense. The remainder of these proceeds amounting to $2,231 was held by agreement for the court's disposition.

By agreement of the parties the trial court appointed a receiver to collect and sell all farm equipment belonging to the parties. The receiver complied with the duties imposed on him and reported the net proceeds from this sale in the amount of $4,492.47.

There is evidence in the record that Myrtle and Melvin Roach sold certain farm machinery and equipment to Arthur Heim in 1957 for the sum of $7,150, payable $1,000 on or before December 31, 1957, and $1,000 each year thereafter until paid. There appears to be a dispute between Melvin Roach and Arthur Heim as to the amount remaining due, if any, on this contract, although it appears that at least $1,000 has been paid thereon.

There is evidence that Myrtle and Melvin Roach were the owners of approximately 80 head of cattle in early 1960. The evidence is that all cattle belonging to the parties were sold to a livestock company. On August 27, 1960, the actual amount still being held by the livestock company is $4,226.50. No other cattle were shown to exist which would be subject to consideration by the court in this action.

The parties agreed that plaintiff was to have the 1959 Oldsmobile automobile, a boat and motor, and a trailer house, owned by the parties subject to liens thereon, and defendant was to have other trucks and pickups owned by them. We will not disturb the contractual disposition of this personal property.

There is considerable evidence in this record concerning the sales of wheat raised on section 23 and under two Colorado leases. An interest in the wheat produced on the leased ground in Colorado is claimed by Eldon Garver. The actual ownership of this wheat cannot be determined from the record before us. The wheat raised on section 23 and its whereabouts or disposition is not made clear in the more than 1,800 pages of testimony we have before us. Some of it was in storage and subject to a government loan. Some was "penalty wheat" which required the deduction of penalty payments to the government. Some of it was damaged during farm storage and produced a very low price. The proceeds were used largely to pay expenses, taxes, and other indebtedness. Some of the proceeds appear to have been paid to Myrtle Roach, which money she contends was used in payment of their mutual obligations. The evidence shows that the wheat ground on section 23 had been placed in the soil bank program in 1959 for which an annual payment of $4,183.90 was being received from a government agency. Two such annual payments had been made at the time of trial on the 10-year soil bank program.

The record shows that there were 150 tons of hay on section 15 and 20 tons on section 23 belonging to the parties at the time of trial. There appears to have been a large number of farm tools and appliances left on section 15, some of which had been sold at public auction and accounted for by an auction company. The furniture on section 15 and some appliances from Lost Park were taken by Myrtle Roach and the remaining personal property at Lost Park was retained by Melvin Roach.

There are taxes and other obligations of the parties remaining unpaid.

There is evidence that Myrtle Roach inherited a tract of land in Texas. Its nature and value are not shown. The nature of the Lost Park operation is shown by the record, but the profit therefrom is speculative. The gross income from the Saturday night dances approximates $400 per dance, but the net income is not shown. There is much testimony in the record concerning the operations of the parties from 1958 to the time of trial. The keeping of books and records by the parties appears to have been of minor concern. The memories of the parties as to their business transactions are faulty. The sales of real estate and farm equipment to their sons-in-law, and the advancements of money in aiding them to get started in their farming operations, appear to have created confusion in valuing the joint assets of these parties.

At the time of this marriage the parties had few if any tangible assets. By their joint endeavors they accumulated the property they now have. The plaintiff, admittedly, worked in the fields and performed other physical labor when the occasion required. Their children are of age and married. Plaintiff is not able to sustain herself, although she has ability as a seamstress. The case appears to be one requiring an approximately equal division of the jointly-owned property. Phillips v. Phillips, 135 Neb. 313, 281 N. W. 22; Eno v. Eno, 159 Neb. 1, 65 N. W. 2d 145.

The plaintiff complains of the inadequacy of the allowance made and particularly of the alleged failure of the court to consider her immediate needs. In considering these contentions, after a review of the evidence, we think that plaintiff is entitled to a division of property and an award of alimony as follows: The plaintiff is to have all right, title, and interest of the parties in section 15, including the contract of sale to Arthur and Melva Heim. Plaintiff shall also take any and all in-

terest, if any, in the school land lease on section 16, including any proceeds therefrom for improvements in case of the forfeiture or voluntary termination of such lease. Plaintiff is awarded all household goods belonging to the parties located on section 15 and all such in her possession at the time of trial. Plaintiff is awarded the 1959 Oldsmobile automobile, the boat and motor, and the house trailer. Plaintiff is awarded a one-half interest in all oil, gas, and mineral leases or royalties on all properties owned by the parties or either of them at the time of trial. Plaintiff is awarded one-half the proceeds from the sale of cattle to the Morrison Livestock Commission Co., which amount is retained by it pending the decision of this case. The Texas property inherited by plaintiff is awarded to plaintiff. In addition thereto plaintiff shall have a judgment for alimony in the amount of $25,000, payable $1,000 on the effective date of this decree and $200 on the first day of each month thereafter until such judgment is paid. Execution is awarded for the collection of any delinquent payments on this judgment.

The defendant is awarded all the remainder of the assets of the parties, subject to the obligations of the parties incurred prior to July 8, 1960, including the $235 attorney's fee owing to Holtorf & Hansen. Such assets are to include the remaining real estate and personal property including choses of action. The obligations to be assumed by defendant are not to include the personal expenses of the plaintiff incurred during the pendency of this suit, other than those specifically allowed.

This decree includes any amount claimed by plaintiff as temporary alimony or support money. The costs of this action are taxed to the defendant including an attorney's fee of $350 for the services of plaintiff's attorney in this court.

On cross-appeal the defendant contends that plaintiff's counsel is not entitled to the award of attorney's fees made to him in the district court in the amount of

$1,750, for the reason that it is barred by section 23-1206, R. R. S. 1943. This section of the statute prohibits a prosecuting attorney from participating in a civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend. Plaintiff's attorney was the deputy county attorney of Scotts Bluff County. In the trial of the divorce action, evidence was adduced in an attempt to show adultery on the part of defendant as a ground for divorce. The crime was not established, and the trial court so found. It is the contention of the defendant that under this statute a prosecuting attorney is prohibited from accepting attorney's fees in any civil case where an attempt is made to show facts which, if established, would constitute a crime under the laws of this state.

The evidence adduced related to an act of adultery in Banner County. There is no evidence pertaining to such an offense in Scotts Bluff County. There is no evidence that a criminal prosecution for adultery was commenced, prosecuted, or investigated in Scotts Bluff County. The defendant relies upon Ress v. Shepherd, 84 Neb. 268, 120 N. W. 1132, but a reading of that case will show that the factual situation was much different than in the case at bar. In Thompson v. Thompson, 151 Neb. 110, 36 N. W. 2d 648, this court held that the purpose of section 23-1206, R. R. S. 1943, is to protect the public by making certain that the duties of county attorneys are not influenced by private interest. We fail to see how any conflict of interest could arise when the crime sought to be established occurred in a county other than where the civil suit was filed. We think the trial court properly overruled the objection of the defendant to the participation of plaintiff's counsel and the allowance of attorney's fees for his services.

The decree of the district court awarding a divorce to the plaintiff is affirmed. The award of alimony and division of property decreed by the district court is

modified in accordance with this opinion, and as so modified it is affirmed.

AFFIRMED AS MODIFIED.

WARREN H. GROSS. APPELLANT, V. DENNIS S. JOHNSON ET AL., APPELLEES.

117 N. W. 2d 534

Filed October 26, 1962. No. 35182.

1. **Automobiles: Highways.** A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it.
2. **Highways.** A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary.
3. **Automobiles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
4. ———: ———. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
5. **Highways.** The word "highway," insofar as the rules above stated are concerned, applies to streets as well as highways.
6. ———. An arterial highway is not deprived of its character or status because a stop sign on an intersecting road is temporarily displaced or otherwise rendered invisible.
7. **Negligence: Trial.** Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury.
8. **Trial.** It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses.
9. **Damages.** When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.

Appeal from the district court for Douglas County: JOHN C. BURKE, Judge. Reversed and remanded.

Kennedy, Holland, DeLacy & Svoboda, Joseph P. Cashen, and Clarence E. Heaney, Jr., for appellant.

Haney & Walsh, for appellees.

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

MESSMORE, J.

Warren H. Gross, plaintiff, brought this action in the district court for Douglas County against Dennis S. Johnson and Marvin Johnson, defendants, to recover damages for injuries sustained by the plaintiff as a result of a collision between an automobile driven by the plaintiff and an automobile driven by Dennis S. Johnson, defendant. Marvin Johnson, defendant, died during the pendency of the action and by order of the court the action was revived in the name of Eileen A. Johnson as administratrix of the estate of Marvin Johnson, deceased. The case was tried to a jury resulting in a verdict for the plaintiff in the amount of $1,998.62. The plaintiff filed a motion for new trial. The defendants, Dennis S. Johnson and Eileen A. Johnson, filed a motion for judgment notwithstanding the verdict. The plaintiff's motion for new trial and the defendants' motion for judgment notwithstanding the verdict were overruled. The plaintiff perfected appeal to this court.

The first question to determine is whether or not the evidence adduced at the trial was such that the question of the defendants' negligence or of the plaintiff's contributory negligence should have been submitted to the jury.

There is no dispute by the parties that a collision occurred on November 25, 1958, at approximately 7:50 a.m., at the intersection of Thirty-third and Hickory Streets in Omaha, between a 1958 Volkswagen automobile operated by Dennis S. Johnson and a 1956 Plymouth

automobile operated by the plaintiff; that Thirty-third Street is protected by stop signs; and that vehicles approaching the intersection on Hickory Street from the west are required to stop before entering the intersection.

The plaintiff, in his petition and the amendment thereto, alleged in the amendment that the Volkswagen driven by Dennis S. Johnson was a family-purpose automobile. The petition further alleged that the accident and plaintiff's injuries were caused solely and proximately by the recklessness and negligence of the defendant Dennis S. Johnson in the following particulars: In failing to keep a proper lookout for northbound traffic on Thirty-third Street and particularly the automobile operated by the plaintiff; in failing to keep defendants' vehicle under proper control; in failing to yield the right-of-way to the plaintiff's vehicle; in traveling at a high and excessive rate of speed; in failing to stop for a stop sign governing eastbound traffic on Hickory Street entering the intersection at Thirty-third and Hickory Streets; in failing to make timely application of the brakes on the Volkswagen that would enable the driver to avoid a collision with another automobile assuming that the driver thereof was exercising due care; and in failing to swerve or divert the course of the automobile so as to avoid a collision with the plaintiff's automobile assuming that the driver thereof was exercising due care. The plaintiff further alleged that as a direct and proximate result of the negligence of Dennis S. Johnson the resulting collision caused the plaintiff to sustain severe, painful, and permanent injuries, expenses for doctor bills, hospital bills, ambulance service, loss of wages, and damage to his automobile for which he prayed damages.

The defendants, in their amended answer, denied every allegation contained in the plaintiff's petition except the allegations of the petition admitted in such answer to be true. The defendants, in their amended answer, denied that the accident occurred as a result of

any conscious negligence on the part of the defendants. The defendants further alleged that said accident, in addition to any acts committed by the defendant Dennis S. Johnson, was due to the negligence of the plaintiff in the method and manner in which the plaintiff operated his automobile at the time and place of the collision; and that the negligence of the plaintiff was more than slight and directly contributed to the happening of the collision. The defendants prayed that the plaintiff's petition be dismissed.

The plaintiff's reply to the defendants' amended answer denied every allegation contained therein except as admitted to be true by the plaintiff's petition.

For convenience we will refer to Dennis S. Johnson as defendant. Eileen A. Johnson was the co-owner with Marvin Johnson, now deceased, of the Volkswagen driven by Dennis S. Johnson, and no further mention need be made of the defendant Eileen A. Johnson. Warren H. Gross will be referred to as plaintiff, his automobile as the Plymouth, and the automobile driven by Dennis S. Johnson as the Volkswagen.

The record shows that Thirty-third Street is 24 feet wide and Hickory Street is 24 feet wide. There are stop signs on either side of Hickory Street to protect drivers on Thirty-third Street proceeding north or south. The speed limit on both streets is 25 miles an hour. Both streets are level and straight. Thirty-third Street runs north and south, and Hickory Street runs east and west and is straight as it proceeds west from the intersection. There is a slight jog of 34 inches as Hickory Street goes in from the west which is of little consequence in this case. Hickory Street is paved with asphalt and Thirty-third Street is paved with brick. On the day of the accident the weather was cloudy and it was misting. The surface of both streets was wet. Along the west side of Thirty-third Street running south is a hedge which also runs west from the southwest corner of Hickory

Street. The height of this hedge from the level of the street is 54 inches.

A police officer connected with the traffic division investigated the accident which occurred in the intersection of Thirty-third and Hickory Streets, and made a report of the accident within an hour from the time of its occurrence. When he arrived at the scene of the accident he found the Volkswagen driven by the defendant and the Plymouth driven by the plaintiff. He testified that the Plymouth was located approximately 10 to 15 feet north of the curb of Hickory Street on Thirty-third Street, facing in a northeasterly direction. This witness ascertained the approximate point of impact of the Plymouth and the Volkswagen by debris and skid marks in the street. The skid marks were laid down by the Volkswagen and were 5 feet 6 inches in length. The debris was 7 feet 6 inches from the north curb of Hickory Street and 12 feet from the east curb of Thirty-third Street, which would be approximately at the centerline of the intersection. The skid marks extended from the west up to that point. This witness further testified that he had a conversation with the defendant. The defendant said that he applied his brakes but due to the wet street he was unable to stop. This witness also had a conversation with the plaintiff in the hospital. The plaintiff said his speed was 15 to 20 miles an hour, and that he was going north on Thirty-third Street and did not see the Volkswagen until the collision occurred. On cross-examination this witness testified that there are stop signs on the northeast and southwest corners of the intersection of Thirty-third and Hickory Streets; and that he saw no evidence that the plaintiff had applied his brakes. On redirect examination this witness testified that the defendant stated that he was eastbound on Hickory Street when he approached Thirty-third Street and slowed down but did not see anything coming until he was within 10 or 12 feet of the plaintiff's Plymouth.

The plaintiff testified that he was employed by the Missouri Pacific Railroad Company as a reclaim clerk. He was familiar with the intersection of Thirty-third and Hickory Streets, and had traveled through it regularly since August 1958. On the morning of the accident, he started to work at 7:30 a.m. He proceeded north on Thirty-eighth Street to Martha Street, then proceeded east to Thirty-third Street and then north on Thirty-third Street. He testified that there is a hedge located just inside of the sidewalk line on the southwest corner of the intersection; that the sidewalk sits back approximately 3 feet from the west curb of Thirty-third Street, and the sidewalk is 3 or 4 feet wide; that the distance between the curb line and the sidewalk is 3 or 4 feet; and that the hedge was free of foliage at the time of the accident. This witness further testified that there are trees located in the parkway between the sidewalk and the curb west of Thirty-third Street on the south side of Hickory Street. On the morning of the accident, as he neared the intersection of Thirty-third and Hickory Streets, he was traveling between 15 and 20 miles an hour. He looked first to his right (east) and then to his left (west) at the time he was 30 to 35 feet back from the intersection. He testified that when he looked to the left, or west, he could see about 90 feet, and he saw nothing coming from the west. He proceeded into the intersection at a speed of 15 to 20 miles an hour, and as he was leaving the intersection and the front of his Plymouth was close to the north curb line, he looked to the west and saw the Volkswagen coming down upon him, it being about a car length to his left, or west. The Plymouth was hit immediately on the left side at the doorpost between the front and rear doors, causing the Plymouth to swerve to the east over the curb, and its right wheel to hit a telephone pole. The Plymouth then whipped around to the northeast and came to a stop 6 to 8 feet north of the north curb line of Hickory Street, facing northeast. Exhibits received in evidence

disclose that the Volkswagen came to rest on Hickory Street just east of Thirty-third Street, facing in a southerly direction.

A witness who was driving south on Thirty-third Street at the time of the accident testified that just before he entered the intersection he saw a Volkswagen approaching Thirty-third Street from the west on Hickory Street. The Volkswagen's left wheels were right at the centerline of Hickory Street. He observed a car parked at the south curb about 20 feet to the west of the stop sign. When he first saw the Volkswagen it was about 30 feet from the entrance to the intersection. The Plymouth was just ready to enter the intersection from the south on Thirty-third Street. He estimated the speed of the Plymouth to be not in excess of 20 miles an hour. When he first saw the Volkswagen, this witness' car was 12 feet or more from the north curb of Hickory Street. This witness further testified that he had the Volkswagen in his vision from the point about 30 feet prior to entering the intersection until it actually made contact with the Plymouth; that the Volkswagen did not come to a stop prior to entering the intersection; that at the time of the impact the Plymouth was in the east line of traffic just over the centerline of Hickory Street; and that it seemed to him that the front of the Volkswagen struck near the center or a little to the rear of the left side of the Plymouth. This witness estimated the speed of the Volkswagen as being in excess of 40 miles an hour, and testified that the defendant, prior to the time of the impact, did not diminish his speed. On cross-examination this witness testified that the impact occurred predominantly in the southeast quarter of the intersection; and that he did make a statement that the stop sign was very difficult to see unless you knew where it was.

The defendant testified that at the time of the accident he was under 21 years of age and was on his way to work; that he was proceeding east on Hickory Street

at a speed of 20 to 25 miles an hour; that he was driving on his own side of the street; that when he was about 60, 65, or 70 feet to the west of the intersection he observed to his left that there was no traffic coming from that direction; that he then looked to the right, or south, and observed that there was a hedge; that as he approached the intersection there was a car parked south and west of the curb line on Hickory Street; that he had to turn out for this car because it was parked against the curb; that if there was an imaginary centerline on Hickory Street, he was approximately 6 inches south of that line; and that he proceeded on, still looking to the right, or south, but was unable to see anything coming from the south on Thirty-third Street because the hedge was blocking his view. This witness further testified that when he was just even with the hedge line, close to the intersection of Thirty-third and Hickory Streets, he saw the stop sign, the Plymouth, and "everything all at one time." His speed at that time was 18 to 20 miles an hour. He further testified that the front end of the Plymouth was about even with a tree on the east side of Thirty-third Street south of the intersection; that when he saw the Plymouth he slammed on the brakes; and that his speed at the time of the impact was 8 to 10 miles an hour. This witness further testified that the Plymouth did not slow down from the moment he saw it until the time of the impact; that he saw the driver of the Plymouth as it was proceeding northward to the point of impact, and the driver was looking to the north and never turned his head to the left (west) or right (east) before the impact; and that the Plymouth was traveling 6 or 8 inches east of the middle line of Thirty-third Street. This witness was able to get the Volkswagen turned to the left, but very little. This witness further testified that the front end of the Volkswagen contacted the Plymouth between the two doors on the left side of the Plymouth; that the front bumper of the Plymouth, with respect to the centerline of Hickory

Street, at the moment of impact was 2 or 3 feet north of the centerline; that the estimated speed of the Plymouth was 30 to 35 miles an hour; and that on the day of the accident the stop sign faced due west, but now it is tilted, which helps visibility, but not too much. The defendant further testified that he had never been on Hickory Street at Thirty-third Street before the morning of the accident.

The record established that the Volkswagen driven by the defendant was a family-purpose automobile.

This court has held as follows: "A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it. * * * A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary. * * * A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. * * * The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view." Nichols v. McArdle, 170 Neb. 382, 102 N. W. 2d 848.

The word "highway," insofar as the rules above stated are concerned, applies to streets as well as highways.

In Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, 74 A. L. R. 2d 223, this court said: "An arterial highway is not deprived of its character or status because a stop sign on an intersecting road is temporarily displaced or otherwise rendered invisible." Cases are cited establishing the rule.

The defendants rely on the recent case of Hammon v. Brazda, 173 Neb. 1, 112 N. W. 2d 272, wherein this

court held: "A motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign protecting the arterial has been broken off and he could not be expected to be aware of its presence." The opinion went on to say that this case differs from Bell v. Crook, *supra,* for the reason that therein the driver on the nonfavored road knew that a stop sign ordinarily protected the arterial highway and that the sign was down, and we held: " 'If a motorist knows of the through character of a highway, the presence or absence of warning signs is immaterial as respects his negligence in failing to yield the right-of-way.'

"There are some cases in other jurisdictions which hold the nonfavored driver guilty of negligence as a matter of law regardless of lack of knowledge. Titus v. Braidfoot, 226 Ala. 21, 145 So. 423, and Jones v. McCullough, 148 Kan. 561, 83 P. 2d 699, are two of them.

"We believe, however, the better rule is the one represented by cases such as Schmit v. Jansen, 247 Wis. 648, 20 N. W. 2d 542, 162 A. L. R. 925; Chambers v. Donaldson, 122 Cal. App. 2d 452, 264 P. 2d 950; Mason v. Yellow Cab & Baggage Co., 153 Tex. 344, 269 S. W. 2d 329; and Lyle v. Fiorito, 187 Wash. 537, 60 P. 2d 709.

"Without attempting to analyze the conflicting views, we hold that a motorist proceeding in the exercise of ordinary care cannot be held negligent in failing to stop at an intersection with an arterial highway with which he is not familiar, where the stop sign protecting the arterial has been broken off and he could not be expected to be aware of its presence."

The evidence discloses that the defendant was driving east on Hickory Street toward the intersection of Thirty-third Street at a speed of 20 to 25 miles an hour, which was the lawful rate of speed on Hickory Street and in that area. As the defendant approached to a distance of 60 or 70 feet west of the intersection, he looked

to his left for approaching automobiles. He then looked to his right, or south, and saw a hedge located on the southwest corner of the intersection which tended to obstruct his vision to the south on Thirty-third Street. Then he saw a car parked on the south side of Hickory Street just east of the sidewalk located approximately 55 feet west of the intersection. The defendant had never been on Hickory Street proceeding toward Thirty-third Street and this intersection prior to the accident. The evidence also shows that there was a tree that tended to obstruct or interfere with his vision to the south, and this tree was located about 7 feet west of the stop sign. The defendant was unaware that there was a stop sign located at the southwest corner of the intersection. There is evidence to the effect that the defendant turned the Volkswagen to go around the parked car and then commenced to reduce his speed; that as he passed the parked car he was still proceeding on the south side of Hickory Street with the left side of the Volkswagen approximately 6 inches south of an imaginary center-line of Hickory Street. As the defendant neared the hedge located on the southwest corner of the intersection, he saw the stop sign and the plaintiff's Plymouth approaching the intersection from the south, and attempted to turn the Volkswagen to the left. The Volkswagen skidded on the wet pavement a distance of 5 feet 6 inches. There is evidence from which the jury could find that the plaintiff was driving his Plymouth north on Thirty-third Street at a rate of speed of 30 to 35 miles an hour, which was beyond the lawful speed limit of 25 miles an hour in that area; that the plaintiff did not reduce his speed or attempt to turn the Plymouth, or apply his brakes as he approached the intersection; and that the plaintiff could not see the Volkswagen until the collision occurred. There is also evidence that the defendant was traveling 40 miles an hour and did not diminish his speed; and that the stop sign was difficult to see unless you knew it was located on that corner.

Considering the evidence in its entirety, the questions of negligence on the part of the defendant and contributory negligence on the part of the plaintiff were for the jury to determine.

"Where different minds may reasonably draw different conclusions or inferences from the adduced evidence, or if there is a conflict therein, as to whether or not the evidence establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to a jury. * * * It is the province of the jury to harmonize the testimony insofar as that is possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses." Klein v. Wilson, 167 Neb. 779, 94 N. W. 2d 672.

This brings us to the question presented by the plaintiff that the verdict is totally inadequate. This assignment of error goes to the injuries sustained by the plaintiff as the result of the collision.

A plastic surgeon testified that the plaintiff received multiple contusions and lacerations to the face and hand, including a transverse laceration of the right cheek that extended posteriorily through the ear and on to the scalp adjacent to the ear; and that the total length of this laceration was about 13 centimeters, or a little less than 6 inches. This laceration was approximately half an inch deep and involved the right parotid gland and seventh cranial nerve. The doctor further testified that as a result of this laceration there was a weakness of the muscles of the eyelid and inability to move the muscles of the forehead on the right side. The doctor sewed the laceration together on the morning of the accident and put a special dressing over the face so that the plaintiff's mouth could only open about half an inch. The plaintiff was seen a few times by the doctor up until March 28, 1959. The doctor gave as his opinion that the plaintiff, at the time of trial, had reached about maximum improvement.

A neurologist testified that he found a decreased sensation throughout the major portion of the right side of the plaintiff's face due to an involvement of the fifth cranial nerve, which he described as producing a sensation similar to that of one having received a novocain injection. This doctor further testified that he found damage to the seventh cranial nerve, resulting in loss of motor power in the plaintiff's right forehead, and damage to the fifth and seventh cranial nerves which would or could be permanent in nature.

There is some evidence that about three months subsequent to the accident the plaintiff suffered headaches, some of them for a short period of time and others of a severe nature for a longer period of time. There is testimony by a physician called by the defendants to the effect that these headaches could not have been attributed directly to the accident, but could be the result of tension on the part of the plaintiff due to his concern over the scar on his face. This doctor concluded that the plaintiff had residuals of injury to the nerve supplying the muscles of the upper part of the face, resulting in a moderate right upper facial weakness, and he felt that the plaintiff might have had some involvement of the sensory nerves, that is, the feeling nerves, to the right side of the head and face. He felt that the sensory nerve changes would not be entirely due to nerve injury. He concluded that the motor nerve involvement and weakness probably would not improve; that any part of the sensory change which is truly organic probably would not improve; and that a rather large part of the sensory change was functional and could be cleared up in time.

The plaintiff's contention is that the verdict of the jury was the exact amount of special damages, minus a bill of Dr. Ladwig for $80. The plaintiff sets forth that the undisputed evidence established that the special damages were as follows: Drs. Dunn and Hubbard, $20; Dr. Black, $285; Douglas County Hospital, $3.50; Omaha Ambulance Service, $10; Bishop Clarkson Me-

morial Hospital, $171.25; 1956 Plymouth Automobile, $1,-225; Dresher Cleaners, $5.70; and loss of wages, $278.17. The total as set forth by the plaintiff was $1,998.62.

The plaintiff's Plymouth was demolished to such a degree that the salvage price was estimated at about $185, while the retail value was appraised at $1,410, making the loss $1,225.

With reference to Dr. Black's bill, $25 was a charge for a report made to the plaintiff's attorneys which should not have been included in the bill. Therefore, Dr. Black's bill would be $260.

With these deductions, the total of the special damages should be $1,973.62, making a difference of $25.

The plaintiff testified that he remained in the hospital for a period of 5 days; that it was a month after the accident before all the bandages were taken off of his face; that he first returned to work on December 15, 1958, that is, he was not at work from November 25, 1958, until December 15, 1958; and that it was 6 months before he was able to do the work which he had done prior to the time of the accident.

In instruction No. 20 given by the trial court, the jury was told to consider: "1. The character and extent of the injuries, if any, and whether the evidence shows with reasonable certainty that any are permanent and will continue to exist in the future to the fullest extent, or only partially, or whether his injuries were only temporary ones from which he will recover; 2. Such pain and suffering of body and mind as you may find, from a preponderance of the evidence, that the plaintiff has sustained by reason of this accident; 3. Such pain and suffering of body and mind as you may find, from a preponderance of the evidence, the plaintiff is reasonably certain to suffer in the future by reason of injuries sustained in this accident; * * *." Other parts of the instruction dealt with medical bills, loss of wages, ambulance charges, etc.

This court held in Dolen v. Beatrice Restaurant Co.,

137 Neb. 247, 289 N. W. 336: "When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict."

In Schumacher v. Lang, 160 Neb. 43, 68 N. W. 2d 892, this court said: "We have now definitely established the rule that: 'When the amount of the damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.' Ambrozi v. Fry, 158 Neb. 18, 62 N. W. 2d 259. * * * As this record stands, it would have been an abuse of discretion for the trial court to have refused to set aside the verdict and grant a new trial." Cases are cited in this opinion with somewhat similar factual situations where the court came to a like conclusion.

We deem the aforesaid authorities controlling in this case.

The plaintiff predicates error on the giving of certain instructions which need not be considered here except to say that in instruction No. 8 given by the trial court, the trial court told the jury in a part of this instruction: "It is the duty of a driver of a motor vehicle to keep a constant lookout in the direction of anticipated danger." The word "constant" means remaining unchanged, and steady. See Webster's Third New International Dictionary. This instruction would indicate to the jury that the plaintiff should have looked continuously to the left, or south. It could be true that the plaintiff could have anticipated danger from the right, or from either or both directions. The word "constant" as used in the instruction is not proper and should not have been used in the connection in which it was used.

In the light of the evidence and the authorities heretofore cited, we conclude that the judgment of the trial court should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

R. T. CALDWELL, APPELLEE, V. JAMES R. WELLS, APPELLANT.
117 N. W. 2d 486

Filed October 26, 1962. No. 35240.

1. **Bills and Notes.** In an action on a promissory note lack of consideration is an affirmative defense.
2. ———. In an action on a promissory note the lack of delivery of the note is an affirmative defense.
3. **Courts: Trial.** It is not the prerogative of a trial court to make an independent investigation of the issues between the parties when there is no provision of law providing for such an investigation.
4. ———: ———. Such an investigation is improper procedure and prejudicial.

Appeal from the district court for Douglas County: FRANK G. NIMTZ, Judge. Reversed and remanded.

Young, Denenberg & Mullery, for appellant.

Leslie D. Carter, for appellee.

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

MESSMORE, J.

This is an action at law brought in the municipal court of Omaha by R. T. Caldwell as plaintiff, against James R. Wells, defendant, on a promissory note to recover the amount of $1,177.03, and costs. The defendant prevailed in the municipal court. The case was appealed to the district court for Douglas County by the plaintiff. The plaintiff's petition in the district court alleged that on September 28, 1959, the defendant did execute and deliver to the plaintiff a promissory note in the sum of $1,177.03. Defendant in his answer, among other affirmative defenses, alleged that the defendant received no consideration for the signing of the note, and pleaded lack of consideration as a defense; and that the note was never delivered by the defendant to the plaintiff or any other person acting in the plaintiff's behalf.

A jury was selected, duly impaneled, and sworn, and the trial was continued to December 20, 1961. Hearing

was had at the trial court's request. The defendant stated his theory of his defense. The trial court ruled that the defendant's statement of his theory of the defense did not constitute a legal defense to the plaintiff's claim. The defendant made an offer of certain exhibits and statements for the record. The plaintiff made a motion for judgment, and offered the instrument sued upon. The plaintiff's motion was sustained and the trial court rendered judgment in favor of the plaintiff in the sum of $1,177.03, with interest and costs as prayed for in the plaintiff's petition.

The defendant filed a motion for new trial. The defendant also filed a motion to have the motion for new trial set for hearing before the presiding judge of the district court for Douglas County for the reason that the trial court had disqualified itself from further acting in the case and from deciding the motion for new trial because the trial court considered the results of a private ex parte investigation unknown to the defendant, and for the reason that the defendant was not given an opportunity to present evidence to rebut the ex parte investigation made by the trial court.

The transcript shows: "THE COURT: Following the first pre-trial conference the Court made inquiry of the Secretary of State at Lincoln as to the status of James, Inc., and received the following communication: 'James, Inc., dissolved on Dec. 9, 1957, for failure to pay occupation tax.' "

The defendant's motion for new trial was overruled. The defendant perfected appeal to this court.

The principal assignments of error are as follows: The trial court erred in holding that the defense of failure of consideration was not a valid defense to the instrument upon which the plaintiff sued; the trial court erred in not allowing evidence on the issue of lack of delivery which is a valid defense to the note upon which the plaintiff sued; and the trial court erred in conducting an independent investigation as to matters concern-

ing the issues between the parties and should have either disqualified himself or referred the defendant's motion for a new trial to another trial judge.

On December 20, 1961, proceedings were held in chambers before the trial judge wherein the trial court made a finding that there was no controversial issue of fact, rendered judgment for the plaintiff, and discharged the jury.

We first point out that it is not the prerogative of a trial court to make an independent investigation concerning issues between the parties when there is no provision of law providing for such an investigation. In the instant case the trial court was following improper procedure which was prejudicial.

In Leach v. Treber, 164 Neb. 419, 82 N. W. 2d 544, this court said: "In an action on a promissory note, the party alleging want of consideration has the burden of proving it by a preponderance of the evidence." See, also, Plaza Hotel Co. v. Hotel Stratton, 132 Neb. 396, 272 N. W. 224.

In Elmcreek Ditch Co. v. St. John, 127 Neb. 253, 255 N. W. 16, this court said: "The right to make the statutory defense of 'failure of consideration' in an action on a negotiable promissory note implies the right to prove that defense by competent evidence." There are other cases holding as the above-cited cases.

The lack of delivery of a promissory note is an affirmative defense. See, §§ 62-115 and 62-116, R. R. S. 1943; Monroe v. Parker, 122 Neb. 499, 240 N. W. 548; Luikart v. Braasch, 130 Neb. 361, 265 N. W. 13.

Other assignments of error need not be determined.

We conclude that in the light of the affirmative defenses set up in the defendant's answer and the proceedings held by the trial court the defendant is entitled to a new trial.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. BENJAMIN K. CROWLEY, APPELLANT.

117 N. W. 2d 488

Filed October 26, 1962. No. 35246.

1. **Trial.** The findings of the court in an action where a jury is waived have the same weight as a verdict of a jury.
2. **Indictments and Informations.** A mere misnomer of the offense is not fatal to the validity of the complaint or information.
3. ———. An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense.
4. ———. Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.

Appeal from the district court for Sarpy County: JOHN M. DIERKS, Judge. Affirmed.

L. W. "Jim" Weber and Philip H. Robinson, Jr., for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

SIMMONS, C. J.

This is an appeal from a judgment of the district court in a case where a jury was waived. The defendant was charged with the operation of a motor vehicle after sunset at a speed in violation of section 39-723, R. R. S. 1943. He was found guilty and appeals. We affirm the judgment of the trial court.

The statute provides: "No person shall operate a motor vehicle on any highway outside of a city or village * * * at a rate of speed exceeding * * * fifty-five miles per hour between the hours of sunset and sunrise, * * *."

We state the facts in the light of the established rule that the findings of the court in an action where a jury

is waived have the same weight as a verdict of a jury. See National Bank of Commerce v. Bossemeyer, 101 Neb. 96, 162 N. W. 503, L. R. A. 1917E 374.

It was stipulated that at the time involved, defendant was driving at a speed of 65 miles per hour. It was further stipulated that at the time and place involved, it was "approximately 15 minutes after scientifically computed and astronomically determined sunset time." There was a trial controversy over whether or not the defendant was driving with the use of headlights. Defendant contended that he was not using his lights. The State's witnesses testified that users of the highway were operating automobiles with headlights on. The trial court's judgment resolves that fact in favor of the State.

We find no contention that in fact the time involved was not after sunset. The defendant testified that the weather was clear, very few clouds, it was dry, and "I could see the horizon."

The defendant's next contention arises as the result of two facts. The one was that there was a sign posted along the highway that recited: "Speed Limit Day 65 Night 55 Radar control." The other is that the complaint had a caption: "For Speeding At Night." The charge was that the defendant operated his motor vehicle at a rate of speed exceeding 55 miles per hour "between the hours of sunset and sunrise."

Defendant then argues at length that night and sunset are not concurrent. That night follows sunset with a dusk period in between and that it was not yet night when he was arrested.

We need spend no time in discussing the highway sign. We find no evidence that the defendant ever saw it, knew about it, or relied upon it.

It is also perfectly patent that defendant was charged, in the language of the statute, for driving at a prohibited rate of speed after sunset. The charging part of the complaint controls. The rule is: "A mere misnomer

of an offense sought to be charged is not fatal to the validity of a criminal complaint or information." State v. Feist, —— N. D. ——, 93 N. W. 2d 646. See, also, 42 C. J. S., Indictments and Informations, § 111, p. 991; In re Application of Harrison, 55 Ariz. 347, 101 P. 2d 457; State v. Elkins, 216 Ore. 509, 339 P. 2d 715.

Defendant's contention is not sustained.

The next contention is that the complaint is not sufficient in that it does not specifically state the time or the place of the alleged offense.

He relies upon May v. State, 153 Neb. 369, 44 N. W. 2d 636, and other cases of like import. We there held: "An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. Article I, section 11, Constitution of Nebraska; Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717. It must state expressly and directly each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet, and it cannot be aided by intendment, by anything stated therein by way of mere recital, or by inference or implication."

The complaint here is not deficient so as to bring it within the above holding.

The rule is: "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute." Goff v. State, 89 Neb. 287, 131 N. W. 213.

We reaffirm that holding. The complaint states the date of the offense as on or about June 9, 1961; it charges an unlawful operation of a motor vehicle on a highway outside of a city or village at a rate of speed exceeding 55 miles per hour between the hours of sunset and sunrise, contrary to the statute; and it charges that offense occurred in Sarpy County, Nebraska.

The charging part of the complaint fully meets the test of the rule relied on by the defendant.

The judgment of the trial court is affirmed.

AFFIRMED.

WILLIAM A. SNOWARDT, APPELLANT, V. CITY OF KIMBALL, KIMBALL COUNTY, NEBRASKA, APPELLEE.

117 N. W. 2d 543

Filed October 26, 1962. No. 35290.

1. **Trial.** Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence.
2. **Workmen's Compensation.** In order to recover, the burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
3. ———. Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause.
4. ———. Where the first accident is not the proximate cause of the second accident, the second accident constitutes an independent intervening cause.
5. ———. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim by virtue of the law.
6. ———. An award of compensation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence.

Appeal from the district court for Kimball County: JOHN H. KUNS, Judge. Affirmed.

Heaton & Heaton, for appellant.

Halcomb, O'Brien & Everson and Harry R. Meister, for appellee.

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

SPENCER, J.

This is a workmen's compensation case. The plaintiff sought medical expenses and compensation for an injury allegedly sustained on September 6, 1959, while employed as a policeman by the city of Kimball. The one-man compensation court found that plaintiff sustained a temporary disability as the result of the accident on that date but that his present disability is the result of a subsequent accident which had no connection with his employment. Plaintiff elected to appeal directly to the district court for Kimball county.

After a trial in the district court, specific findings were made that the plaintiff had suffered a back injury in other employment August 20, 1956; that he had sustained a temporary disability involving no compensable loss of time in an accident on September 6, 1959; and that subsequently, on October 27, 1959, he suffered another accident outside of his employment. The court further found that the plaintiff had failed to maintain the burden of proving that the accident of September 6, 1959, was the proximate cause of his present disability, and allowed him a recovery only for the medical expenses incurred between the time of the accident on September 6 and September 25. From this judgment plaintiff appeals to this court. The cause is here for trial de novo on the record. Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51.

William A. Snowardt, hereinafter referred to as the plaintiff, on September 6, 1959, was 40 years of age, was 6 feet 2 inches tall, and his normal weight was 245 pounds. He was employed as a night policeman for the city of Kimball at a salary of $315 per month. About 1 a.m. on that day, while patrolling with another officer, he came upon two drunks who were fighting near a tavern and dance hall located within the city limits of Kim-

ball. One of the men, weighing about 160 pounds, had his arm around the neck and throat of the other man and was choking him. Plaintiff, in attempting to break the hold, lifted the man off the ground about 6 inches, at least twice. He testified that on this occasion he experienced a sharp stabbing pain in his back and released his hold. He then struck the man with the side of his hand on the jaw, broke the hold, and made an arrest. He continued to work the rest of the night. The next morning at 8 o'clock, when he picked up the chief of police, he told the chief of the incident.

Plaintiff testified that he was in severe pain when he went home that morning and that his wife used a heat lamp on his back to relieve the pain. The testimony of the wife is to the effect that, as she remembers, she used the heat lamp for 3 successive days. She also testified plaintiff could not bend down and she had to help him put on his socks and pull up his trousers. Plaintiff further testified that he experienced continuous pain thereafter but did not consult a doctor for a week or 10 days. The medical evidence is that a doctor was not consulted for 17 days, or until September 23, 1959, at which time plaintiff made an office call on Doctor Siedenburg of Kimball. On that same day he also consulted a chiropractor at Pine Bluffs, Wyoming. He made office calls on Doctor Siedenburg again on the 24th and 25th of September. The doctor gave him medication and physical therapy, and advised him to wear a wide belt.

On the 27th of October 1959, plaintiff was helping a neighbor put an extension on a TV antenna on the top of a trailer house. When he lifted the extension it became tangled in some electrical wires and the plaintiff was knocked unconscious. When he regained consciousness, he was lying flat on his back on the top of the trailer house. He did not know with what force he was knocked down. This electrical shock burned holes in both of his heels about the size of the tip of his little finger. A doctor was called, but by the time he arrived

plaintiff had recovered consciousness and there was very little treatment given. Plaintiff did not see this doctor thereafter. On October 29, he consulted Doctor Siedenburg who treated the burns and sores on his feet. He consulted Doctor Siedenburg again on the 4th, 5th, 6th, and 7th of November, and so far as the record indicates, the treatment given was confined to the feet. Doctor Siedenburg testified as follows concerning this period: "Q Doctor, from the first visit to your office in the latter part of October, until he was hospitalized in November, did he at any time ever complain to you about back pains or problems to his back? A From what date? Q From the time he came in to see you the latter part of October, until he was admitted to the hospital? A Yes. He started complaining of his back while I was treating him for his feet. Q Do you recall specifically what those complaints were? A Well, when I first put this ointment on the soles of his feet, it worked real well, but then, the next day it didn't work as well, and the next day after that, not quite as well; because he was beginning to try to walk without putting his weight on his heels, and as he did that, he developed more and more backache. Q What do you mean by walking without putting the weight on his heels? A Well, you walk on the ball of your foot and try to take the weight on the front part of your foot rather than your heel. Q Is that what Mr. Snowardt was doing? A That is my understanding. He was trying to take the weight off the soles of his feet by putting more of it on the balls of the foot. Q In other words, he was balancing himself in an unnatural position, physically? A That's right. Q Now, did he do that continually until he was admitted to the hospital—the walking in this unnatural position? A Yes, he did. Q What was he admitted to the hospital for? A For back pain—severe back pain, radiating down in the right leg."

Plaintiff was admitted to the Kimball County Hospital on November 8, 1959, and placed in traction. He

was released from the hospital on November 22. On November 23 his difficulty returned, and he was referred to a neurosurgeon and admitted to the DePaul Hospital at Cheyenne, Wyoming, where he had surgery. Doctor Grizzle, the neurosurgeon who performed the surgery, testified plaintiff had sustained an injury to his intervertebral disc which allowed it to protrude. Plaintiff was released from DePaul Hospital on December 4, 1959, and returned to work about April 1, 1960.

In 1956, while doing construction work for another employer, plaintiff hurt his back. He was taken to a medical clinic. The doctor told him he thought that vertebrae were injured, and injected some medicine around the area of the injury and gave him some pills. He later went to a chiropractor, who X-rayed his back and told him two vertebrae had slipped out and were pinching a nerve. The chiropractor gave him four or five treatments thereafter. On this occaison, plaintiff missed 2 days of work, and thereafter on this job did only light work. He quit after 10 days and went back to a previous employer, Solomon Mills at Buda, Nebraska, working 7 days a week.

Doctor Calkins, a Kimball physician, testified the plaintiff consulted him on November 13, 1958, for back pain. The doctor's record has a notation under that date, "Low Flank & back pain." The doctor testified he treated the plaintiff on that occasion, but the plaintiff denied ever consulting him. Doctor Calkins was treating other members of the family, including Mrs. Snowardt who was pregnant. Her record was kept on a separate card, and this record designates "Mr." rather than "Mrs." and lists the plaintiff's correct age. This testimony is not material on the question of injury, because there could be recovery if plaintiff proved the activation or aggravation of a preexisting injury. Maul v. Iowa-Nebraska Light & Power Co., 137 Neb. 128, 288 N. W. 532. It is material, however, on the question of plaintiff's

credibility and that of his wife. They both testified that the plaintiff had fully recovered from whatever difficulty he experienced in 1956, and that he had no back difficulty whatever until the accident of September 6, 1959. In this respect, it is also to be noted that Doctor Masek, a chiropractor and therapist consulted by plaintiff after the October 27th accident, testified that plaintiff's history indicated he had had some back trouble periodically just about a year and a half prior to November 5, 1959.

Doctor Grizzle testified that from the history he received he presumed that the injury of September 6, 1959, weakened plaintiff's disc. In this regard, as will be set out later, Doctor Grizzle received no history of any previous back difficulty. With reference to the accident of October 27, Doctor Grizzle's testimony is as follows: "A It may be that his fall aggravated his back condition. However, and since we can only go by his statement, at the time, he indicated that it did not aggravate his back. Q In other words, in your opinion, it is a condition that he had prior to the fall, from what you know of the history? A From what I know of the history, yes, this protruded disc could have started before his fall. * * *."

Doctor Grizzle further testified: "Q Didn't the patient's history indicate that afterwards, the pain caused by the scuffle had pretty well cleared up? A Yes. Q Hadn't his condition improved considerably, Doctor? A No. I don't have the original—does somebody have the original? They took my original history. MR. HEATON: Hasn't that been sent back to you? I thought I mailed it to you—I am sorry. Q Doctor, let me ask this question? A Yes. Q Assuming that Mr. Snowardt's own story to you was that after the injury, if there was an injury from the scuffle—A Yes. Q —his condition improved considerably, and it wasn't until after the fall on the trailer roof that he again experienced considerable pain, would that change your opinion, assuming that, Doctor? A Assuming what you have just said would

be true, it would only be my opinion to the effect the second injury caused his disc protrusion to come out again. Q Well, would it be possible under that assumption, that the second fall actually was the cause? A Not with the history that he gave me of the original injury. Q Even though the pain had disappeared? A Yes, even though the pain had disappeared, because—that is what we got into such a long discussion about. This is as if you had a rock and you are moving it toward the edge of this desk—you move it two feet—it starts at three feet, and you move it two feet, and then a week later you come along and move it another foot and it falls off the edge of the desk; which act actually caused the rock to fall off the desk? You see my point? Q But, can you say from the history that you have of this patient, that this scuffle referred to was actually the first movement of the rock? A That is what I assume, from what the patient told me. Q But from what he told you, there were several other things that could have been the first instance, were there not? I mean, from this history, can you say positively that the scuffle caused the protrusion, in the first instance? A Well, we are at a philosophical point, aren't we, here? We have to accept what the patient says as true when he came to me the first time seeking treatment. Q You are aware of the patient's history of back trouble prior even to the scuffle, are you not? A *No; because he didn't discuss too much of that with me.* Q You didn't discuss his physical condition or his back condition at all, prior to the scuffle? A We do in the course of our interrogation of the patient, but usually at that time, if the patient has had trouble before, he usually admits it. Q Well, in this particular case, was there no discussion of any prior difficulty with the back? A No. I don't have any note of it on here. * * * Q With a protrusion, Doctor, would you say it was usual for the back to pain for a while and then stop? I mean, does the condition better and worsen over a period of time? A Yes, it is

characteristic—I think if we got a—really, a case history of every patient that has a disc, sooner or later we find that over a period of time they will have periods of ups and downs with this thing, if they have been untreated by surgery. Lots of times they start from one injury, and then maybe a year or so later they will have another problem. And this, I think we touched upon on our previous deposition too, and we said that for our purpose, all we could do is take the injury that put the man out of commission. Q And then you assume that this is the original cause? A We assume that is, yes. Q *But that assumption would be definitely affected if there was history of prior injury to the back, or prior treatment to the back for pain?* A *I think if there is a definite history to the back, yes, that it would.* Q And where you have two injuries fairly close together in time—A Yes. Q *—you definitely are not saying that you can tell which caused the protrusion originally, are you? In other words, it could be caused by either injury, when they are close together in time?* A *Yes.* Q Even though the first injury was associated with the back? A Right. And again, we go on the history to ascribe which injury was responsible." (Italics supplied.)

The plaintiff worked every night without interruption from September 6 to September 23, 1959, but he did not work the night of September 23 which was the day he consulted Doctor Siedenburg and the chiropractor. He worked continuously after September 23 until November 8, when Doctor Siedenburg put him in the hospital. The only testimony as to the plaintiff's continuous difficulty from September 6 to November 8, 1959, was that of plaintiff and his wife. Plaintiff's testimony was that he had severe pain in his lower back at all times after September 6. He testified: "It was almost impossible for me to bend over to put on my shoes and tie them and put on my overalls or trousers. I would have to either throw them at my feet or have my wife start them on."

The history plaintiff gave to the neurosurgeon was to

the effect that the electrical shock caused him to fall to his buttocks on the top of the trailer house. The doctor's testimony from the history further indicates that the plaintiff told him he was not aware of any increase in his lower back discomfort after this fall until approximately 1 week to 10 days later when his right leg began to pain him severely. It is evident that plaintiff minimized the accident of October 27, 1959, when he consulted Doctor Grizzle. It is undisputed, however, that he did not experience the pains shooting down into his right leg until at least a week after October 27. It does seem that if plaintiff could do no bending or lifting as his wife testified, or if his back troubled him between September 6 and October 27 as much as his testimony would indicate, that it would have been difficult and unusual for him to climb to the top of a trailer house to install an extension on a TV antenna. It does test credulity to believe that plaintiff could have been knocked unconscious, flat on his back, and not have suffered an increase in his back discomfort if it was as constant as he testified it was. Triers of fact are not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of the evidence may be destroyed even though not contradicted by direct evidence. Dworak v. City of Omaha, 172 Neb. 209, 109 N. W. 2d 160.

For plaintiff to obtain a recovery herein he must adduce competent evidence having probative value which predominately convinces the trier of fact that he sustained an accident on September 6, 1959, which resulted in the disability for which he is now seeking compensation. As we said in McDuffee v. Seiler Surgical Co., Inc., 172 Neb. 325, 109 N. W. 2d 384: "The burden of proof is upon the claimant in a workmen's compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment."

Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributable to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. Where the first accident is not a proximate cause of the second accident, the second accident constitutes an independent intervening cause. See Towner v. Western Contracting Corp., 164 Neb. 235, 82 N. W. 2d 253. Plaintiff makes no contention that the first accident had anything to do with the second one. His contention is that his disability on November 8, 1959, had no connection with the accident of October 27.

The plaintiff argues that the Workmen's Compensation Act is to be liberally construed so that its beneficient purposes may not be thwarted by technical refinement of interpretation. This is the rule followed in this jurisdiction. However, the liberal construction referred to 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 the claimant shall prove his right to compensation by a preponderance of the evidence and it does not permit a court to award compensation when the requisite proof is lacking. Klentz v. Transamerican Freightlines, Inc., 173 Neb. 53, 112 N. W. 2d 405.

Both the judge of the compensation court and the district court found the accident of October 27, 1959, to be the cause of plaintiff's hospitalization and surgery. It is not necessary to discuss the sufficiency of the evidence on that point. It is sufficient in a determination of this appeal to state that, as we view the record, the plaintiff has not sustained the burden of proving that the accident sustained by him on September 6, 1959, was the proximate cause of the disability for which he was treated subsequent to October 27, 1959.

We have said many times that an award of compen-

sation under the Workmen's Compensation Act may not be based on possibilities, probabilities, or speculative evidence. Towner v. Western Contracting Corp., 164 Neb. 235, 82 N. W. 2d 253.

For the reasons given above, the judgment of the district court was in all respects correct and is affirmed.

AFFIRMED.

PEARL C. HOPWOOD, APPELLANT, V. GEORGE VOSS ET AL., APPELLEES.

117 N. W. 2d 778

Filed November 9, 1962. No. 35188.

1. **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.
2. **Trial.** Where the court instructs a jury correctly on a subject involved on the trial of a case, and a party desires more explicit instruction with regard thereto, it is his duty to offer a more specific instruction.
3. **Negligence: Damages.** Where it is pleaded and proved that two or more parties, even though recovery is sought against only one, were guilty of combined negligence which taken together proximately caused injuries to the plaintiff, the entire damage may be assessed by a jury against the one made a party.
4. **Trial.** The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Kenneth H. Dryden, Smith Brothers, and Soren S. Jensen, for appellant.

John E. Dougherty, for appellee Voss.

Tye, Worlock & Knapp, for appellees Aetna Cas. & Surety Co. et al.

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

YEAGER, J.

This is an action for damages for personal injuries by Pearl C. Hopwood, plaintiff and appellant, against George Voss, defendant and appellee. Aetna Casualty and Surety Company, a corporation, and the City of Kearney, a municipal corporation, were made parties on account of their rights of subrogation in the event of recovery in damages by the plaintiff for payments made by them pursuant to the Workmen's Compensation Act. Further mention of these parties will not be required. Hopwood will be referred to hereinafter as plaintiff and Voss as defendant.

The case was tried to a jury and a verdict was rendered in favor of the defendant and against the plaintiff. Judgment was rendered on the verdict. Thereafter a motion for new trial was filed. This motion was overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

This case was before this court previously as Hopwood v. Voss, 172 Neb. 204, 109 N. W. 2d 170, but it is pointed out that the matters decided there are not of any controlling significance as to the matters presented by this appeal.

The action arose out of a head-on collision between an automobile and a tractor operated on Twenty-sixth Street, a street of the city of Kearney, Nebraska, at about 8:30 p.m. on June 24, 1958. On that date one Gene Harvey was driving a tractor eastward on the north side of Twenty-sixth Street at a speed of not to exceed 5 miles an hour. Attached to the rear of the tractor was a trailer on which was carried a device for spreading a chemical fog the purpose of which was to destroy certain insects. The device was in operation and was being operated by the plaintiff. When the tractor and the accompanying device reached a point about halfway between Avenue E and Avenue G the defendant came from the east in a Ford automobile at a speed of 25 to 30 miles an hour and came into collision with the front

end of the tractor. As a result of this collision the plaintiff was injured.

By his petition the plaintiff alleged that the defendant was guilty of negligence which was the proximate cause of the collision and of his injuries. The defendant denied these allegations and alleged affirmatively that the accident and injuries were proximately caused by the heedless, reckless, and negligent acts of the operator of the tractor.

He pleaded further that the plaintiff was guilty of contributory negligence, but this court, in the earlier case referred to herein, concluded that such a defense was not on the evidence available to the defendant.

There are five assignments of error which the plaintiff has asserted as grounds for reversal. One of them generally is that the verdict is contrary to law. It requires no separate consideration. On the basis of the other four, the question of whether or not the verdict is supported sufficiently by evidence, and the further question of whether or not there is reversible error in instructions given and a failure to instruct properly and sufficiently, are presented.

By the second assignment of error it is urged that the verdict of the jury is contrary to and against the overwhelming weight of evidence. It is observable that the complaint is not that the verdict had no evidence to support it but that it was contrary to evidentiary weight.

With regard to the right of this court to weigh evidence in an action at law for damages, this court said in Nisi v. Checker Cab Co., 171 Neb. 49, 105 N. W. 2d 523: "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." See, also, 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; Corbitt v. Omaha Transit Co., 162 Neb. 598, 77 N. W. 2d 144; Johnston v. Robertson, 171 Neb. 324, 106 N. W. 2d 192; Graves v. Bednar, 171 Neb. 499, 107 N. W. 2d 12.

As to the question of negligence the plaintiff as incidents thereof alleged that the defendant failed to maintain a proper lookout for vehicles or equipment belonging to the city; that the defendant operated his car at an excessive rate of speed, said speed being in excess of 25 miles an hour; that the defendant negligently failed to maintain the control of his said vehicle necessary to prevent the same from running into, upon, and against the vehicle in which this plaintiff was traveling; and generally that the defendant failed to operate his vehicle so as to prevent it from running into, upon, and against the vehicle on which the plaintiff was riding. He did not charge negligence or contributory negligence against anyone else.

The defendant filed an answer in the case in which he charged that the plaintiff's injuries were proximately caused by the negligence of the driver of the tractor which was pulling the trailer on which the plaintiff was riding. The specifications were that this driver failed to keep and maintain a proper lookout; that he failed to have the machine under control; that he failed to drive his machine upon the right half of the highway; that he failed to seasonably turn his machine from the left-hand side to the right-hand side so as to permit the defendant to have the legal right-of-way; that he failed to give any signal or warning of his intention to usurp the use of the left-hand side of the highway; that if he had looked he could have observed that he had time to turn to the right and avoid a collision, but this he failed to do; and generally that he failed to yield the right-of-way.

By the answer negligence and contributory negligence of the plaintiff were pleaded but this court in its former opinion, which is cited herein, concluded that this defense was not available to the defendant. The reply was a general denial. The driver of the tractor will be hereinafter referred to as Harvey.

A review of the pertinent evidence in support of the

pleaded cause of action of the plaintiff discloses that there was evidence that on the evening in question the plaintiff and Harvey, on behalf of the city of Kearney, were engaged in the distribution of a chemical composition to produce a spray or fog which, after moving under power about 5 feet, floated about 20 feet with the wind and thereafter it raised and was carried in the direction of the wind about a block; that at the time the wind was from the southeast; that the purpose was to destroy insects in the air and in foliage; that at the time in question it was at least dusk, if not dark; that the operation was from west to east on the north or left-hand side of Twenty-sixth Street; that Twenty-sixth Street is not paved but it has a graveled surface estimated to be of the width of 30 to 35 feet; that Harvey was operating the tractor behind which a trailer was attached; that the plaintiff was riding on the trailer and was operating the fogging device but had no control over the operation of the tractor; that at the time of the collision the tractor and trailer were off the traveled portion of the street and on a part which has been referred to as a borrow pit; that there is some evidence that the right side may have been outside and to the south of the borrow pit a short distance; that the way was clear and unobstructed to the east and one could possibly see for a distance of 2 blocks without lights; that the defendant's car, which had lights, could be seen at a distance of 4 or 5 blocks; that at the time there was no fog to the south and the fog being created was moving to the northwest; that the movement of the tractor eastward was not over 5 miles an hour; that the tractor had observable headlights which could be seen from the east; that at the time of the collision neither the plaintiff nor Harvey was looking to the east; and that the tractor and defendant's automobile collided head-on and after the collision stood from 1 to 1½ feet apart.

Against this is evidence that the defendant came from the east on his right side of the street and on the traveled

portion at 25 to 30 miles an hour and when he was about a block from the point of collision he observed what appeared to be smoke which obscured his vision on account of which he could not and did not see the tractor or its lights; that he drove into this smoke and the front end of his automobile collided with the front end of the tractor; and that at the time the tractor and trailer were entirely in the traveled portion of the street and not in the borrow pit.

The manifest and single purpose of the plaintiff was, by his pleading, to state a cause of action against a single defendant and to prove the pleaded cause of action against that one defendant. He offered no evidence manifesting directly or inferentially a contention that Harvey was in anywise responsible.

The purpose of the defendant was to plead negatively a denial of plaintiff's claim, and affirmatively that plaintiff's injuries were caused by negligence of Harvey.

Examination of the evidence discloses that there was competent evidence of probative value to support the cause of action of plaintiff. This was counteracted by evidence also of probative value. The contention of the defendant that negligence of Harvey caused the accident found support in the evidence. There was, as to this, evidence of probative value to the contrary.

The issues tried and presented for review here were of disputed fact and for determination by the jury. It follows therefore that on the basis of the principle set out herein the second assignment of error may not be sustained.

The next assignment of error is that the court erred in failing to instruct regarding the duty of the driver of a motor vehicle when his vision is obscured by fog or smoke. The following instruction in this area was given by the court: "You are instructed that the presence of fog or smoke on a highway is not an independent intervening cause as that term is mentioned in the definition of 'proximate cause,' but is, rather, a condition of

the highway which it is the duty of the driver of a motor vehicle to take into consideration in operating his motor vehicle." As a statement of principle this has been approved. See, Anderson v. Byrd, 133 Neb. 483, 275 N. W. 825; Jones v. Union P. R. R. Co., 141 Neb. 112, 2 N. W. 2d 624; Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250. The plaintiff requested no further or more explicit instruction with regard to this subject. Under the circumstances disclosed it must be said that if the plaintiff desired more specific instruction it was the duty of his counsel to offer a more specific instruction. See Graves v. Bednar, *supra*. The assignment of error may not be sustained.

The remaining two assignments of error deal with a single subject matter and will be considered together. The charge in them is that the court erred in giving instructions Nos. 4 and 8, for the reason that they did not properly and sufficiently submit the theory of proximate cause, or more particularly the controlling principles relating to more than one cause which proximately contributed to an accident.

By instruction No. 4 the jury was told that the burden was on the plaintiff to prove that the defendant was guilty of one or more of the acts of negligence alleged by plaintiff, and that such negligence was "the proximate cause" of plaintiff's injuries.

By instruction No. 8 the jury was told that if any damages of plaintiff were not "caused proximately" by negligence of the defendant in this case the plaintiff would not be entitled to recover. The claimed error as pointed out in the brief is that the issue to be determined by the jury was that of whether or not the defendant Voss was guilty of any negligence which constituted or was part of the proximate cause resulting in the accident and injuries to the plaintiff, but that these two instructions did not inform the jury that if the plaintiff had proved that the negligence of the defendant constituted any part of the proximate cause,

combined with any negligence on the part of the driver of the tractor, in such an event, the jury should find for the plaintiff. In other words, it is contended that by these instructions the jury was told only that it could find for the plaintiff if it found that the proximate cause was the conduct of the defendant, but did not tell it that it could also so find if the defendant was guilty of a negligence which only proximately contributed to the accident.

As an abstract and academic statement, and citations are not necessary to support it, where in a case it is pleaded and it is proved that two or more parties, even though recovery is sought against only one, were guilty of combined negligence which taken together proximately caused injuries to a plaintiff, the entire damage may be assessed by a jury against the one made a party.

The record in this case does not disclose that the two instructions, in the light of instruction No. 6 which was given, run in contravention of this statement. They are in this light in strict conformity with it. The petition charges that the negligence of the defendant Voss was "the proximate cause."

The case was tried and all evidence was adduced at the conclusion of which no amendment to the petition was made or offered. Also there was no manifest effort made to present the case on a theory of causation of the accident by the defendant and Harvey.

It follows therefore that by these instructions the case was submitted in strict conformity with the pleaded cause of action and the evidentiary theory of the plaintiff. This was in conformity with established rules. In Springer v. Henthorn, 169 Neb. 578, 100 N. W. 2d 521, it was said: "The charge of the trial court to the jury should be confined to the issues presented by the pleadings and supported by the evidence." See, also, Becks v. Schuster, 154 Neb. 360, 48 N. W. 2d 67; Perrine v. Hokser, 158 Neb. 190, 62 N. W. 2d 677; Owen, Admr. v. Moore, 166 Neb. 226, 88 N. W. 2d 759.

The plaintiff may not therefore properly complain that these two instructions did not present the issues presented by his pleaded cause of action and his apparent theory of proof.

If it should be assumed that in view of the fact that the defendant asserted by his answer that the accident and injuries were caused by the negligence of Harvey the plaintiff was entitled to the benefit of the combined evidence rule and instruction in pursuance thereto, still it may not be said that there was improper or insufficient instruction.

To present this theory the plaintiff tendered an instruction in pertinent part as follows: "Therefore, if you find that the negligence of the defendant, George Voss, was a proximate cause of the accident, or a proximately contributing cause of the accident, although Harvey may have been to some degree negligent, the defendant Voss is responsible for the whole result and the degree of blame as between himself and Harvey is immaterial."

The instruction was refused. Instead, on this subject the court on its own motion gave instruction No. 6 which contained the following: "If the plaintiff * * * has satisfied you by the preponderance of the evidence that the defendant * * * was negligent in any of the respects charged against him * * * and * * * If you further find from all of the evidence in the case that Gene Harvey * * * was also negligent in any of the respects charged * * * and * * * That the proximate cause of the accident was the combined and concurrent negligence of the two * * * Then your verdict must be for the plaintiff * * * and this result would follow even though the negligence of the defendant * * * or of Gene Harvey * * * was more or less than that of the other."

This instruction contained in complete and clear essence the same direction as the one which was requested and refused by the court. It clearly extended and defined the meaning of the term "proximate cause" so

that it included concurring causes as requested by the plaintiff in his proposed instruction.

If it be assumed that the plaintiff was entitled to instruction which departed from and enlarged the meaning of the term "proximate cause" as used in the petition of the plaintiff, it must be said that the departure was accomplished fully and fairly by instructions Nos. 4, 6, and 8. To have instructed on concurring negligence in the light of the pleaded cause of action in any other substance would have been erroneous. These assignments of error are therefore without merit.

For the reasons herein set forth the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

PRISCILLA C. ROGERS, APPELLEE, V. VERL E. PETSCH, ALSO KNOWN AS BUS PETSCH, APPELLANT, IMPLEADED WITH LESTER M. BECK ET AL., APPELLEES.

117 N. W. 2d 771

Filed November 9, 1962. No. 35193.

1. **Waters.** The owner of land upon which springs are located and from which waters flow in a well-defined channel in the course of drainage through other lands does not have an exclusive right to control and use the waters to the injury of lower riparian owners or senior appropriators.
2. ———. Waters flowing from springs which do not form a watercourse or lake are surface waters until they empty into and become part of a natural stream or lake.
3. ———. The owner of land upon which surface waters arise may retain them for his own use and change their course upon his own land by a ditch or embankment.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Reversed and remanded with directions.

Atkins, Ferguson & Nichols, for appellant.

Lovell & Raymond, for appellees.

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

BOSLAUGH, J.

This action was brought by Priscilla C. Rogers as plaintiff against Verl E. Petsch as defendant to enjoin interference with the natural flow of water from Nealy Springs and to require the defendant to remove certain structures on his land. By answer and cross-petition the defendant alleged that the flow of water from Nealy Springs did not exceed the volume necessary for his use for domestic purposes, and prayed that the plaintiff be enjoined from trespassing upon his property and interfering with his use of the water and that he recover damages.

The trial court found that the defendant was entitled to the use of the water from Nealy Springs for household purposes, the watering of his garden and lawn around the house, and the watering of all of his livestock; and that the maintenance of two dams or ponds and a lateral running east on the defendant's property was an unlawful interference with the flow of water from Nealy Springs. The trial court enjoined the use of the lateral and ordered the removal of the dams or ponds. The defendant's motion for new trial was overruled and he has appealed.

This being an action for equitable relief, we are required to try the issues of fact complained of de novo and reach an independent conclusion without reference to the findings of the district court. § 25-1925, R. R. S. 1943; Toelle v. Preuss, 172 Neb. 239, 109 N. W. 2d 293.

The property involved in this action is all located within Section 11, Township 23 North, Range 58 West of the 6th P. M., in Scotts Bluff County, Nebraska. The defendant is the owner of that part of the east half of the southwest quarter of Section 11 which lies north of the right-of-way of the Chicago, Burlington & Quincy

Railroad Company, except that part owned by the State of Nebraska and the right-of-way in favor of the State of Nebraska for highway purposes. The plaintiff is the owner of that part of Section 11 which lies between the north or left bank of the North Platte River and the south line of the right-of-way of the Tri-State (Farmers Irrigation District) Canal.

The north boundary of the plaintiff's land is the south line of the Tri-State Canal right-of-way. The railroad right-of-way is directly north of the canal right-of-way. Before 1956 the south boundary of the defendant's property was the north line of the railroad right-of-way. At that time U. S. Highway No. 26 ran parallel to and directly north of the railroad. In 1956 the defendant conveyed a strip of land across his property to the State of Nebraska for highway purposes. Part of the land conveyed had been previously occupied as the highway. As now constructed, U. S. Highway No. 26 curves to the north so that the south line of the highway right-of-way at the west line of the defendant's property is approximately 500 feet north of the north line of the railroad right-of-way. The effect of the 1956 conveyance by the defendant to the state was to sever a triangular tract lying between the railroad right-of-way and the highway right-of-way from the remainder of his property which is north of the highway right-of-way.

The defendant obtained title to his property in 1950 by conveyance from Leonard LaVerne Nealy and Mabel Nealy. The northern part of the defendant's property consists of level terrace farmland. The terrace is a rough bench of Brule clay which is a tight, impervious formation that does not hold or transfer water in large quantities. The Brule clay is covered by a layer of sand and gravel and then a layer of soil. Near the south end of the defendant's property the terrace is eroded. The soil there contains sand and gravel and is of a more porous nature. Nealy Springs flows out of a gully at an elevation 25 or 30 feet below that of the

level terrace farmland. The source of the water flowing from Nealy Springs is return flow from irrigation and natural precipitation.

A concrete dam constructed across the gully impounds water flowing from the springs until it rises sufficiently to flow through a trough near the top of the dam. The trough is a section of round steel pipe 1.69 feet in diameter that has been split lengthwise. There was evidence that the water flowing through the trough was .21 feet deep at the deepest part and the volume of water flowing through the trough was from .059 to .092 cubic feet of water per second. Water flowing through the trough then flows into a pond described as the north pond.

The north pond is approximately one-fifth of an acre in area and from 5 to 8 feet deep. Water can be released from the north pond to the east through a spillway into a lateral which is from 700 to 800 feet long. The first 350 to 400 feet of the lateral is lined with concrete. Water flowing through the lateral eventually flows into a basin near the southeast corner of the defendant's property.

There is a second pond upon the defendant's property described as the south pond. The south pond is approximately one-fourth of an acre in area and is located south and west of the north pond. There was evidence that the volume of water flowing from the north pond to the south pond was 120 gallons per minute.

The plaintiff's rights are based upon two permits for the appropriation of water from Nealy Springs for the purpose of irrigation granted by the Department of Water Resources of the State of Nebraska and its predecessor, the Department of Roads and Irrigation. They are referred to as application No. 2311 and application No. 9777.

In 1933 the plaintiff's land was owned by Paul H. Covington. In that year Covington obtained a permit to appropriate .06 cubic feet of water per second from

Nealy Springs to irrigate a 4-acre tract consisting of his yard and garden. Covington constructed a concrete dam upon the defendant's property just south of the north pond. He then installed a wooden pipeline running from the dam south of the north pond on the defendant's property to the plaintiff's property. Before the pipeline was constructed, water from the springs ran down under the old highway through a culvert and into the Farmers Irrigation Canal during the winter and before the irrigation season. After the pipeline was installed the water ran through the pipe onto the plaintiff's land. During the irrigation season Nealy took all of the water and Covington received only excess or runoff water.

Covington did not use the water from Nealy Springs for irrigation after 1936 and installed two irrigation wells on the plaintiff's land. Covington filed the acreage reports required by section 46-261, R. R. S. 1943, from 1934 through 1956, but there is no evidence that he used any of the water for irrigation purposes after 1936. On August 6, 1956, Covington executed and delivered to the defendant a written assignment of his interest in a license to construct and maintain the pipeline across the railroad right-of-way together with the pipe and works on said right-of-way. O. E. Bible was one of the witnesses to this assignment.

The concrete dam constructed by Covington on the defendant's property just south of the north pond has a hole knocked in it where the wooden pipe was formerly placed. The pipe south of the south pond has collapsed from heavy equipment being operated over the surface of the ground where the pipe is buried.

In 1948 Covington sold the plaintiff's land to the defendant on contract. In 1950 the contract of sale was surrendered by mutual agreement and Covington went back into possession.

In 1956 O. E. Bible purchased the plaintiff's land from Covington and went into possession during the first

part of August. Bible did not use any of the water from Nealy Springs for irrigation and did not file any acreage reports. While he owned the property he installed a third irrigation well. In 1957 Bible sold the property to Lester M. Beck and Hattie M. Beck.

In 1959 the Becks sold the property to the plaintiff on contract. The Becks were made parties to the action but they have no interest in the property other than as contract vendors. In 1959 the Becks filed an application for a permit to appropriate 1 cubic foot of water per second from Nealy Springs to irrigate the entire tract of land owned by the plaintiff. This application, known as No. 9777, was approved by the Department of Water Resources on July 20, 1960.

Exhibit 1-A, a map filed by the Becks as a part of application No. 9777 and referred to in the order approving the application, shows that the applicants proposed to construct a diversion structure upon the triangular tract of land owned by the defendant that lies between the highway right-of-way and the railroad right-of-way. The record shows that the diversion structure or settling basin actually built by the plaintiff is partly upon the defendant's land and partly upon the highway right-of-way. The pipeline leading from the settling basin crosses the defendant's land until it reaches the railroad right-of-way.

The plaintiff's rights in this action depend entirely upon the validity of the permits to appropriate water from Nealy Springs for irrigation purposes granted under application No. 2311 and application No. 9777. There is no authority in our law for the appropriation of water flowing from springs located upon the lands of another where the water does not create or become a stream or watercourse. The right to appropriate water for irrigation purposes under our law is limited to waters of natural steams. Art. XV, §§ 5 and 6, Constitution of Nebraska; §§ 46-202, 46-204, and 46-259, R.

R. S. 1943; Drainage Dist. No. 1 v. Suburban Irrigation Dist., 139 Neb. 460, 298 N. W. 131.

Where the waters flowing from springs flow naturally in a well-defined channel in the course of drainage through other lands, the owner of the land upon which the springs are located does not have an exclusive right to control and use the waters to the injury of lower riparian owners or senior appropriators. Slattery v. Dout, 121 Neb. 418, 237 N. W. 301. But where the waters flowing from springs do not form a watercourse or lake they are surface waters until they empty into and become part of a natural stream or lake. Lackaff v. Bogue, 158 Neb. 174, 62 N. W. 2d 889. See, also, Jack v. Teegarden, 151 Neb. 309, 37 N. W. 2d 387; Snyder v. Platte Valley Public Power & Irr. Dist., 144 Neb. 308, 13 N. W. 2d 160, 160 A. L. R. 1154. The owner of land upon which surface waters arise may retain them for his own use and change their course upon his own land by ditch or embankment. Nichol v. Yocum, 173 Neb. 298, 113 N. W. 2d 195.

There is no evidence that the waters from Nealy Springs have ever flowed in a definite or well-defined channel. The only evidence as to how the water did or would flow in a state of nature is that it would flow normally toward the valley and river and that before Covington constructed the pipeline it went down through a culvert under the old highway and into the Farmers Irrigation Canal. Surface waters do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity or by flowing into a natural basin from which they normally disappear through evaporation or percolation. Lackaff v. Bogue, *supra*.

There is considerable evidence which suggests that the water from Nealy Springs would never reach plaintiff's land in a state of nature. The small volume of water flowing from the springs, the gravelly nature of

the soil on the defendant's land south and east of the springs, the concrete dams and lateral constructed by the defendant, the location of the diversion structures erected by Covington and the plaintiff, and the pipelines constructed by Covington and the plaintiff all support an inference that the plaintiff's land would receive very little if any water flowing from Nealy Springs in a state of nature.

We think the evidence in this case, when considered as a whole, establishes that the waters flowing on the defendant's land from Nealy Springs are surface waters and as such are not subject to appropriation by the plaintiff. That being true, the injunctions granted by the trial court should not have been granted. We think the evidence further establishes that the plaintiff had no right to construct the settling basin and pipeline upon a part of the defendant's property.

We have considered the evidence of the defendant in support of his claim for damages and find that he is not entitled to recover any amount from the plaintiff for the expense of hauling feed and cattle to Torrington, Wyoming.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in conformity to this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROBERT WILLIAM LOSIEAU, APPELLANT.

117 N. W. 2d 775

Filed November 9, 1962. No. 35231.

1. **Criminal Law. By the terms of section 29-2221, R. R. S. 1943, where punishment of an accused as an habitual criminal is sought, the facts with reference to the charge of habitual criminal must be set out in the indictment or information which**

charges the criminal offense, but the facts thus set out shall not be an issue on the trial of the criminal offense, that is, during the trial the fact that the defendant is charged as being an habitual criminal shall not be disclosed to the jury.

2. **Criminal Law: Venue.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
3. **Criminal Law.** In a criminal case where it is sought to have a verdict of guilty set aside on the ground that the defendant did not have a fair trial on account of prejudice, the trial court has a large discretion in ruling on the question of prejudice.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

William G. Line, for appellant.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

YEAGER, J.

This is a criminal action wherein in the district court for Dodge County, Nebraska, Robert William Losieau, defendant, appellant here, was, in an information filed by the county attorney in the name of the State of Nebraska as plaintiff, appellee here, charged with the offense of breaking and entering, and further that he was an habitual criminal. The defendant was tried to a jury and convicted of the offense charged. On a later hearing in the action to the court he was found to be an habitual criminal and was sentenced to serve a term of 20 years in the State Penitentiary at Lincoln, Nebraska.

The defendant filed a motion for new trial which was overruled. From the order overruling this motion and from the judgment sentencing him the defendant has appealed.

As grounds for reversal of the judgment the defendant's brief contains eight assignments of error. Only

one of these requires separate consideration. The other seven deal with a single subject matter and therefore do not require separate consideration.

The one requiring separate consideration is the seventh. By this one it is contended that the verdict is not sustained by sufficient evidence. It must be regarded as having no merit. The brief of the defendant in the following words substantially so declares: "On the record in this case if the defendant's witnesses were telling the truth, defendant could not possibly be guilty. If the accomplices were telling the truth defendant could not possibly be innocent. It was the task of the jury to weigh the evidence and decide where the truth lay."

By the other seven assignments of error it is urged that the defendant was tried in an atmosphere wherein the danger of the jury being improperly influenced in its determination of guilt or innocence prevented it from being said that the defendant was accorded a fair trial. Specifications urged are that in consequence of this the court erred in failing to grant a change of venue; it erred in failing to quash the jury panel; it erred in failing to grant a mistrial; it erred in failing to dismiss the action; and it erred in failing to grant a new trial.

There is no showing made the effect of which was to say, or from which a reasonable inference could be drawn, that the jury was improperly influenced, but only that it could have been. The defendant does not contend otherwise.

One theory of the presentation of the defendant is that if a jury or its members had knowledge or came into possession of knowledge during or before a trial that a defendant on trial for a criminal offense and as an habitual criminal, the knowledge or possibility of acquisition of knowledge that he was charged with being an habitual criminal would render a verdict of guilty invalid, no matter whether that information was disclosed by the proceedings on the trial or from some other source or, as applied to this case, through publica-

tions contained in newspapers. The defendant relies for support upon the following from section 29-2221, R. R. S. 1943: "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."

The reliance of the defendant is in particular on the words "and shall not in any manner be disclosed to the jury."

The consideration here is, by the record, limited to the question of whether or not there was a possibility that during the trial the jury obtained information from newspapers that the defendant was charged as an habitual criminal, and not to such information obtained theretofore or through the processes of the trial.

The record negatives prior information and information obtained through trial processes. After 24 prospective jurors were called they were separately examined and each by answer disclaimed possession of any information the effect of which would be to say that he or she knew that the defendant was charged as an habitual criminal. It will be said here that each denied knowledge of anything which would prevent himself or herself from becoming a fair juror. From this group the jury was selected. There is nothing in the record to show and it is not suggested in the brief of the defendant that any such information was disclosed at the trial.

Coming back then to the true meaning of the words "and shall not in any manner be disclosed to the jury" it can be said that they have reference only to what shall or rather what shall not be disclosed at the trial. The clear and unmistakable meaning is that the charge of being an habitual criminal shall be contained as an

issue in the information but that issue may not be disclosed to the jury at the trial. The language is incapable of any other meaning. The jury does not come into existence until the commencement of the trial and it ends with the verdict.

The conclusion reached is that by the language "and shall not in any manner be disclosed to the jury" it was the intention of the Legislature that it should have application only to the time during which a case is being tried. Thus it must be said that under the terms of this section of the statute the defendant is entitled to no relief.

This leaves only for consideration the general question of whether or not there was any reasonable probability that a substantial right of the defendant independent of statute was impaired by the fact that members of the jury could have or did before or during the trial read in local newspapers accounts of the charge or charges against the defendant.

This question must be decided in the light of the facts and circumstances, as they have been disclosed, and recognized principles of law. One of these is: "A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed." Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. See, also, Simmons v. State, 111 Neb. 644, 197 N. W. 398; Peterson v. State, 116 Neb. 268, 216 N. W. 823; Murray v. State, 119 Neb. 16, 226 N. W. 793.

Another statement of principle having application here is that in a situation where it is contended that because of unfavorable publicity through newspaper articles the defendant did not have a fair trial and on account thereof seeks to have a verdict of guilty set aside, the trial court has a large discretion in ruling on the question of prejudice. In each such instance the case must turn on its special facts. See, Holt v. United States, 218 U. S. 245, 31 S. Ct. 2, 54 L. Ed. 1021, 20

Ann. Cas. 1138; Marshall v. United States, 360 U. S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250.

In Schreiner v. State, 155 Neb. 894, 54 N. W. 2d 224, it was pointed out in an instance where a jury had used a dictionary that only such conduct of the jury as is calculated to prejudice the substantial rights of the defendant is ground for setting aside a verdict.

It has already been pointed out that there was information from each and all of the jurors that they had read nothing prior to the trial that would influence a verdict in the case. Neither at nor after the trial was anything presented by affidavit which carried any fact or inference that any juror was or could have been influenced by any kind or character of publication.

There are clippings from newspapers in the bill of exceptions which contain a statement of the charges against the defendant, but it is not made to appear that any of these were ever read by or called to the attention of the members of the jury or any of them either before or during the trial.

In the light of all this it may not well be said that the trial court failed to exercise a sound discretion in refusing to set aside the verdict and grant the defendant a new trial.

The judgment of the district court is affirmed.

AFFIRMED.

VIRGIL HERMANSEN, APPELLEE AND CROSS-APPELLANT, V. THE ANDERSON EQUIPMENT COMPANY ET AL., APPELLEES AND CROSS-APPELLEES, IMPLEADED WITH WINSLOW O. TILFORD, APPELLANT AND CROSS-APPELLEE.

117 N. W. 2d 791

Filed November 9, 1962. No. 35273.

1. **Witnesses: Trial.** The credibility of witnesses and the weight of evidence are, in an action at law, for the jury and its verdict

may not be disturbed by this court unless it is clearly wrong as a matter of law.

2. **Trial: Appeal and Error.** Disputed questions of fact in an action at law are by the verdict of the jury resolved in favor of the prevailing party and in deciding an appeal in the cause the evidence and reasonable inferences therefrom are required to be considered most favorably to him.
3. **Highways: Negligence.** 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.
4. **Automobiles: Negligence.** Whether one failed to look or looked and failed to see a motor vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching motor vehicle was within the limit of danger that reasonable minds could not differ thereon.
5. ———: ———. The driver of a motor vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger.
6. **Automobiles: Trial.** Before a verdict can be properly directed in such a case the position of the oncoming motor vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury.
7. **Negligence.** The rule with reference to cause which will afford the basis for an action for damages for negligence is that the act must be a proximate cause of the accident and the ensuing injuries.
8. ———. A proximate cause is a cause without which the injury would not have occurred.

Appeal from the district court for Custer County: S. S. SIDNER, Judge. Affirmed in part, and in part reversed and remanded.

McGinley, Lane, Mueller & Shanahan, for appellant.

Roy E. Blixt and Baylor, Evnen, Baylor & Urbom, for appellee Hermansen.

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

SIMMONS, C. J.

This action is one for personal injuries and property damages arising as a result of an automobile and light truck collision within the city limits of Arnold and to the north of the paved portion of the east and west state highway. It happened about 4 p.m. on November 26, 1959. No unfavorable weather conditions are shown.

There were originally three defendants. The Anderson Equipment Company was dismissed from the action and its counterclaim put over for a trial to a succeeding jury. The action proceeded against Winslow O. Tilford, driver of the car, and Arnold Swanson Co., his employer. The defendant Tilford, hereinafter called the defendant, also cross-petitioned for damages. The jury found for the plaintiff on both plaintiff's claim and the defendant's claim. On motion for judgment notwithstanding the verdict, the judgment for the plaintiff was set aside on the ground that plaintiff was guilty of contributory negligence as a matter of law barring recovery. The trial court sustained the verdict insofar as the judgment in favor of plaintiff on defendant's cross-petition is concerned.

Defendant Tilford appeals and plaintiff cross-appeals.

We affirm the judgment of the trial court in denying a new trial to Tilford. We reverse the judgment of the trial court in setting aside the jury's verdict in favor of plaintiff and against the defendants and direct that judgment be granted the plaintiff on the jury's verdict.

We state the evidence in the light of the rule that: "The credibility of witnesses and the weight of evidence are, in an action at law, for the jury and its verdict may not be disturbed by this court unless it is clearly wrong as a matter of law. * * * Disputed questions of fact in an action at law are by the verdict of the jury resolved in favor of the prevailing party and in deciding an appeal in the cause the evidence and reasonable inferences therefrom are required to be considered most favor-

ably to him." Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410.

The location of the accident was about 100 feet west of a filling station which was within the city limits and on the north side of a paved through state highway. The station had a gravel driveway to its pumps which lead from the highway. To the west of the station building and pumps was a graveled storage lot used by customers of the station. The lot and pump area was covered with gravel and connected with the highway to the south. Some loose gravel had gotten on the paved highway surface. To the east, a few hundred feet, was a hill so that the pavement sloped slightly to the west toward the station.

The movement of plaintiff's truck is not in dispute. He was driving from the west toward the east at a speed of 10 to 15 miles per hour and intended to go to the filling station to have a tire repaired. When west of the station, he looked to the west and east and saw no cars approaching. He gave no signal of an intent to turn. He turned left across the westbound lane of travel. He then saw defendant's car about 100 feet to the east and directly opposite the filling station pumps. His car was partly off the paved portion of the highway at that time. He proceeded northeast. Plaintiff testified that defendant's car came off the pavement and into the right side of his truck. The rear end of the truck was then about 14 feet north of the north edge of the pavement. The jury evidently accepted plaintiff's version of the accident.

Defendant asks us to apply the turning at a nonintersection rule which we said in Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355, was a movement "fraught with danger" and required a degree of care commensurate with the danger. Plaintiff was here moving across the westbound lane in what was more nearly an intersection turn. But plaintiff's failure to give any signal of an intent to turn was in violation of section 39-7,115,

R. R. S. 1943, and was in itself evidence of negligence. We stated in Jarosh v. Van Meter, 171 Neb. 61, 105 N. W. 2d 531: "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 timing of the movement of defendant's car and the movement itself is not at all clear or certain in the evidence.

Defendant Tilford testified that he approached the city limits at a speed of 60 miles per hour. The witness riding with him fixed it at 45 to 50 miles per hour. Defendant testified that he was going 30 to 35 miles per hour when he passed the filling station and was about 100 feet from plaintiff when he began his turn; that he then put on his brakes but the loose gravel prevented their operation and that he then accelerated his power drive to the limit and turned to the right as much as possible; pivoted on his right wheel; and in that way he hoped to miss hitting plaintiff. Defendant, apparently, wanted the jury to believe that he made this maneuver in 50 to 60 feet and had succeeded at it when plaintiff ran into him. Defendant testified that "40 or 50 feet before we would have passed him," plaintiff made a left turn "right in front of us"; that he then put on the brakes; and that he then accelerated his car and made the turn to the right. This evidence is in direct conflict with the testimony of the deputy sheriff as to skid marks and their length.

Defendant's witness, who was riding with him, testified that the abrupt turn of plaintiff was made less than 100 feet ahead of them. The witness then testified that defendant had applied the brakes *before* plaintiff made his left turn and that their intention was to stop in Arnold.

There is shown no speed limit by ordinance in Arnold.

Section 39-7,108, R. R. S. 1943, fixes the speed limit at 25 miles per hour under those circumstances. This is evidence of negligence sufficient to take the issue to the jury.

Defendant contends that plaintiff should have seen his car approaching and was required to notice his approach. We held in Pupkes v. Wilson, 172 Neb. 15, 108 N. W. 2d 220, that: "Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon. * * * The driver of a vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within that radius which denotes the limit of danger. Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury."

Just when defendant reached the point where plaintiff was obligated to see him as "within that radius which denotes the limit of danger" is not at all certain in this record. On that issue, we have the directly opposite testimony of the plaintiff that when he started to turn, he looked and did not see the defendant. We have the conflicting statement of defendant and his own witness as to the location of plaintiff when defendant began to make the right turn and plaintiff made his left turn.

The city limits were about 600 feet east of the point of the accident. At that time, defendant's speed could have been found by the jury to be 60 miles per hour and that it was 30 to 35 miles per hour when defendant was 100 feet or less from the collision. All of this and other

testimony presented a question of negligence sufficient to take that issue to the jury.

In Palmer v. McDonald, 171 Neb. 727, 107 N. W. 2d 655, we held: "The rule with reference to cause which will afford the basis for an action for damages for negligence is that the act must be a proximate cause of the accident and the ensuing injuries."

Both plaintiff's cause of action and defendant's cause on the counterclaim, and the issue of contributory negligence, depend upon the question of proximate cause.

We have defined proximate cause over the years as follows: "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." Edmunds v. Ripley, 172 Neb. 797, 112 N. W. 2d 385. See, also, Jarosh v. Van Meter, *supra.*

In Cover v. Platte Valley Public Power & Irr. Dist., 173 Neb. 751, 115 N. W. 2d 133, in shorter and for that reason better language, we stated: "A proximate cause is a cause without which the injury would not have occurred."

This brings us to the crucial question of whose negligence could be found to be the proximate cause of this accident?

The jury could have found that at the time of the collision, the plaintiff's truck had completed its left-hand turn and was on the graveled apron leading to the storage lot. At that time, he was where he had a perfect right to be. At that time, the paved portion of the highway and 14 feet of graveled apron were open for travel by defendant. Plaintiff's evidence and pictures of his wrecked truck were to the effect that defendant ran into the right side of plaintiff's truck.

Defendant's testimony was that before the collision he had made the rather unusual maneuver of executing a U-turn at a high rate of speed which we have attempted

to describe. He wanted the jury to believe that he had succeeded at it and was headed north when plaintiff ran into his car. Pictures were taken of defendant's car, but were not produced at the trial.

On defendant's version of the event, he turned his car off the paved portion of the highway onto the graveled approach to the storage lot. Gravel on the pavement did not prevent his use of his brakes after he left the pavement for the last half of his trip, as evidenced by skid marks. On the contrary, he testified that he saw he "wasn't going to be able to stop in time to avoid a head-on collision, so I hit the accelerator, pushed it clear to the floorboard, with the wheel turned to the right as hard as I could. * * * and I tried to turn the car around to get away from him." In doing so defendant, if believed by the jury, put his car at a high rate of speed directly in the path of plaintiff's truck. But the jury did not accept that version of what happened.

The deputy sheriff's testimony was that the skid marks showed defendant's movement to be a curve to the right, about the first half on the pavement, the last half off the pavement, leading directly to the side of plaintiff's truck, and skid marks of plaintiff's truck pushed sidewise. He was corroborated generally by another witness and the picture of plaintiff's truck. Not to be overlooked here is the testimony of defendant's witness that defendant intended to stop in Arnold anyway and put on his brakes before plaintiff made his left turn.

The jury also could have found that the defendant was heading for the storage lot with his car out of control because of speed and was unable to stop in the 82 feet after he applied his brakes. The deputy sheriff who was at the scene of the accident measured skid marks 82 feet long beginning just west of the filling station. Defendant's witness put the "acceleration marks" at 35 to 40 feet and that before that the skid

marks were "something less than 60 or 65 feet." The skid marks and plaintiff's testimony are in direct conflict with defendant's testimony of distance and abrupt right-hand turn and being run into by plaintiff. The jury's verdict on that issue of fact must be accepted.

The jury could have found that the defendant was driving at an unlawful and excessive rate of speed. He testified to such a rate of speed. The evidence, likewise, presented an issue as to whether or not defendant was driving at a speed that permitted him to control his car. The defendant's evidence also presented a question as to whether or not he was maintaining a proper lookout.

On this evidence, we hold that the trial court erred in setting aside that part of the verdict and judgment awarding plaintiff damages from the defendant Tilford and his employer Arnold Swanson Co. The trial court did not err in sustaining the verdict denying defendant damages against the plaintiff.

The term point of impact is used throughout this testimony by the parties and their counsel. It was used by the sheriff at least three times with reference to the general course of the skid marks. The officer described the location of debris on the ground and the skid marks. Without objection, he testified that it was "plainly marked on the gravel where the point of impact was." He was then asked and testified to distances and measurements he made from three markers to the "point of impact." There was no objection. He was then asked what the point indicated at which the three measurements came together. Over objection that it was an invasion of the province of the jury, he testified that "it indicated the point of impact." It could hardly do anything else for it was already in evidence, without objection, that the three measurements terminated at the "point of impact." We find no prejudicial error in permitting the witness to state what he had previously

stated, without objection, was the "point of impact." We find no evidence to the contrary.

Defendant had nine assignments of error directed at the instructions. He submits them all together contending that there was no proof to support any of the allegations of negligence made against him and in submitting plaintiff's cause to the jury. These assignments all go to matters of the record where the jury found against him. We have in effect ruled on all of the propositions contained in them and in the brief argument defendant makes to support his assignments. We see no reason to do more.

We hold that the trial court did not err in denying defendant a new trial on his counterclaim. That part of the trial court's judgment is affirmed.

That part of the judgment setting aside the verdict of the jury is reversed, and the cause is remanded with directions to grant plaintiff a judgment against the defendants based on the jury's verdict.

All costs in this court are taxed to the defendant Tilford.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

HERMAN HAARBERG, APPELLEE, V. OLIVER SCHNEIDER, APPELLANT.

117 N. W. 2d 796

Filed November 16, 1962. No. 35213.

1. **Fraud: Damages.** In an action for damages for fraud and misrepresentation the measure of damages is the difference between the value of the article or thing if it had been as represented and its actual value.
2. **Damages: Appeal and Error.** When a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether correct or not.
3. **New Trial: Appeal and Error.** Where a motion for a new trial

presents a question of fact as to the regularity of the proceedings, the trial court becomes the trier of the facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong.

Appeal from the district court for Red Willow County: VICTOR WESTERMARK, Judge. Affirmed.

William W. Lyons, for appellant.

Daniel E. Owens, for appellee.

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

CARTER, J.

This is an action brought by Herman Haarberg against Oliver Schneider for damages sustained as a result of false representations made by Schneider to Haarberg in selling an automobile to Haarberg. The jury returned a verdict for the plaintiff in the amount of $1,083.34 and defendant has appealed from the judgment entered thereon.

The evidence shows that Haarberg is a farmer, 49 years of age, who has resided in Chase County all his life. Schneider is a new and used car dealer who has had a place of business in McCook, Nebraska, for the past 25 years. On September 9, 1960, Haarberg purchased a 1960 Chevrolet 4-door Corvair automobile from Schneider for which he paid $2,502.50, $950 in cash and the balance by a trade-in allowance of $1,552.50 on his 1955 Oldsmobile automobile.

Schneider had obtained the Corvair from Lester Buzzell, an automobile dealer in Cambridge, Nebraska, in June 1960. Buzzell testified that at the time he transferred the Corvair to Schneider, it had been driven more than 7,000 miles and the speedometer so showed. When Schneider transferred the Corvair to Haarberg the speedometer showed that it had been driven 800 miles, a manufacturer's suggested retail list price was attached to a rear window, and the invoice given to Haarberg

showed it was a "new" car sold on an "as is" basis. Schneider's wife testified that she made out the invoice and that she inserted "NEW" in the "New or Used" car designation by mistake. Schneider testified that when he obtained the automobile from Buzzell the speedometer was defective. He did not remember the mileage shown at that time. After its repair the mileage showed zero. Schneider and members of his family had driven the automobile during the period of Schneider's possession, which accounts for the 800 miles showing on the speedometer at the time of its sale to Haarberg.

Haarberg and his son Ronald examined the Corvair a few times before the sale was made. Both testified that Schneider represented the Corvair as a new automobile and that the speedometer correctly showed the mileage the Corvair had been driven so far as he knew. They testified also that Schneider stated that the "break-in" oil was still in the Corvair's motor and that it should have its 1,000 mile check-up when the speedometer showed 1,000 miles. Haarberg testified that he believed the representations made and relied on them when he purchased the car. Haarberg and Ronald both testified that while they were driving the Corvair home, following its purchase, the motor "cut-out" a few times and the speedometer stuck. They complained to Schneider who told them that the General Motors Company warranty was in effect and that they should take the matter up with that company. This they did and were informed that the one-year warranty had expired and that the General Motors Company had no obligation in the matter. Ronald Haarberg testified that the valve lifters stuck and the heater went out in November 1960 when he was driving the car in Brighton, Colorado. In late December the motor stuck or was burned out, and the car has not been used since. Herman Haarberg testified that the Corvair had an actual value of $1,400 to $1,500 when he purchased it. Ronald Haarberg testified that its value at that time was from $1,000 to

$1,200. There is no evidence in the record of the value of the Corvair at the time of its sale to Herman Haarberg if it had been as represented.

Schneider testified that he knew the Corvair had been used as a demonstrator, that he had the speedometer repaired, and that it showed no mileage when it was replaced in the car. He said that he never told Haarberg that the car was a new car and that he made no statement as to the number of miles the Corvair had been run. He admits that the manufacturer's suggested retail list price was on it just as it was when he received the automobile from Buzzell. Schneider's contention is that the deal was made at arms-length, that Haarberg examined the car and drove it, and that Haarberg knew that it was a used car.

We think a jury question was presented. The invoice delivered to Haarberg showed it to be a new car, and the price was the new car list price. The speedometer indicated that the Corvair had been driven only 800 miles, when Schneider knew that it had been driven 7,000 miles in addition thereto. He permitted Haarberg to assume that the car was new by leaving the manufacturer's suggested retail list price on it without explanation. These implied representations, together with the testimony of Herman and Ronald Haarberg, were sufficient to sustain the verdict of the jury. Trebelhorn v. Bartlett, 154 Neb. 113, 47 N. W. 2d 374; Herlan v. Bleck, 148 Neb. 816, 29 N. W. 2d 636; Dargue v. Chaput, 166 Neb. 69, 88 N. W. 2d 148. No contention is made that the trial court did not properly instruct the jury on the elements of fraud and misrepresentation essential to establish a cause of action.

The defendant assigns as an error the giving of instruction No. 11 which states in part: "In the event you find for the plaintiff the measure of plaintiff's damages in this case is the difference between the price paid by the plaintiff and the fair and reasonable market value of said automobile as it was on or about September 9,

1960." Plaintiff's petition alleged the sale price to be $2,502.50 and the value of the Corvair to be $1,000 at the time of the sale. The correct measure of damages is the difference between the value of the Corvair if it had been as represented and its actual value at the time of sale. Rankin v. Bigger, 128 Neb. 800, 260 N. W. 202. The petition did not allege the proper measure of damages. The court instructed on the measure of damages on the theory set out in plaintiff's petition. Defendant asserts this as error.

Plaintiff contends that the case was tried by both parties on the theory set forth in plaintiff's petition and that defendant cannot now complain. It is the rule that when a certain theory as to the measure of damages is relied upon by the parties in the trial court as the proper one, it will be adhered to on appeal whether it is correct or not. Welch v. Reeves, 142 Neb. 171, 5 N. W. 2d 275.

In the instant case, the petition was not attacked by motion or demurrer for failure to allege the proper measure of damages. The defendant asserts, however, that he made a motion for a directed verdict which had the effect of raising the question. The motion was: "The defendant at this time moves the Court for a directed verdict on the ground that the plaintiff has not shown sufficient evidence to sustain his petition." It will be observed that the form of the motion for a directed verdict is consistent with the measure of damages alleged in the petition. We think the case was tried on the theory that the measure of damages set out in the petition was the correct one and that the decision of the case is controlled by our holding in Welch v. Reeves, *supra*. The case having been tried by both parties on the measure of damages stated in plaintiff's petition, we shall adhere to that theory on this appeal, although it is not a correct one.

Defendant contends that a quotient verdict was returned by the jury and that a new trial should be

awarded for that reason. A quotient verdict is one where the jurors for the purpose of arriving at a verdict agree that each should write on his ballot a sum representing his judgment; that the aggregate should be divided by twelve; that they will be bound by the result; and that the quotient shall be the verdict. Killion v. Dinklage, 121 Neb. 322, 236 N. W. 757. Such verdicts are generally recognized as being invalid.

Three jurors were called as witnesses to establish that the verdict was a quotient one. The first testified that he could not remember everything about it but that each put down an amount and "I guess" we divided it and arrived at it that way. He testified that there was no prior agreement that the amount arrived at would be the verdict in the case and he could not remember if a subsequent vote was taken. The second juror remembered the action of the jury about the same as the first juror called. She testified that there was no agreement ahead of time to be bound by putting down an amount and she in fact testified that she did not know "that we divided by 12." The third juror testified that the jury could not arrive at an amount and someone suggested that each give the figure he thought to be correct and they would take an average of it. It was her "understanding" that the average amount would be the verdict. She testified someone said: "We should lump it off to an even thousand," and someone answered "No, it was going to be an average." She testified that no additional vote was taken.

The foregoing evidence indicates that each juror submitted a figure which was his estimate of the damages sustained by the plaintiff. There is no evidence of any prior agreement to be bound by the average of these amounts. There is evidence of a suggested change in the amount so found. While one juror said that no subsequent vote was taken, the evidence indicates that the amount of the verdict was the individual verdict of each. When a new trial is sought on the ground of misconduct

by the jury, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing. Where a motion for a new trial presents a question of fact concerning the regularity of the proceedings, the trial court becomes the trier of disputed facts with reference thereto, and its decision thereon will not be disturbed on appeal unless clearly wrong. Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863; Pope v. Tapelt, 155 Neb. 10, 50 N. W. 2d 352. The evidence is sufficient to sustain the finding of the trial court and under the foregoing holdings such finding will not be disturbed.

We conclude that the judgment is free from prejudicial error and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE A. H. MEYER, ATTORNEY GENERAL, RELATOR, V. FRANK SORRELL, RESPONDENT.

117 N. W. 2d 872

Filed November 16, 1962. No. 35241.

1. **Officers.** A violation of section 53-111, R. R. S. 1943, affords an adequate basis for a charge upon which an order of removal by the Governor can be based.
2. **Constitutional Law: Officers.** The power of the Governor to remove an officer of the executive branch of the government, appointed for a definite term, requires a sufficient specification of charges, notice, hearing, and adequate competent evidence to sustain the order made.
3. **Officers.** An officer exercising quasi-judicial functions may act in a proceeding where he is disqualified by interest, relationship, or bias, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceeding.
4. **Witnesses: Evidence.** The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be put in evidence through the device of offering evidence which is known or should be known to be

adverse in order, under the name of impeachment, to get before the trier of fact a favorable ex parte statement otherwise inadmissible.

5. **Master and Servant.** The word "employment" as used in section 53-111, R. R. S. 1943, refers to a status and relationship and not to the nature of the benefit received.
6. **Judgments.** A declaratory judgment action will not be entertained if there is pending, at the time of its initiation, another action or proceeding in which the same parties are involved and in which the same issues may be adjudicated.
7. **Constitutional Law: Officers.** If there is evidence to support the decision of the Governor in removing an officer where a hearing is required, and the cause for removal is one on which the Governor is authorized to act, his decision on disputed facts is conclusive; and if he acts within his jurisdiction the courts will not, under the above circumstances, inquire into the weight and credibility of the evidence to support the charge, but will regard the finding of the Governor as final and not subject to review by the courts.

Original action. Judgment of ouster.

Clarence A. H. Meyer, Attorney General, and John E. Wenstrand, for relator.

Ginsburg, Rosenberg & Ginsburg and Norman M. Krivosha, for respondent.

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

CARTER, J.

This is an original action in quo warranto instituted by the Attorney General to test the right of respondent, Frank Sorrell, to hold the office of member of the Nebraska Liquor Control Commission.

The respondent was appointed a member of the commission and assumed the office on May 25, 1959. The term was for a period of 6 years as provided by section 53-106, R. R. S. 1943. No contention is made as to the regularity of the appointment or that respondent failed to qualify for the office in the manner required by law.

On November 29, 1961, the Governor of Nebraska, after giving notice thereof to respondent, began a hear-

ing to determine whether or not respondent should be removed from the office of liquor control commissioner for violating section 53-111, R. R. S. 1943, in that he was employed by persons engaged in the liquor business, to-wit: Helen Giittinger and Lloyd Copenhaver, while he was holding the office of liquor control commissioner. On January 24, 1962, after the completion of the hearing, the Governor directed the removal of respondent as a member of the commission. Respondent refused to surrender the office, and this action in quo warranto was brought to determine by what warrant, if any, the respondent now holds the office of liquor control commissioner.

The respondent for many years before becoming a member of the Liquor Control Commission was engaged as an auctioneer, real estate broker, and loan agent at Syracuse, Nebraska. He was well acquainted with Lloyd Copenhaver, who held a license to sell beer, issued by the Liquor Control Commission, and operated Cope's Tavern in Syracuse. He was also well acquainted with Helen Giittinger, who held a license to sell package liquor issued by the commission, and who, with her husband Fred Giittinger, operated a business under the name of H. G. Sundries in Talmage, Nebraska. On October 15, 1961, a tavern, on and off sale, beer only, in Syracuse, Nebraska, was advertised for sale in the Omaha World-Herald over the name of the respondent. It is not disputed that the tavern advertised was that of Lloyd Copenhaver. On April 27, 1961, the business of H. G. Sundries in Talmage, including its package liquor business, was advertised for sale over the name of respondent and Mr. and Mrs. Fred Giittinger. These advertisements and the apparent connection of the respondent therewith resulted in a notice and hearing before the Governor on the alleged violation of section 53-111, R. R. S. 1943. The authority of the Governor to hold a hearing after notice, and to remove a member of the Liquor Control Commission if cause is found to exist,

is discussed and decided in State ex rel. Beck v. Young, 154 Neb. 588, 48 N. W. 2d 677, and we shall not repeat the holding of that case.

It is provided in section 53-111, R. R. S. 1943, in part as follows: "No commissioner * * * shall solicit or accept any gift, gratuity, emolument or employment from any person subject to the provisions of this act, * * * and every such person * * * is hereby forbidden to offer to any commissioner * * * any gift, gratuity, emolument or employment. If any commissioner * * * shall violate any of the provisions of this section, he shall be removed from the office or employment held by him."

On November 10, 1961, the Governor caused a notice to be served on respondent requiring him to show cause on November 29, 1961, why he should not be removed from office on the following charge: "The specific charge against you is that you were employed by persons engaged in the liquor business in violation of Section 53-111, R. R. S., 1943, to-wit, Helen Giitenger and Lloyd Copenhaver, while holding the office of State Liquor Commissioner." It is the contention of respondent that the charge was too indefinite to apprise the respondent of the dereliction of duty with which he was charged. There is no merit in this contention. A respondent in a case such as this is not entitled to the same degree of exactness required in court pleadings in stating the charge, although it should be specifically stated with reasonable certainty. Sharps v. Jones, 100 W. Va. 662, 131 S. E. 463. In the instant case, the respondent was charged with having been employed by Helen Giittinger and Lloyd Copenhaver, persons in the liquor business, while he held the office of liquor control commissioner. The charge states the nature of the offense and the name of the persons involved with him. The charge is in the language of the statute and the persons involved are named. The charge is sufficient.

In a hearing conducted by the Governor under the provisions of Article IV, section 12, Constitution of Ne-

braska, and section 53-111, R. R. S. 1943, the charge must be reasonably definite, notice of hearing must be given, an opportunity to defend afforded, and there must be evidence to sustain a ground for removal as specified in the statute. Whether or not these requirements are met is, in a final analysis, a question for the courts. State ex rel. Beck v. Young, *supra.*

It is contended that the Governor in conducting the proceedings did not afford a fair and impartial hearing. The motives of the Governor, or apparent bias and prejudice, if shown, in the discharge of his duty as such, are not the subject of inquiry by the court in this proceeding. State ex rel. Churchill v. Hay, 45 Neb. 321, 63 N. W. 821. The right of a fair and impartial hearing before administrative officers exercising quasi-judicial functions as well as in the courts is generally recognized as one growing out of constitutional guarantees. There is an exception to this rule which is designated in applicable cases as a rule of necessity. Under this rule an officer exercising quasi-judicial functions may act in a proceeding where he is disqualified by interest, relationship, or bias, if his jurisdiction is exclusive and there is no legal provision for calling in a substitute, so that his refusal to act would prevent absolutely a determination of the proceeding. Emerson v. Hughes, 117 Vt. 270, 90 A. 2d 910, 34 A. L. R. 2d 539. See, also, 42 Am. Jur., Public Administrative Law, § 22, p. 312; 67 C. J. S., Officers, § 66d, p. 276; Annotation, 39 A. L. R. 1476.

The licensees, Helen Giittinger and Lloyd Copenhaver, did not testify. Prior to the hearing respondent submitted affidavits by each of them to the Governor in an attempt to induce the Governor not to proceed with the hearing. At the commencement of the hearing the Governor made a statement as to the reasons for the hearing in which he read the two affidavits previously submitted by the respondent. They were not offered in evidence by the Attorney General. During the presentation of his case-in-chief the Attorney General offered

in evidence written statements signed by the two licensees which statements were objected to by respondent as being incompetent. It was contended that these statements were offered for impeachment purposes only. The statements were admitted in evidence. Thereafter the respondent offered in evidence two different affidavits of the licensees to rebut the two written statements placed in evidence by the Attorney General. The statements offered were to impeach the affidavits which must be treated as having been offered by the Attorney General or which were not in evidence at all. In either event, we think the objections to these statements and affidavits should have been sustained under the holding of Wilson v. State, 170 Neb. 494, 103 N. W. 2d 258, which is: "The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made." We shall not, therefore, consider the affidavits and statements referred to in considering the case.

Donald E. Shasteen, a newspaper reporter for the Omaha World-Herald, testified that he called the respondent by telephone on October 28, 1961, regarding the advertisement over his name for the sale of the property of the licensee Copenhaver involved herein. He testified that respondent said he was a licensed real estate broker and that he was acting in that capacity in placing the advertising. He quoted the respondent as saying that he had not solicited the listing and that the property had not been sold; that his relationship as real estate broker would not constitute employment by the tavern owner within the meaning of the state law; and that he was surprised that someone would try to make something out of nothing. Other statements were made indicating that respondent was participating in some

manner in the sale of the property of the licensee.

Frank Rall, a newspaper reporter for the Lincoln Journal, testified that he called respondent on the evening of October 28, 1961, with reference to the advertisement offering the property of licensee Copenhaver for sale. He testified that respondent said he was in the real estate business, that the building listed with his firm was a tavern, that he did not solicit it, and that he knew commissioners cannot solicit for bonds or business. He further stated that he did not intend to violate the law, that he did not sell the property, and that someone is trying to make a mountain out of a molehill.

The respondent vehemently denied he told the two newspaper reporters that he had listed the property or that he had any arrangement to sell the property. He is corroborated in this by his son and wife, who respectively heard his statements made over the telephone to Shasteen and Rall.

Respondent testified that he was called by Copenhaver and Fred Giittinger, the husband of Helen Giittinger, and asked to sell their properties. He stated to each of them that he could not do so because of his membership on the Liquor Control Commission, but that he would help them to find a buyer as a matter of friendship. He admitted that the advertisements were prepared in his office and that he paid for the advertising. He stated that he has never billed the licensees for this expense and that he had no intention of doing so. He testified that he had no listing agreement or any other arrangement with either of the licensees to sell their properties, and that his connection with these matters was gratuitous and nothing more than acts of friendship toward long-time friends.

The evidence shows that respondent was asked, when undertaking to serve someone, if he entered into a listing agreement whenever he undertook to sell somebody's property or business. His answer was: "We have to before we can advertise it."

It is the contention of the respondent that the evidence does not show that he solicited or accepted "employment" within the meaning of section 53-111, R. R. S. 1943. He contends that the term "employment" as contained in the statute is used in the sense of benefit and is simply an extension of the various ways that benefits can be rendered, that is by gift, gratuity, emolument, and the like. From this the respondent argues that a gratuitous employment is not violative of the statute since he neither solicited nor accepted anything from the licensees. While the argument is an ingenious one, its logic is not overwhelming. It is the status and relationship that is condemned, not the nature of the benefit received. It would require a strained interpretation of the statute to hold that a commissioner could not solicit nor accept employment but that he could accept it on a gratuitous basis. Whether or not respondent was employed to perform a service for the licensees is a question of fact. In considering the evidence of the witnesses Shasteen and Rall, it will be noted nothing was said by the respondent that he was performing gratuitous acts for the licensee. The trier of facts could well find from all the facts and circumstances that the gratuity phase of the case was an afterthought to meet the exigencies of the litigation. We think there is competent evidence in the record sufficient to sustain the findings made by the Governor. True, the evidence is in direct conflict, but this can avail the respondent nothing under applicable rules.

The general rule is: If there is evidence to support the decision of the Governor in removing an officer, and the cause for removal is one on which the Governor is authorized to act, his decision on disputed facts is conclusive; and not only is this so, but if he acts within his jurisdiction the courts will not, under the above circumstances, inquire into the weight and credibility of the evidence to support the charge, but will regard the finding of the Governor as final and not subject to

review by the courts. Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17; Munk v. Frink, 81 Neb. 631, 116 N. W. 525, 17 L. R. A. N. S. 439; People ex rel. Johnson v. Coffey, 237 Mich. 591, 213 N. W. 460, 52 A. L. R. 1; Craig v. Jensen, 66 S. D. 93, 278 N. W. 545.

A further contention is advanced that the statute contemplates the rendition of service to licensees and to hold otherwise would reduce the statute to an absurdity. We quite agree with respondent that the Liquor Control Commission shall render service to the state and licensees alike in the administration of the Liquor Control Act. But this is far different from a case where a commissioner renders personal service to a licensee which is wholly disconnected from his duty as a public officer. The distinction is so plain that we shall not dignify this contention by further discussion.

It is further contended that a declaratory judgment action filed in the district court for Lancaster County prior to the hearing by the Governor, and amended after the Governor's removal order to allege such additional proceedings, has the effect of depriving this court of its original jurisdiction in quo warranto. This contention appears to have been previously settled by this court. In Phelps County v. City of Holdrege, 133 Neb. 139, 274 N. W. 483, we said: "The declaratory judgment law is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court having jurisdiction of parties and subject-matter." In Strawn v. County of Sarpy, 146 Neb. 783, 21 N. W. 2d 597, this court said: "'* * * the rule * * * seems to be that jurisdiction of a declaratory judgment action will not be entertained if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties, in which are involved and may be adjudicated the same identical issues that are involved in the declaratory action.' Annota-

tion, 135 A. L. R. 934." The contention of respondent on this point is without merit.

The purpose of section 53-111, R. R. S. 1943, is set forth in State ex rel. Beck v. Young, *supra,* in the following language: "By section 53-111, R. S. 1943, the Legislature evidenced an intention to prohibit a member of the liquor control commission to deal with persons subject to the regulation and control of the commission. * * * The purpose of the statute is to remove the temptation on the part of a commissioner to use his influence with those under the regulation and control of the commission for private gain. Experience shows that to permit such dealings has a tendency to create partiality and discrimination on the part of the officer in administering the functions of his office. It involves a question of public morals in the administration of government of which the supreme executive power could properly take cognizance in the performance of his constitutional duty to take care that the laws be faithfully executed and the affairs of the state efficiently and economically administered."

The record shows that respondent had notice, a specification of charges, and a hearing, all in accord with legal requirements. There is competent evidence in the record to sustain the charges made. The order of removal is regular and binding. The respondent, therefore, has not been an occupant of the office of liquor control commissioner since the issuance of the order of removal by the Governor. A judgment of ouster against the respondent is hereby entered. A proper writ is allowed to enforce the order of this court if it be necessary.

JUDGMENT OF OUSTER.

STATE OF NEBRASKA EX REL. DAWSON COUNTY FEED PRODUCTS, INC., A CORPORATION, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT, CITY OF FREMONT, NEBRASKA, A MUNICIPALITY, INTERVENER-APPELLANT, UTILITY SECTION OF THE LEAGUE OF NEBRASKA MUNICIPALITIES, AMICUS CURIAE.

118 N. W. 2d 7

Filed November 16, 1962. No. 35259.

1. **Electricity: Statutes.** By virtue of the language contained in section 70-401, R. R. S. 1943, and the history of the provision, the right to obtain service from persons, associations, or corporations, operating electric transmission lines outside the limits of incorporated cities or villages, extends to all persons, associations, and corporations residing within the statutorily described territory.
2. ———: ———. The origin of the history which makes this so is contained in the declaration of intent contained in the title of chapter 170, Laws 1923, page 403, which declaration has not been changed by later legislative action or judicial determination.
3. **Statutes.** In the adoption of legislation it must be presumed that the Legislature had in mind all previous legislation on the subject.
4. ———. Resort to the title to a previous act is properly available for the purpose of ascertaining legislative intent.
5. **Public Utilities.** Where two public service corporations are occupying the same area and rendering service therein, the obligation to serve is upon the one from which service is requested.
6. **Electricity: Statutes.** Chapter 336, Laws 1961, page 1046 (sections 70-901 to 70-905, R. S. Supp., 1961), does not destroy or impair the obligations imposed and rights declared by section 70-401, R. R. S. 1943.
7. ———: ———. All of the obligations imposed and rights declared by section 70-401, R. R. S. 1943, are specifically preserved by section 70-667, R. R. S. 1943.
8. **Mandamus.** Mandamus is the proper procedure to compel a public service corporation to furnish service.

Appeal from the district court for Dodge County: ROBERT L. FLORY, Judge. Affirmed.

Fraser, Stryker, Marshall & Veach and Tracy J. Peycke, for appellant Omaha Public Power Dist.

Sidner, Lee, Gunderson & Svoboda, for intervener-appellant City of Fremont.

Stewart & Stewart, for appellee.

Perry & Perry, for amicus curiae.

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

YEAGER, J.

This action was instituted by the State of Nebraska on relation of Dawson County Feed Products, Inc., a corporation, relator. By the action the relator sought a writ of mandamus for the purpose of requiring Omaha Public Power District, a public corporation, respondent, to furnish to relator all necessary electrical energy and electricity required in the construction and operation of its plant on certain described real estate in Dodge County, Nebraska, about 1 mile north of the city limits of the city of Fremont, Dodge County, Nebraska, the purpose of which plant was the blending and storage of alfalfa pellets. The City of Fremont, Nebraska, became an intervener for the purpose of responding to and defending against the application of the relator for the writ of mandamus.

The action was tried to the court and at the conclusion of the trial a judgment was rendered granting the writ of mandamus prayed for by the relator. Separate motions for new trial were filed by the respondent and intervener. These were overruled. From the ruling on these motions and the judgment the respondent and intervener have appealed.

As grounds for reversal the respondent and the intervener have set forth in their briefs numerous assignments of error. For reasons which will become apparent later herein these do not require separate recognition or consideration. The case has been briefed at length by the parties and by the League of Nebraska Municipalities as amicus curiae, but the basic matter for determina-

tion is the true present meaning of section 70-401, R. R. S. 1943, and proper application of that meaning to the issues which have been presented by the record in this case.

The pertinent part of the statute is the following: "All persons, associations or corporations engaged in this state in the generating or transmitting of electric current for sale, or both, for power or other purposes, where the person, association or corporation operates an electric transmission line outside of the limits of incorporated cities or villages, shall furnish facilities, accommodations and service * * * upon application, to (1) any individual or any person who may reside in a territory which may be served by an electric transmission line and who may apply for physical connection and service; * * *." There are other provisions in this and succeeding sections of the statute but they do not appear to have controlling significance as to issues in this case.

The relator contends that under this statutory provision and the pertinent facts it was and is entitled to the relief granted by the judgment of the district court.

A summary of the petition of the relator, to the extent necessary to be set out herein, is that the relator is a corporation organized and existing under the laws of the State of Nebraska, with its principal place of business in Lexington, Dawson County, Nebraska, and engaged in the business of processing alfalfa and the storage of alfalfa products; that the respondent is a public corporation with its principal place of business in Omaha, Douglas County, Nebraska, and engaged in the business of generating, transmitting, and selling electrical energy and electricity to the public; that the relator is the lessee of certain real estate 450 feet by 500 feet in dimensions in Section 11, Township 17 North, Range 8 East of the 6th P.M., in Dodge County, Nebraska, which real estate is about 1 mile north of the city limits of the city of Fremont, Dodge County, Nebraska, it being on

the right-of-way of the Chicago, Burlington & Quincy Railroad Company; that on this real estate the relator intends to and is constructing a plant for the purpose of blending and storage of alfalfa pellets; that in the construction and operation of the plant it is necessary to use electrical energy; that the respondent owns and operates an electrical transmission line located upon the public road right-of-way immediately to the north of this leased real estate; that the respondent furnishes electrical energy to rural and other customers in the immediately surrounding vicinity; that the relator desires to purchase electrical energy from the respondent for the construction and operation of the plant; and that relator requested that it be furnished and offered to pay therefor the regular industrial rates established by the respondent, and also offered to comply with reasonable rules, regulations, and conditions of the respondent, but that the request of the relator was refused.

On the basis of this refusal, which the relator contends was willful and wrongful, the relator made the application for the writ of mandamus which was awarded.

It is stipulated that the real estate of the relator is three-fifths of a mile north of the north line of the city of Fremont.

Other pertinent facts pleaded and which are not in dispute are that the intervener is a legally organized and operating municipality which through a board of public works, under proper authority, has developed an electric power system having exclusive rights to generate and distribute electrical energy within the city limits of Fremont; and that by virtue of contract it furnishes electrical energy to certain territory adjacent to the city of Fremont under the natural and inherent rights of the city to expand its electrical load to the expanding suburban and fringe area of the city, which area potentially is subject to annexation and which is subject to zoning and building regulations, within a one-mile

limit pursuant to the provisions of sections 16-901 to 16-904, R. R. S. 1943. The intervener has and does serve customers at locations within a not clearly defined or described area, although in an area of several miles, in which the plant of the relator is located. Likewise the respondent serves customers at locations within this same area.

It is pointed out here that the rights of the two parties to so serve the area are not controverted. It is further pointed out that the real question is not that of which had the right to serve under the circumstances, but rather that of which, if either, had the right to refuse to serve, more particularly stated, that of whether or not the respondent had the right to refuse.

Some of this service has been rendered over a period of years and some of it is of recent origin. Present determination of which shall furnish requested service depends upon private agreement in each separate instance of application for service between the respondent and the intervener. No formal agreement in relation to this subject has come forth and it has not been pointed out that there is any such agreement.

The date or character of the request or demand for service and that of its refusal do not appear, but the parties make no point of this.

After the demand and refusal the relator obtained the necessary electric service from the intervener. The electric current supplied to the relator was delivered first to the intervener by the respondent and by the intervener to the relator. The estimated cost of the current from the intervener was $1,193.50 a month, whereas the estimated cost, if it had been obtained from the respondent, would have been $962.50 a month.

It is stated here that it is not urged that the relator has, by obtaining the needed service from the intervener after denial thereof by the respondent, waived any right, if it had any right, to the service requested of the respondent.

As has been indicated the relator predicated its claimed right to service on the portion of section 70-401, R. R. S. 1943, which has been quoted. The defense made by the respondent and the intervener is in substance and effect that this provision does not declare the right which was awarded to the relator by the judgment of the district court, in consequence of which they contend that the writ of mandamus was erroneously issued.

It is urged by the respondent that section 70-401, R. R. S. 1943, has no application in an instance such as this where an industrial plant seeks service from it. The position taken by the intervener supports this theory.

To support this theory the respondent urges substantially that by the language employed in the section, a party having the status of the relator is not entitled to the benefits of the statute. The statute provides that "(1) any individual or any person who may reside in a territory which may be served by an electric transmission line" outside of the limits of incorporated cities or villages shall be entitled, on conditions imposed by the statute, to the service described. The relator, it is contended, is not an individual or person residing in the territory wherein service is sought, hence service can with impunity be refused.

The position of the relator is that no such narrow interpretation was intended by the Legislature. Its position is that the words used extend to any natural or artificial person or entity having need of the service. This question does not appear to have been directly passed upon by this court since section 70-401, R. R. S. 1943, came into being.

This provision in its present substance came into being by the enactment of chapter 170, Laws 1923, page 403. It was amended with but one change in substance by chapter 143, Laws 1925, page 374. By this change the right to service was extended to "any individual or any person who may reside in a territory which may be served by an electric transmission line" whereas the

provision of the 1923 act extended service only to "any individual or any person who may reside along or immediately adjacent to such an electric transmission line." Slight and insignificant changes are found in the section which appears as section 70-501, Comp. St. 1929, and also in the present revision.

The provision by its terms imposes a mandatory duty and obligation upon those engaged in generating and transmitting electric current for sale in the state to furnish electric current. It confers a right to receive current, and it appears reasonably from the language of the entire statute that the intent of the Legislature was that the right to receive current was conferred upon persons and individuals within the broad and not the narrow meaning of those terms contended for by the respondent and the intervener. Such intent could not be regarded as inconsistent with the terms of the statute. Moreover, in Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N. W. 855, a case not in point on any issue presented here except the intent of the Legislature in 1923 in the enactment of this provision, it is said: "The principal object and purpose of this act was to require persons, associations, companies and corporations, * * * to furnish physical connection between their power lines to properties near or adjacent thereto outside the limits of incorporated cities and villages."

In addition to all of this the Legislature by the title to the act of 1923 left no doubt of its intention. The declaration is contained in the title as follows: "AN ACT to provide that electric transmission lines and power companies of Nebraska shall afford and give to all persons, associations and corporations upon reasonable and equal terms, service facilities and physical connection to their lines running between cities and villages within this state, and to provide for the enforcement of the provisions of this act."

It is of course true that this title is not the title of

the act of 1925 and it is not the title to the revisionary act or acts directly leading to section 70-401, R. R. S. 1943, but it is an unchanged part of the history of the provision. This is history which it is proper to examine for the purpose of determining the legislative intent. In Omaha Nat. Bank v. Jensen, 157 Neb. 22, 58 N. W. 2d 582, it was said: "In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act."

In Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688, it was said: "The legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the pre-existing law and any other acts relating to the same subject." See, also, Chicago & N. W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N. W. 256. Also by the holdings in the following cases it is made clear that resort to the title of the act of 1923 is properly available for the purpose of ascertaining the legislative intent inhering in section 70-401, R. R. S. 1943: Hansen v. Dakota County, 135 Neb. 582, 283 N. W. 217; McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N. W. 2d 608; Yeoman v. Houston, 168 Neb. 855, 97 N. W. 2d 634; State ex rel. Bottolfson v. School Board, 170 Neb. 417, 103 N. W. 2d 146; Metropolitan Utilities Dist. v. City of Omaha, 171 Neb. 609, 107 N. W. 2d 397.

The conclusion reached is that it must be said that the relator was included within the classes named and described in section 70-401, R. R. S. 1943.

The respondent as ground of resistance of the relator's request asserts that its service is in the nature of a public offering and it is not bound to serve beyond the area and customers embraced in its offering. Factually, a matter conceded by the presentations of the respondent and the intervener, this area is within the

area of the public offering of the respondent. It is within the offering area of both the respondent and the intervener. It is pointed out in the record by the two parties that when an application is received by either they decide at the time and without agreement with the applicant and without reference to any statutory authority which shall perform the service.

In a situation such as this, under section 70-401, R. R. S. 1943, where two parties are occupying the same service area, the obligation to serve a particular customer in the area depends upon and is required of the one upon which the request is made.

The next proposition urged by the respondent and also the intervener as ground for reversal of the judgment herein is in effect that the agreement between the respondent and the intervener whereby the respondent refused to comply with a request for service became, under chapter 336, Laws 1961, page 1046 (sections 70-901 to 70-905, R. S. Supp., 1961), a valid agreement and therefore the relator was not entitled to relief under the terms of section 70-401, R. R. S. 1943.

Neither the provisions of this chapter of the statute nor the authorities cited support the contention of these parties. The statute in nowise contravenes the substantive rights and obligations declared by section 70-401, R. R. S. 1943, or any other declaration of substantive right in the field of electric current. It calls attention to defects in the field of production and distribution of electric current and points to corrective measures which may and should be employed, but at no point does it command the performance of any act or practice the effect of which would destroy or impair the rights and duties defined by section 70-401, R. R. S. 1943.

This is not to say that if the Legislature had implemented the commentary contained in chapter 336, Laws 1961, page 1046, such implementation would have been futile. The statement here is that it did not do so. Clearly there is nothing in this chapter which impairs

any rights of users of electricity or duties of producers thereof under section 70-401, R. R. S. 1943.

This is a sufficient answer to the proposition that mandamus may not issue the result of which would frustrate and defeat a legislative program and a declared public policy. The act did not declare a tangible or substantial legislative program or public policy.

The respondent is a public power district within the meaning of sections 70-601 to 70-603, R. R. S. 1943, and the intervener is a municipality which operates a plant for the production and distribution of electric current as a public utility, to the extent necessary to mention here, the same as a public power district. As to this there is no dispute. The two furnish electric current in the area adjacent to the plant of the relator. The right to do this is not questioned. There is no division of area between the two and about this there is no dispute. The right of the intervener to operate outside the city of Fremont is not questioned.

The intervener asserts that districts and municipalities have the discretionary right to determine how the service shall be rendered in their authorized areas. No authority for this broad assertion is cited and none has been found. This ignores provisions of statute to the contrary. It ignores the statutorily declared rights of parties contained in section 70-401, R. R. S. 1943, which are by section 70-667, R. R. S. 1943, required to be protected and preserved, as follows: "* * * all provisions of law now applicable to electric light and power corporations, * * * for any of the purposes contemplated in such statutory provisions, the manner or method of construction and physical operation of power plants, systems, transmission lines * * * as herein contemplated, shall be applicable, as nearly as may be, to districts organized under sections 70-601 to 70-672, and in the performance of the duties conferred or imposed upon them under such statutory provisions."

In enacting this statutory provision it must be pre-

sumed that the Legislature had in mind the provisions of section 70-401, R. R. S. 1943, which had been in existence without substantial change since 1923.

As pointed out hereinbefore, in enacting a statute the Legislature must be presumed to have had in mind all previous legislation on the subject. See, Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, *supra;* Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856; Roy v. Bladen School Dist. No. R-31, 165 Neb. 170, 84 N. W. 2d 119.

From what has been said herein it becomes apparent that the relator was entitled to the service, and it is clear that it was entitled to a writ of mandamus. Mandamus is the proper procedure to compel a public service corporation to furnish service. See Richey v. Omaha & L. Ry. & L. Co., 100 Neb. 847, 161 N. W. 575.

The judgment of the district court is affirmed.

AFFIRMED.

ARLA CATTLE COMPANY, A CORPORATION, ET AL., APPELLANTS, V. REUBEN E. KNIGHT ET AL., APPELLEES.

118 N. W. 2d 1

Filed November 16, 1962. No. 35269.

1. **Appeal and Error.** In the absence of a bill of exceptions it is presumed that an issue of fact presented by the pleadings was established by the evidence, that it was correctly decided, and the only issue that will be considered on appeal is the sufficiency of the pleadings to support the judgment.
2. **Affidavits: Evidence.** Affidavits used as evidence on the hearing or trial of any issue of fact must have been, as a prerequisite to examination of them in this court, identified and offered in evidence in the trial court and embodied in a bill of exceptions.
3. **Appeal and Error.** This court on appeal will consider only those assignments of error which are argued in the brief of the appellant.
4. **Trial: Judgments.** Section 25-1331, R. R. S. 1943, provides:

"A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

5. ———: ———. In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law.
6. ———: ———. The issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.
7. ———: ———. The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial.
8. **Deeds: Mortgages.** The true test in determining whether a conveyance absolute in form should be treated as a mortgage is whether the relation of the parties to each other as debtor and creditor continues. If it does so continue, the transaction will be treated as a mortgage and the conveyance as security only, otherwise not.

Appeal from the district court for Box Butte County: ALBERT W. CRITES, Judge. Affirmed.

Wade H. Ellis, Charles A. Fisher, and Charles F. Fisher, for appellants.

Reddish, Fiebig & Curtiss, for appellees.

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

MESSMORE, J.

This is an action in equity by the Arla Cattle Company, a corporation, and Charles E. Murphy, plaintiffs, against Reuben E. Knight and Florence Knight, husband and wife; F. M. Knight, deceased; the Estate of F. M. Knight, deceased; Edward M. Knight and Ruth Knight, husband and wife; and Edward J. Bignell and Jeannine M. Bignell, husband and wife, defendants. The purpose of the action was for an accounting; that a warranty deed dated April 7, 1933, an affidavit, a warranty deed dated December 3, 1960, and a warranty deed dated

January 2, 1958, be decreed to be satisfied and constitute a mortgage in favor of the defendants and against the plaintiffs; that the amount due, if any, at the date of decree be ordered paid by the plaintiffs to the defendants, after deducting all sums paid by the plaintiffs on leases to the defendants, less sums received by the defendants from sales of parcels of the land involved to others, and all sums received by the defendants from oil and gas leases, the defendants to be credited for all sums paid by them for real estate taxes; that the defendants, and each of them, be required to reconvey the real estate to the plaintiffs; and that the title of the plaintiffs in and to the real estate be quieted against any and all claims by or on behalf of any of the defendants and all persons claiming by, through, and under them.

The defendants Reuben E. Knight, Florence Knight, Edward M. Knight, and Ruth Knight filed a motion for summary judgment, without filing an answer to the plaintiff's petition as amended.

The defendants Edward J. Bignell and Jeannine M. Bignell filed an answer and cross-petition to the plaintiffs' petition, and filed a motion for summary judgment.

The trial court sustained the motion for summary judgment filed by the defendants Reuben E. Knight, Florence Knight, Edward M. Knight, and Ruth Knight; sustained the motion for summary judgment filed by the defendants Edward J. Bignell and Jeannine M. Bignell; and dismissed the plaintiffs' petition as amended, with prejudice.

The plaintiffs filed a motion for new trial which the trial court overruled. The plaintiffs appealed from the order overruling the motion for new trial.

There is no bill of exceptions in this case.

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

State ex rel. Line v. Kuhlman, 167 Neb. 674, 94 N. W. 2d 373. See, also, Bryant v. Greene, 163 Neb. 497, 80 N. W. 2d 137.

In Powell v. Van Donselaar, 160 Neb. 21, 68 N. W. 2d 894, the court said: "In Darlington v. State, 153 Neb. 274, 44 N. W. 2d 468, it is said: 'It has long been a mandatory requirement in this jurisdiction * * * that affidavits used as evidence on the hearing or trial of any issue of fact must have been, as a prerequisite to examination of them in this court, identified and offered in evidence in the trial court and embodied in a bill of exceptions.' See, also, State ex rel. Nebraska State Bar Assn. v. Pinkett, 157 Neb. 509, 60 N. W. 2d 641; Higgins v. Loup River Public Power Dist., 157 Neb. 652, 61 N. W. 2d 213."

This court on appeal will consider only those assignments of error which are argued in the brief of the appellant. See Rule 8a 2(4), Revised Rules of the Supreme Court of the State of Nebraska, 1960.

The plaintiffs set forth a number of assignments of error. However, the plaintiffs concede that the court is here asked to decide only one real question, the question of whether there is any genuine issue as to any material fact involved. The only assignment of error discussed, therefore, is whether or not there is any genuine issue as to any material fact involved. We shall consider this as the question to be answered in the instant case.

The plaintiffs contend that the motion for summary judgment of the defendants Reuben E. Knight, Florence Knight, Edward M. Knight, and Ruth Knight, filed before pleading responsively to plaintiffs' petition, was filed prematurely; that the defendants Knight have not filed their answer to the plaintiffs' petition and amended petition; and that the said motion of the defendants Knight is out of order and contrary to law.

Section 25-1331, R. R. S. 1943, provides: "A party against whom a claim, counterclaim, or cross-claim is

asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." See, also, Rule 56(b), Federal Rules of Civil Procedure.

A leading authority on the federal rules states: "* * * the proposition is well settled that a defending party may move for summary judgment prior to the service of a responsive pleading." 6 Moore's Federal Practice (2nd ed.), § 56.08, p. 2049. See, also, cases cited in footnote 7, 6 Moore's Federal Practice (2nd ed.), § 56.08, p. 2047.

The fact that the defendants Knight had not filed a responsive pleading does not make their motion for summary judgment premature, and such motion was timely filed. The plaintiffs' contention in this respect is without merit.

In Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643, the court said: "In order to obtain a summary judgment the movant must show, first, that there is no genuine issue as to any material fact in the case, and second, that he is entitled to a judgment as a matter of law." See, also, Miller v. Aitken, 160 Neb. 97, 69 N. W. 2d 290.

In Illian v. McManaman, 156 Neb. 12, 54 N. W. 2d 244, the court said that the issue to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.

"The Summary Judgments Act authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, and that no genuine issue remains for trial." State v. Kidder, 173 Neb. 130, 112 N. W. 2d 759.

With the foregoing authorities in mind, we now come to the pleadings in this case.

The plaintiffs' petition as amended alleged in substance that this action was brought by the Arla Cattle

Company, a corporation organized and existing under the laws of Nebraska with its principal offices in Alliance, Nebraska, by and through its president, Charles E. Murphy, and by Charles E. Murphy individually; that the plaintiffs have been the owners and at all times have been in possession of certain lands which are described in the petition, comprising 4,542.81 acres of which 1,002.81 acres are in Morrill County and 3,540 acres are in Box Butte County; that on or about April 7, 1933, Charles E. Murphy and Martha E. Murphy, his wife, now deceased, being financially embarrassed, were indebted to and did make and execute to F. M. Knight, a loaner of money, a warranty deed for the stated consideration of $61,037.44, being the principal and interest on a promissory note claimed due from Charles E. Murphy and Martha E. Murphy to F. M. Knight, now deceased, and predecessor and heirs herein to Reuben E. Knight and Edward M. Knight; that said warranty deed was intended to be, and was in truth and in fact, a mortgage from Charles E. Murphy and Martha E. Murphy to F. M. Knight, deceased, for the sum of $61,037.44, was not to be recorded, and was to be returned to Charles E. Murphy and Martha E. Murphy upon their tendering payment of the sum of $61,037.44 to F. M. Knight or his heirs or successors in interest; that as further evidence of such facts and the good faith of Charles E. Murphy and Martha E. Murphy, F. M. Knight made and executed a lease dated April 8, 1933, for 5 years for the aforesaid premises to Charles E. Murphy in a total consideration of $10,000, with payments of $2,000 due on November 1, 1933, and $1,000 due on May 1, 1934, etc.; that on April 8, 1933, there was, in addition to the instruments heretofore referred to, made and executed by Charles E. Murphy and Martha E. Murphy, at the special request of F. M. Knight, an affidavit for and on behalf of F. M. Knight in an effort by F. M. Knight to show that he had purchased the land described herein, when in truth and in fact said warranty deed, the lease, and the

affidavit were all only extensions and renewals of the note and mortgage due from Charles E. Murphy and Martha E. Murphy to F. M. Knight; that since said purported warranty deed, lease, and the affidavit, the plaintiffs, Charles E. Murphy and the Arla Cattle Company, a corporation, have been in continuous possession of the aforesaid real estate under leases executed by F. M. Knight or his heirs and successors in interest herein, Reuben E. Knight or Edward M. Knight, and have paid certain sums as interest and taxes to the defendants, which are set out in the petition; that the defendants, F. M. Knight, Reuben E. Knight, or Edward M. Knight, or some of them, have received unknown sums believed to be in excess of $6,100 from the Superior Oil Company as a bonus and oil rentals for said lands for the years from August 19, 1949, through 1959; that all of said sums received by the defendants from the City of Alliance, Edward J. Bignell, and Jeannine M. Bignell, and for oil and gas lease bonus or rentals, except taxes paid by the defendants, should be applied on the indebtedness, if any, of $61,037.44 due from the plaintiffs to the defendants; that Edward M. Knight and Ruth Knight, his wife, by warranty deed dated January 2, 1958, conveyed all of their right, title, and interest in and to the aforesaid lands to Reuben E. Knight, which warranty deed was filed of record on February 1, 1958, but which warranty deed reserved to Edward M. Knight one-half of all oil, gas, or other minerals, and that said warranty deeds are fraudulent and an attempt by the defendants Reuben E. Knight and Edward M. Knight to show that they are in truth and in fact the owners of said premises and had a right to convey said lands, when they knew or should have known that the plaintiffs, the Arla Cattle Company, Inc., Charles E. Murphy, and Martha E. Murphy, were in possession of and the owners of said real estate and entitled to all oil or delayed rentals of said oil leases; that the plaintiffs, the Arla Cattle Company, Inc., and Charles E. Murphy seek the removal

and reformation of the warranty deed dated April 7, 1933, the affidavit dated April 8, 1933, the warranty deed dated January 2, 1958, from Edward M. Knight and Ruth Knight to Reuben E. Knight, recorded on February 1, 1958, and the warranty deed dated December 3, 1960, from Reuben E. Knight and Florence Knight to Edward J. Bignell and Jeannine M. Bignell, his wife, recorded December 7, 1960; and that the plaintiffs are ready to pay whatever may be justly due to the defendants on said accounting, and offer to pay the same into court or to the defendants.

The deed from Charles E. Murphy and Martha E. Murphy, his wife, is a warranty deed conveying to F. M. Knight the lands in controversy. The deed contained the following recital: "This deed is an absolute conveyance of title in effect as well as in form, and is not intended as a mortgage, trust conveyance or security of any kind. The consideration therefor and for the payment of 1930 and 1931 tax by grantors is full release of all deeds, notes, obligations, costs and charges heretofore subsisting on account of and by the terms of that certain mortgage heretofore existing on the property herein conveyed, executed by Charles E. Murphy and Martha E. Murphy, husband and wife, to F. M. Knight and recorded in Book 48, Page 101, of the Mortgage records of Box Butte County, Nebraska, and in Book 27, Pages 269-270, of the Mortgage records of Morrill County, Nebraska, this conveyance and the payment of said taxes completely satisfying said obligation and terminating said mortgage and the notes or bonds secured thereby and any effect thereof in all respects."

The petition reflects that F. M. Knight is deceased, his death apparently occurring between May 1, 1939, and May 1, 1940, as the schedule of rentals reflects the lease of May 1, 1939, to May 1, 1940, with F. M. Knight as lessor, and the lease of May 1, 1940, to May 1, 1941, with F. M. Knight estate as lessor. The petition further

reflects that leases were executed covering periods from April 8, 1933, to May 1, 1961, with varying amounts of rentals; and that at some unstated date a tract was sold by F. M. Knight, Reuben E. Knight, or Edward M. Knight to the city of Alliance. The petition likewise reflects that F. M. Knight refused to execute a written option for the plaintiffs to repurchase the property as agreed, and from 1940, Charles E. Murphy discussed the settlement of his option to repurchase said real estate with Reuben E. Knight, and on other occasions tendered and offered to pay any sums due and owing.

The defendants Bignell denied all allegations contained in the plaintiffs' petition not expressly admitted, and alleged that they were bona fide purchasers for value of the premises described in their answer without notice of the claim of the plaintiffs, based upon purchase of real estate for valuable consideration; and that they procured and had an abstract of title examined which disclosed the absence of any recording which would provide actual or constructive notice of interest in the Morrill County land of any person other than Reuben E. Knight or Edward M. Knight. The defendants Bignell further alleged that at the time they purchased the said land they were informed of the existence of a lease between Reuben E. Knight as landlord and Charles E. Murphy personally, Charles E. Murphy as president of the Arla Cattle Company, Inc., and Richard D. Murphy as tenants, expiring May 1, 1961; and that there was absence of notice of any claimed interest of plaintiffs in the Morrill County land other than as tenants in possession.

These defendants pleaded the statute of limitations and adverse possession with knowledge by the plaintiffs, instruments appearing of record in Morrill County constituting constructive notice to the plaintiffs as follows: Mortgage, Charles E. Murphy and wife to F. M. Knight, dated June 11, 1928, recorded in the mortgage records, released by F. M. Knight April 7, 1933, and

filed for record in the mortgage records April 21, 1933; deed from Charles E. Murphy and wife to F. M. Knight, dated April 7, 1933, filed April 21, 1933, and recorded; recording of transcript of the will of Frank Millard Knight March 13, 1941, book 13, pages 437 to 440, miscellaneous records, and of certified copy of decree of distribution March 13, 1941, in book 13, pages 441 to 445, miscellaneous records; condemnation proceedings of the United States of America v. 27,819 Acres of land, recognizing title of Reuben E. Knight and Edward M. Knight to subject land, wherein order of court was filed June 17, 1943, and recorded in book 14, page 231, miscellaneous records; condemnation by the United States of America of 1.33 acres of land in Alt survey, Section 44, Township 23 North, Range 47 West, with decree of July 6, 1944, filed July 11, 1944, recorded in book 14, pages 472 and 473, miscellaneous records; and oil and gas lease by Reuben E. Knight and Edward M. Knight and their respective spouses, dated August 19, 1949, filed August 29, 1949, and recorded in book 17, page 223, miscellaneous records, together with the affidavit of Charles E. Murphy and his wife, dated April 8, 1933, recorded April 18, 1960, and the deed from Edward M. Knight and wife to Reuben E. Knight, dated January 2, 1958. These defendants prayed that the plaintiffs' petition be dismissed.

On the proposition raised by the plaintiffs in their petition as amended as to whether or not the deed conveying the property described in the petition to F. M. Knight on April 7, 1933, was an absolute conveyance of such real estate or in effect a mortgage thereon with the right of reconveyance to the plaintiffs upon the payment of the indebtedness heretofore stated to F. M. Knight, we deem the following to be applicable.

In Riley v. Starr, 48 Neb. 243, 67 N. W. 187, the court said: "A safe and perhaps the most satisfactory test, in all such cases, is whether the relation of the parties to each other as debtor and creditor continues. If it

does, the transaction will be treated as a mortgage, otherwise not * * *." Cases are cited. Campbell v. Ohio Nat. Life Ins. Co., 161 Neb. 653, 74 N. W. 2d 546, cites Riley v. Starr, *supra,* and Samuelson v. Mickey, 73 Neb. 852, 103 N. W. 671, on rehearing 73 Neb. 856, 106 N. W. 461, and other cases pronouncing the same rule with approval.

In O'Hanlon v. Barry, 87 Neb. 522, 127 N. W. 860, the court said: "We have repeatedly said that where it is sought to establish by parol that an absolute deed was only intended as a mortgage or given as security, the evidence must be clear, convincing and satisfactory. Deroin v. Jennings, 4 Neb. 97; Schade & Schade v. Bessinger, 3 Neb. 140; Stall v. Jones, 47 Neb. 706; Butler v. Peterson, 79 Neb. 715."

In Cox v. Young, 109 Neb. 472, 191 N. W. 647, quoting from Snoke v Beach, 105 Neb. 127, 179 N. W. 389, the court said: " 'The rule is also established in this state that, where it is sought to vary the effect of a deed absolute on its face by parol testimony so as to declare it to be a mortgage, the evidence must be clear, convincing, and satisfactory before a court is warranted in adjudging it to be a mortgage.' These propositions find support in Sanders v. Ayres, 63 Neb. 271, Kemp v. Small, 32 Neb. 318, and O'Hanlon v. Barry, 87 Neb. 522."

The plaintiffs' petition as amended reflects that there is no evidence whatsoever, let alone clear, convincing, or satisfactory evidence, to support the existence of any right to obtain a reconveyance of the real estate as set forth in the warranty deed given to F. M. Knight. The petition reflects that the debtor-creditor relationship terminated on April 8, 1933, and that the warranty deed or absolute conveyance was not intended as security for a debt.

The pleadings and exhibits appearing in the transcript clearly disclose that the relationship between the plaintiffs and the defendants was that of landlord and tenant.

A period of nearly 28 years elapsed before the plaintiffs

ever made an attempt to set aside the warranty deed here involved and to have it declared to be a mortgage. Considering the pleadings, this action on the part of the plaintiffs clearly indicates a further reason as to why their contention lacks merit.

There are other reasons why the plaintiffs cannot prevail in this case which need not be determined or discussed.

In the state of the record before this court, we conclude that the defendants are entitled to a judgment as a matter of law, and the judgment of the trial court should be affirmed.

AFFIRMED.

ELEONORE HARDING, APPELLEE, V. WENDELL W. HARDING, JR., APPELLANT.
117 N. W. 2d 800

Filed November 16, 1962. No. 35278.

1. **Divorce: Appeal and Error.** An appeal from a judgment denying the modification of a divorce decree is triable de novo in this court subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court in determining the weight of the evidence will consider the fact that the trial court heard and observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
2. **Divorce.** An application for the modification of a divorce decree with respect to the custody of minor children, made any time after the granting of the divorce, must be founded upon facts and circumstances which have arisen subsequent to the granting of the divorce.
3. **Parent and Child.** Ordinarily the interests and welfare of a child of tender years will be best served by placing the child in the custody of the natural mother if she is a fit and suitable person.
4. **Parent and Child: Appeal and Error.** In an action involving the custody of minor children, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses,

the conclusion of the trial court as to such reliability will be carefully regarded by this court on review.

Appeal from the separate juvenile court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Beynon, Hecht & Fahrnbruch, for appellant.

Wagener & Marx, for appellee.

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

CARTER, J.

This is an appeal from an order of the separate juvenile court of Lancaster County denying a modification of a divorce decree as it relates to the custody and support of the children provided for in the decree.

The petition for divorce was filed by Eleonore Harding, whom we shall hereafter refer to as Nora. The defendant is Wendell W. Harding, Jr., whom we shall hereafter refer to as Del. Two minor children were involved in the litigation. Lucy, 8 years of age at the time of trial, was a daughter of Nora by a former marriage and was legally adopted by Del. Mark, 4 years of age at the time of trial, was the natural son of the parties. The divorce was granted on May 11, 1960, and by its terms the custody of the two children was granted to Nora. Del was required to pay support money for the children in the amount of $95 per month. Alimony was awarded in the amount of $2,500, payable $55 per month until paid. Nora was given the use of the family home until she remarried or abandoned it. At the time of the hearing on the petition to modify the decree Nora was living in the family home and Del had made all payments due under the terms of the decree.

On March 3, 1961, Del filed a petition for modification of the divorce decree praying that he be awarded the custody of the two children. Del alleged that during the time the children were in the custody of Nora they had become dirty and unkempt; that Nora had failed to re-

main in the home and care for the children although she had the means to do so; that she had left the home for periods of time without making adequate provision for the children during her absence; that Nora was guilty of indiscretions in the home that resulted in a bad environment; and that Nora failed to properly supervise and train the children. Del alleged that he had remarried; that he has a good home for the children; and that their best interests require that he have their custody. The allegations of fact in the petition for modification that tend to support it are denied generally by Nora. The trial court refused to modify the decree of divorce by changing the custody of the children and denied, also, the prayer of the cross-petition praying for an additional allowance for their support.

There is evidence in the record that the children were at times dirty and unkempt. There is evidence to the contrary to the effect that the children were generally clean and well cared for. There is some evidence that the children were not well supervised, particularly after the children returned from school or nursery, and before Nora returned home from work. There is evidence that the children on occasion left the home premises without their mother's knowledge and went to the home of their great-grandmother for whom they appear to have great affection. There is evidence that the children, particularly Mark, were difficult to handle on occasion, and that sometimes they got involved in difficulties not uncommon to children of tender years.

It is evident from the record that neither Nora nor Del lost any time in seeking the company of the opposite sex after the divorce was granted. This question is pertinent as to whether or not Nora is a fit and suitable person to retain the custody of the children and whether or not Del is a fit and suitable person to have such custody if Nora is found to be an unfit and unsuitable person to have their custody.

In this respect there is some evidence that Nora dated

a married man; that a single man remained overnight in her home on one occasion; and that she made occasional trips out of town with men friends. She denied any wrongdoing and explained the situations that tend to impugn her character. On the other hand, the evidence shows that Del was dating other women, particularly the one to whom he is presently married. Each of the parties is very critical of the other's conduct. The evidence reflects somewhat upon the character of each. We concur with the holding of the trial court that the evidence is insufficient to sustain a finding that either is an unfit or unsuitable person to have the custody of these children.

The evidence shows that both parents have great affection for these two children. The children appear to have a normal affection for each of their parents. The evidence is in conflict on the acts charged as misconduct by each against the other. We cannot overlook the fact that the trial court saw and heard the witnesses testify, while we have only the written record from which we can make our determination. On questions of fact that are in irreconcilable conflict the findings of the trial court furnish the only reasonable guide for us to follow. In proceedings to modify a decree of divorce we are required to try the case de novo on the record. Where the evidence is principally oral and in irreconcilable conflict, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court on review. Dwinnell v. Dwinnell, 165 Neb. 566, 86 N. W. 2d 579.

The children, Lucy and Mark, were 8 and 4 years of age at the time of trial. Lucy is the daughter of Nora by a former marriage who was formally adopted by Del. They are children of tender years whose interests are ordinarily best served by placing them in the custody of the natural mother, if she be a suitable and fit person. Ivins v. Ivins, 171 Neb. 838, 108 N. W. 2d 99.

The custody of children of tender years having been awarded to the natural mother, such custody will not ordinarily be disturbed unless it be shown that the mother is unfit to have their custody, or that their best interests require such action. Wakefield v. Wakefield, 157 Neb. 611, 61 N. W. 2d 208.

After a consideration of all the evidence, and the allowable effect of the trial court's findings on the facts that are in irreconcilable conflict, we conclude that the evidence does not sustain a finding that Nora was an unfit and unsuitable person to have the custody of the two children. We find no basis, also, for increasing the amount of child support fixed by the original decree of divorce. The trial court having come to these same conclusions, we affirm the judgment of the trial court. We allow appellee's counsel $250 for services rendered in this court, to be taxed as costs.

AFFIRMED.

MERLIN OLSON, INDIVIDUALLY AND AS ASSIGNEE, APPELLEE, v. UNION FIRE INSURANCE COMPANY, ALSO KNOWN AS UNION INSURANCE COMPANY MUTUAL, APPELLANT.

118 N. W. 2d 318

Filed November 30, 1962. No. 35195.

1. **Insurance.** The liability of an insurer to pay in excess of the limits of the insurance policy accrues when the insurer, having the exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within policy limits.
2. ———. When an insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no contractual obligation to do so.
3. ———. The amount of liability fixed by an insurance policy and upon which the premium is paid determines the limit of the contractual liability and duty of the insurer.
4. ———. An insurer may settle a claim within the limit of its liability as it chooses since the insured cannot be prejudiced by a settlement to be paid by the insurer.

5. ———. An insurance company is not required to waive its defense of nonliability which is made in good faith to avoid being held for a judgment in excess of the limits of its insurance policy.
6. ———. An insurance company cannot be held for the payment of a liability in excess of policy limits merely because its determination, arrived at in good faith, proved to be erroneous in the light of subsequent events.
7. ———. The right of an insurer to control the litigation in all of its aspects carries with it the duty to exercise diligence, intelligence, good faith, and conscientious fidelity in the interests of the parties.
8. ———. Where an insurer has exercised good faith in declining a settlement which has been fully and fairly considered, based on an honest belief that insurer could defeat the action or keep any possible judgment within policy limits, and its conclusions are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, accompanied by legal advice with reference thereto, no liability over policy limits exists even if it is ultimately determined that its determination was a mistaken one.

Appeal from the district court for Dixon County: JOHN E. NEWTON, Judge. Reversed and remanded with directions.

Lyle C. Holland and Healey & Healey, for appellant.

Harry N. Larson, Wear, Boland, Mullin & Walsh, and A. Lee Bloomingdale, Jr., for appellee.

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

CARTER, J.

This is an action by plaintiff, individually and as assignee of Thomas Shellington, against the defendant insurance company because of the refusal of the latter to settle the claims of plaintiff against Thomas Shellington within the limits of an automobile insurance policy issued by the insurance company to E. C. Shellington, Thomas Shellington being an additional insured under the provisions of the insurance policy.

The automobile accident giving rise to the present

litigation occurred on June 29, 1952. At about 11:30 p.m. of that day Thomas Shellington, then 17 years of age, was driving his father's automobile from Wayne to Wakefield, in Wayne County, Nebraska, accompanied by four other members of the Wakefield Junior American Legion baseball team. Merlin Olson was one of the four guests riding in the Shellington automobile. At a point 2 miles south and 2 miles west of Wakefield an accident occurred on a bridge which had been constructed on an angle with the highway. There was a curve in the highway immediately west of the bridge. The road was level for 50 rods west of the bridge. The bridge was difficult to see until one approached close to it. The railings on the bridge were unpainted, badly rusted, and dark in color. There was nothing to warn an approaching traveler from the west of the position of the bridge with reference to the road. It was a dark night. The automobile approached the bridge at a speed of 45 to 50 miles an hour on the right side of the road with its headlights on the bright beam. The driver did not see the bridge until he was about 25 feet from it. The automobile struck the bridge railing and went off the bridge. Merlin Olson sustained injuries resulting in total and permanent disability. A more detailed statement of the facts can be found in Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20.

Merlin Olson, by his mother and next friend, brought suit against the County of Wayne to recover damages for his injuries as a result of the alleged insufficiency and disrepair of the highway and bridge at the place of the accident. The trial court directed a verdict for the defendant at the conclusion of the evidence, and this court affirmed. Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400. Plaintiff then commenced an action against Thomas Shellington to recover for injuries sustained while riding as a guest in the automobile driven by Shellington. Whether or not Shellington was guilty of gross negligence was the primary issue in that

case. The jury found for the plaintiff in the amount of $24,000 and added these words in its verdict: "We find slight negligence on the part of the defendant." The trial court set aside the inconsistent verdict and ordered a new trial. This court affirmed. Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709.

Upon a second trial of the case in the district court the jury found the driver of the automobile guilty of gross negligence and returned a verdict for the plaintiff for $50,000. This court on appeal held that the evidence was sufficient to take the case to the jury on the issue of gross negligence and affirmed the judgment. Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20. The insurance company thereupon paid $10,000 with interest and costs, such amount being its limit of liability under the provisions of the insurance policy.

The plaintiff thereafter commenced this action against the insurance company, alleging the issuance of the insurance policy to E. C. Shellington, that Thomas Shellington was an additional insured, the limit of liability as to any one person of $10,000, the offers to settle plaintiff's claims for $10,000, and the demands of Thomas Shellington that the offers of settlement be accepted; asserting negligence and bad faith by the insurance company in refusing to settle the claims for $10,000; and praying for judgment for $50,000. The insurance company denied liability and specifically denied that it was guilty of any negligence, or that it acted in bad faith in any manner in its handling of the litigation. For reply the plaintiff specifically denied that defendant was no longer obligated to pay any further amount by virtue of the issuance of the policy of insurance and otherwise generally denied the affirmative allegations of the answer. Upon the trial of the case the jury returned a verdict for plaintiff against the insurance company for $40,000. The insurance company has appealed. The insurance company assigns as error the failure of the trial court to sustain its motions for a directed verdict.

The liability of an insurer to pay in excess of the face of the policy accrues when the insurer, having exclusive control of settlement, in bad faith refuses to compromise a claim for an amount within the policy limit. The weight of authority is to the effect that when the insurer has the exclusive right to settle a claim within the limits of its liability, it has an option to compromise but no obligation to do so. In the event the insurer elects to resist a claim of liability, or to effect a settlement thereof on such terms as it can get, there arises an implied agreement that it will exercise due care and good faith where the rights of an insured are concerned.

The amount of liability fixed by the insurance policy, upon which the premium is paid, determines the limit of the contractual liability and duty of the insurer. An insurer may settle a claim within its limit of liability as it chooses since the insured cannot be injured by a settlement to be wholly paid by the insurer. The exclusive power to settle a claim within the limits of its liability is therefore ceded to the insurer for its sole benefit. While an insured may compromise his possible liability over and above the limits of the insurance policy, he has no duty even to attempt to do so. He may rely upon the policy, the promise to indemnify in a fixed amount, and the duty of the insurer to defend and to use its discretionary authority to settle in good faith. It is clear that the insurance company is not liable to plaintiff for refusal to settle his claim unless the refusal was in bad faith. The question raised by this appeal is whether or not the evidence is sufficient to present a question for the jury as to the bad faith of the insurance company.

"Good or bad faith is a state of mind. Of necessity, it must be determined from proof of conduct, except as the owner of the mind discloses its operations. Defendants, being corporations, could act only through agents, whose state of mind is that of the defendants."

City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N. W. 643.

With these fundamental rules in mind we shall set forth the evidence upon which the verdict was returned. The testimony of plaintiff is to the effect that the serious injury sustained by Merlin Olson and the course of the litigation between plaintiff, the County of Wayne, and Thomas Shellington indicated that a judgment in excess of the limits of the insurance policy would be obtained and that it was negligence or bad faith on the part of the insurance company to refuse to settle the claim within the limits of the policy upon demand by Thomas Shellington that it do so. The evidence of the insurance company is that it honestly believed that gross negligence on the part of Thomas Shellington, the driver of the automobile involved in the accident, could not be established; in other words, that it was a nonliability claim. The evidence shows that the insurance company took statements from all persons having any knowledge concerning the accident. Its attorneys advised that gross negligence on the part of Thomas Shellington did not exist. The manager of the claim department, a lawyer, was of the opinion that gross negligence did not exist. The insurance company employed Guy C. Chambers, an able lawyer of long experience in personal injury cases involving gross and slight negligence, for an opinion as to whether or not Thomas Shellington could be held for gross negligence. His opinion was, after a study of the evidence in the Wayne County case, the statements and depositions taken, and a consideration of the Nebraska Supreme Court decisions, that gross negligence did not exist as a matter of law. After it was determined by the rulings of the district court that the evidence of gross negligence was sufficient to submit the case to a jury, the agents and legal counsel of the insurance company determined that the case could be successfully defended before an impartial jury. The question here is not whether its judgment was correct in

analyzing the facts and the law of the case, but whether it acted honestly, without negligence, and in good faith.

We think the evidence shows conclusively that it used all available means to assemble the facts and to determine the applicable law. Whether or not the evidence was sufficient to sustain a finding of gross negligence was a close question as shown by the meticulous care with which the facts were considered by this court in Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20. "Courts, as well as attorneys, sometimes differ on the law applicable to a given state of facts." Berk v. Milwaukee Automobile Ins. Co., 245 Wis. 597, 15 N. W. 2d 834. We find none of the elements of negligence or bad faith existed in the making of these determinations. The conclusion of the insurance company that it had a valid defense, although wrong, is not in itself evidence of negligence or bad faith. Byrnes v. Phoenix Assurance Co., 303 F. 2d 649.

While it is true that the insurance company knew of the seriousness of the injuries sustained by Olson in the accident and would sustain a judgment for as much as $100,000, it was not bound to surrender its defense of nonliability to avoid being held for a judgment in excess of the limits of its policy. It cannot be held merely because its determination, honestly arrived at, proved to be erroneous in the light of subsequent events. The contention of the plaintiff is, in effect, that the insurance company, primarily in the light of previous litigation, should have foreseen a judgment against Thomas Shellington in excess of its policy limits and that its mistake in this respect amounts to negligence or bad faith. We think not.

In the instant case Thomas Shellington has at all times denied that he was guilty of any negligence. His demand that the insurance company settle the claim is not based, therefore, on any admitted liability on his part but on the theory that the insurance company should pay $10,000, which it claimed it did not owe, in

order to relieve Shellington of the litigation and the incidents thereof. It is not negligence or bad faith on the part of an insurer to refuse a settlement which it honestly believes is not to its best interest merely to avoid the distasteful incidents of litigation on the part of its insured.

"Exclusive authority to act does not necessarily mean the right to act arbitrarily. * * * The right to control the litigation in all of its aspects carries with it the correlative duty to exercise diligence, intelligence, good faith, honest and conscientious fidelity to the common interest of the parties." Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F. 2d 621, 142 A. L. R. 799.

"* * * a defense going far enough to show reasonable and probable cause for making it will vindicate the good faith of the insurance company." Hall v. Preferred Acc. Ins. Co., 204 F. 2d 844, 40 A. L. R. 2d 162.

"* * * it cannot be said to be bad faith to deny a claim when there is substantial evidence to support the denial." Kleinschmit v. Farmers Mut. Hail Ins. Assn., 101 F. 2d 987.

The general rules as to the liability of the insurer are stated in Davy v. Public National Ins. Co., 181 Cal. App. 2d 387, in the following apt language: "Good faith implies honesty, fair dealing and full revelation. * * * Bad faith implies dishonesty, fraud and concealment. * * * Neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith. * * * As a consequence, liability upon the part of the insurer for refusal to accept an offer of settlement may not be predicated upon its failure to correctly predict the outcome of the action it is defending." As one court aptly stated: "The gift of prophecy has never been bestowed on ordinary mortals, * * *." Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S. W. 2d 777.

There is a lack of uniformity in the cases in dealing with this subject. See, Annotations, 40 A. L. R. 2d 168, 68 A. L. R. 2d 892. We shall not undertake a discussion

of the refinements of these cases. We think the controlling rule in the instant case is: If the insurer has exercised good faith in all of its dealings under its policy, if the settlement which it has rejected has been fully and fairly considered and has been based on an honest belief that the insurer could defeat the action or keep the judgment within the limits of the policy, and if its determination is based on a fair review of the evidence after reasonable diligence in ascertaining the facts, accompanied by competent legal advice, a court will not subject the insurer to liability in excess of policy limits if it ultimately turns out that its determination is a mistaken one. See Christian v. Preferred Acc. Ins. Co., 89 F. Supp. 888.

Where an insurer acts honestly and in good faith upon adequate information, it will not be held liable because it failed to correctly prophecy the result. The evidence of the plaintiff fails to make even a prima facie case of bad faith. The evidence of the insurance company which stands undisputed shows the good faith of the company in refusing to settle within the limits of the insurance policy. The trial court erred, therefore, in not sustaining the motion of the insurance company for a directed verdict at the close of all the evidence. The judgment of the district court is reversed and the cause remanded with directions to sustain defendant's motion for judgment notwithstanding the verdict and to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

BROWER, J., dissenting.

I respectfully dissent from the decision of the court. My disagreement with the court is in the application of the law to the facts in this particular case. The case against Wayne County was brought July 23, 1952. The decision of this court in Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400, was decided June 19, 1953. To my mind this court in that case decided that condition of the road or bridge was not the proximate

cause of the plaintiff's injury and rather pointedly suggested that the negligence of the driver was the proximate cause. On April 2, 1954, Merlin Olson, by his next friend, started his action against Thomas Shellington, the insured's son. At the suggestion of defendant's counsel made by letter to the company, it sought the opinion of Mr. Guy Chambers, an eminent lawyer, particularly qualified in personal injury actions, as to the liability of the defendant about the middle of September 1954. The portion of the letter of the defendant's counsel suggesting the reference made after consulting the defendant Thomas Shellington is in these words: "Considering that Tom Shellington is a minor, and not a very bright minor at that, it is doubtful if he understands why he is not liable to the injuries to Merlin Olson or to any other passengers in the automobile which he was driving. We would therefore like to visit with you about the possibility of securing an opinion from a recognized authority on negligence law to the effect that Tom Shellington is not liable for any injuries to the guests in the car, and that we are therefore not being unreasonable in refusing to settle this case within the limits of the policy. It would seem that such an opinion would be of much more value to show our good faith in the handling of this claim than any statement from young Shellington to the effect that he doesn't believe he is liable for the injuries to Merlin Olson. When Mr. Head returns from his vacation, we would like to take that matter up with him."

This portion of the letter to my mind is susceptible of different meanings. One might be that the company was not attempting to negotiate any settlement and intended in all events to stand pat and sought the advice of counsel wholly as a defense to a suit of the present nature well knowing the minor defendant was not very bright and not convinced of his not being liable for the plaintiff's injuries; further, that counsel writing the letter anticipated an adverse judgment in the case as early

as 1954. Mr. Chambers, after studying the files of the defendant herein with respect to the accident and the evidence in the case against the County of Wayne, gave his opinion that Shellington was not guilty of gross negligence and the plaintiff guest could not recover. Neither Mr. Chambers nor anyone else was ever consulted again in spite of the fact that subsequent events in my opinion increasingly pointed to the ultimate liability of the defendant Shellington. This is a case for injuries that the defendant's vice president handling claims, himself a lawyer, conceded would substantiate a verdict of at least $100,000, if liability was established. On March 18, 1955, the jury returned the verdict for $24,000 after the trial court by its instructions had submitted the issue of Shellington's gross negligence to the jury. The verdict was set aside because of the special finding or notation on the verdict that defendant was guilty of "slight negligence." On appeal to this court the defendant contended the case should have been dismissed on his motion for judgment notwithstanding the verdict because there was no evidence of gross negligence. This court sustained the trial court in granting a new trial but refused to dismiss the case. Its opinion, Olson v. Shellington, 167 Neb. 564, 94 N. W. 2d 20, indicates clearly that an issue of gross negligence sufficient to submit to the jury was shown in the first trial. Defendant argues that another jury might well have held that the negligence was only slight. This is true of course but it might on the other hand indicate a jury would on a subsequent trial find for the plaintiff on the issue of gross negligence and under circumstances not rendering their verdict assailable. That the defendant itself realized the situation was grave is to my mind shown to a considerable extent by its raising the reserve for this risk from time to time. On the report of the accident it was $1,500. Later it was raised to $4,000. On June 23, 1953, after the Supreme Court's opinion in Olson v. County of Wayne, *supra,* it was

raised to $9,000. In December 1958, it was raised to $10,000, the full limits of the policy, though all other liability appeared to be barred by limitations except this one cause. During practically the whole of the period this suit was pending in district court up to and after the time of the trial court's overruling the defendant's motion to dismiss at the second trial of the case, it could have been settled for the $10,000, the limit of defendant's insurance. The insured at all times demanded the settlement. The matter of negotiation and settlement was, as provided by the policy, in the exclusive hands of the defendant insurance company herein. It neither accepted the offer for settlement of the claim for the full amount of its policy limits nor explored the possibility of a lesser settlement by counter negotiation. Its negotiation consisted of one word "no," except on one occasion on which it refused to answer at all and didn't inform its insured that an offer was made at that time. After the last judgment for $50,000 and before the appeal therefrom by Shellington to this court, the company which had reassured the defendant for all loss over $5,000, plus half of the cost, suggested there might still be a settlement affected and advised it should be attempted. The reinsurer pointed out in its letter that more than a year and a half before the expense of litigation had then exceeded $4,300, and that the ensuing expense had no doubt considerably augmented that amount. The defendant's vice president made no attempt to settle until after the judgment of $50,000 was pending on appeal to this court and then according to him because of the suggestion of the coinsurer only. Defendant's vice president to my mind in his testimony considered the continuation of the litigation to be a matter of principle and gave little thought to the rights of the assured, the extent of the damage, nor the amount of the expense.

There is to my mind clearly sufficient evidence of

bad faith on the part of the defendant to authorize the issue to be submitted to the jury.

I am authorized to state Judge Spencer concurs in this dissent.

STATE OF NEBRASKA, APPELLEE, V. MARY BROWN, APPELLEE, IMPLEADED WITH NORMA LEVERING ET AL., APPELLANTS.
118 N. W. 2d 328

Filed November 30, 1962. No. 35220.

1. **Criminal Law.** In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. ———. Under section 29-2002, R. S. Supp., 1961, a motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence of an abuse of discretion.
3. **Criminal Law: Evidence.** A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered.
4. ———: ———. Prior inconsistent and contradictory statements of a defendant which were voluntary are admissible for the purpose of impeachment.
5. **Witnesses: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of discretion is shown.
6. **Juries.** The fact that a jury may have deliberated for a relatively short time before reaching its verdict does not establish that it acted with passion and prejudice or ignored the instructions of the court.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

William W. Graham, for appellants.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee State of Nebraska.

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

BOSLAUGH, J.

The defendants, Norma Levering and Victoria Levering, were convicted of robbery under section 28-414, R. R. S. 1943. Their motion for new trial was overruled and they have appealed to this court. Their assignments of error are that the evidence is not sufficient to sustain their conviction; that the trial court erred in refusing to grant them separate trials, in failing to strike certain evidence, and in restricting their right to cross-examine; and that the jury ignored the instructions of the court.

There is evidence from which the jury could have found that Norman L. Runyon, the complaining witness, met the defendants at Morgan's Bar in Omaha, Nebraska, on the evening of March 24, 1961. When Morgan's Bar closed at 1 a. m., Runyon and the defendants went to 1407 Cass Street where they met Mary Brown. About 30 minutes later, as Runyon was leaving 1407 Cass Street, the defendants and Mary Brown "jumped" him when he was outside the door; that they grabbed him and started whipping his clothes off; that he had about $60 in bills in his right-hand pocket and about $400 in a billfold in his back pocket; that Mary Brown took the billfold out of his back pocket; and that Norma Levering had her hand in his other pocket while Victoria Levering was hitting him. In addition to being beaten with fists, Runyon was struck with a sharp object. When the fight was over, everything, including his car keys, had been removed from Runyon's pockets. Runyon then walked to the police station and reported the robbery. From there he was taken to a hospital and treated for bruises and lacerations about the face and head.

Although there was evidence to the contrary, the evidence was sufficient for the jury to find that Runyon was robbed by the defendants and Mary Brown as charged in the information. It is not the province of

this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. State v. Wilson, *ante* p. 86, 115 N. W. 2d 794.

The defendants and Mary Brown were charged with robbery in one information. Several days before the trial the defendants filed a motion for separate trials supported by an affidavit of their attorney. The motion and affidavit appear in the transcript but the bill of exceptions does not contain any evidence which was before the trial court at the time of the ruling on the motion. Affidavits in support of a motion will not be considered by this court where they are not preserved in the bill of exceptions. Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858.

Before 1957, persons who were charged jointly with the commission of a felony were entitled to separate trials as a matter of right if a timely application was made to the court for that purpose. § 29-2002, R. R. S. 1943; Reed v. State, 93 Neb. 163, 139 N. W. 1015. In 1957 the statute was amended and section 29-2002, R. S. Supp., 1961, now provides in part: "Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. * * * If is (it) appears that a defendant or the state would be prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires."

The right to a separate trial now depends upon a showing that prejudice will result from a joint trial. A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such a motion will not be disturbed in the absence

of a showing of an abuse of discretion. Opper v. United States, 348 U. S. 84, 75 S. Ct. 158, 99 L. Ed. 101, 45 A. L. R. 2d 1308; 53 Am. Jur., Trial, § 56, p. 65; 23 C. J. S., Criminal Law, § 933, p. 696.

The fact that one of several defendants had made an admission which may be received in evidence against him is not a conclusive ground for ordering the defendants tried separately even though the admission incriminates the other defendants. United States v. Caron, 266 F. 2d 49; Costello v. United States, 255 F. 2d 389. There is some danger of prejudice in any trial involving multiple defendants but severance should be denied in the absence of a showing of prejudice against which the trial court will not be able to afford protection. United States v. Lev, 22 F. R. D. 490, 276 F. 2d 605. The record in this case does not establish that the trial court abused its discretion in overruling the motion of the defendants for separate trials.

When Mary Brown was searched at the police station she was found to have $222 on her person. A police matron and a detective testified that Mary Brown said that this money had been given to her by the defendants. No objection or motion to strike was made to this testimony. The defendants now contend that the trial court on its own motion should have stricken this testimony as hearsay and instructed the jury to disregard it as to the defendants.

A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357. A defendant may not permit questionable or incompetent evidence to be admitted without objection, take the chance of a favorable verdict, and thereafter complain of its admission. Vinciquerra v. State, 127 Neb. 541, 256 N. W. 78. The failure to object at the time the evidence was offered prevents the defendants from asserting at this time that the trial court erred in failing to exclude this testimony as to the defendants.

Both defendants testified in their own behalf. On cross-examination each defendant was questioned in regard to statements made on the day of their arrest to the county attorney at the police station in the presence of a court reporter. On rebuttal the State produced the court reporter who testified as to the statements made by the defendants. The statements made by the defendants which were proved by the State on rebuttal were not in the nature of confessions and did not directly implicate the defendants in the crime. The statements contradicted the testimony of the defendants at the trial and were admissible for the purpose of impeachment. Tatum v. State, 61 Neb. 229, 85 N. W. 40; Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113.

The defendants argue that their motion to strike the testimony as to the statements made at the police station should have been sustained because it was not shown that the statements were voluntary. The argument is based upon testimony by the defendants on redirect examination that they told the county attorney that they did not want to answer any questions.

The court reporter testified that no threats or promises of leniency were made to either defendant and that each defendant was advised by the county attorney that she could consult counsel and refuse to answer any of the questions. The trial court instructed the jury that the statements could be considered only for the purpose of determining the weight of the testimony and the credibility of the witness and only if the jury found that the statements were made voluntarily and not obtained by compulsion or fear nor by any promise or inducements offered to the witness. The assignment of error is without merit.

The defendants complain that the trial court erroneously restricted their right to cross-examine the witnesses for the State. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld unless an abuse of

discretion is shown. Pierce v. State, 173 Neb. 319, 113 N. W. 2d 333.

Many of the questions to which objections were sustained related to matters which were not relevant or material to the case. Some of the questions related to the disposition of other persons arrested at the same time. Other questions were argumentative or did not properly reflect the evidence. The record does not show an abuse of discretion by the trial court in limiting the scope of cross-examination.

The case was submitted to the jury at 4:11 p. m. At 5:25 p. m., the jury returned its verdict. The defendants argue that this establishes that the jury acted with passion and prejudice, and ignored the instructions of the court.

There is no rule which requires the jury to deliberate any particular length of time. In State v. John, 11 Wis. 2d 1, 103 N. W. 2d 304, the Supreme Court of Wisconsin affirmed a conviction for murder where the jury deliberated 67 minutes after a trial which lasted for 7 days. The court noted that the jury might have considered the evidence which it believed to be so convincing that it could reach a verdict in a comparatively short time. See, also, State v. Payne (Mo.), 342 S. W. 2d 950; Sepulveda v. People (Colo.), 361 P. 2d 625; 23A C. J. S., Criminal Law, § 1368, p. 976.

The record in this case does not establish that the jury acted with passion and prejudice or ignored the instructions of the court.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARY BROWN, APPELLANT.

118 N. W. 2d 332

Filed November 30, 1962. No. 35224.

1. **Criminal Law: Trial.** The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn from a consideration of the actions of the defendant viewed in the light of all surrounding circumstances.
2. ———: ———. Intent may be inferred from the nature of the act itself and the circumstances surrounding it.
3. ———: ———. Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial.
4. **Criminal Law: Evidence.** The clothing which a complaining witness was wearing at the time the crime was committed may be received in evidence if it has evidentiary value.
5. **Criminal Law: Trial.** It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested.
6. Criminal Law. A sentence which is within the limits authorized by statute will not be reversed in the absence of an abuse of discretion.

Appeal from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Thomas P. Lott, for appellant.

Clarence A. H. Meyer, Attorney General, and Harold Mosher, for appellee.

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

BOSLAUGH, J.

The defendant, Mary Brown, was convicted of robbery under section 28-414, R. R. S. 1943. Her motion for new trial was overruled and she has appealed to this court.

This case is a companion case to No. 35220, *ante* p. 387, 118 N. W. 2d 328. The defendant was charged jointly

with Norma Levering and Victoria Levering. There was a joint trial in the district court. Victoria Levering and Norma Levering filed a separate notice of appeal which was docketed in this court as No. 35220. Since the appeals have been briefed and argued separately, they will be disposed of by separate opinions.

The assignments of error which require consideration are that the evidence is not sufficient to sustain the conviction; that the trial court erred in admitting certain evidence and in giving and failing to give certain instructions; and that the sentence is excessive.

There was evidence from which the jury could have found that Norman L. Runyon, the complaining witness, together with Norma Levering and Victoria Levering, met the defendant at 1407 Cass Street in Omaha, Nebraska, shortly after 1 a.m., on March 25, 1961; that about 30 minutes later, as Runyon was leaving 1407 Cass Street, the defendant with Norma Levering and Victoria Levering "jumped" him when he was outside the door; that they grabbed him and started whipping his clothes off; that he had about $60 in bills in his right-hand pocket and about $400 in a billfold in his back pocket; that the defendant took the billfold out of his back pocket; and that Norma Levering had her hand in his other pocket while Victoria Levering was hitting him. In addition to being beaten with fists, Runyon was struck with a sharp object. When the fight was over, everything, including his car keys, had been removed from Runyon's pockets. Runyon then walked to the police station and reported the robbery. From there he was taken to a hospital and treated for bruises and lacerations about the face and head.

The defendant argues that the evidence was insufficient in that there was no evidence of an "intent to rob or steal" on the part of the defendant as required by the statute, section 28-414, R. R. S. 1943. The law does not require independent evidence of the specific intent required. Krchnavy v. State, 43 Neb. 337, 61

N. W. 628. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of all surrounding circumstances. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357. Intent may be inferred from the nature of the act itself and the circumstances surrounding it. Young v. State, 127 Neb. 719, 256 N. W. 908. The evidence in this case was sufficient for the jury to find that the defendant took the money from the person of Runyon with intent to rob or steal.

There was evidence that the defendant had been drinking before the robbery occurred. That was a circumstance which the jury could consider in determining whether the defendant had the specific intent required by the statute. The trial court properly instructed the jury that evidence of excessive intoxication by which a party is wholly deprived of reason may be considered for the purpose of determining whether such party is capable of entertaining the specific intent charged. Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761.

The trial court also instructed the jury as to aiders and abettors. The defendant complains that this was error in that the jury might have found the defendant guilty as an aider and abettor without finding that she had the specific intent required by the statute. Other instructions given by the trial court covered the matter of the specific intent required by the statute. The instructions when considered as a whole are not subject to the criticism made by the defendant. Instructions must be considered as a whole in determining whether a particular instruction or a part thereof is prejudicial. Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588.

The State offered in evidence the clothing which Runyon was wearing at the time the robbery occurred. If the clothing which the complaining witness was wearing at the time the crime was committed has evidentiary

value it may be received in evidence. Miller v. State, 169 Neb. 737, 100 N. W. 2d 876; MacAvoy v. State, 144 Neb. 827, 15 N. W. 2d 45. In this case the clothing was of evidentiary value in that it tended to prove the force and violence with which the robbery was committed. The exhibits were properly identified and received in evidence.

The defendant complains that the trial court should have given a cautionary instruction in reference to the testimony of accomplices. The defendant did not request that such an instruction be given. The general rule is that the trial court is not required to give a cautionary instruction in the absence of a request. Miller v. State, 173 Neb. 268, 113 N. W. 2d 118. It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested. Cornell v. State, 138 Neb. 708, 294 N. W. 851.

The State did not rely upon the testimony of an accomplice in this case but several witnesses testified, without objection, to statements that Victoria Levering, Norma Levering, and the defendant made after the robbery had occurred. The trial court instructed the jury that it should consider the guilt or innocence of each defendant separately, and that evidence relating to one defendant alone could not be considered against the other defendants.

The defendant complains that her sentence to 4 years imprisonment in the Nebraska Reformatory for Women is excessive. The statute provides a penalty of not less than 3 years and not more than 50 years imprisonment in the penitentiary. § 28-414, R. R. S. 1943. The sentence which was imposed is very near the minimum sentence prescribed by the statute. Any evidence that was presented to the trial court at the time of sentencing was not preserved in the bill of exceptions. Where the sentence imposed is within the limits authorized by statute, the sentence will not be disturbed in the absence of an

abuse of discretion. Olney v. State, 169 Neb. 717, 100 N. W. 2d 838. The record in this case does not establish that the sentence imposed by the trial court was an abuse of discretion.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

KEITH S. SCHWARTZ AND KENNETH P. SCHWARTZ, EXECUTORS OF THE ESTATE OF JOSEPH SCHWARTZ, DECEASED, APPELLANTS, V. B. R. HIBDON, FIRST AND REAL NAME UNKNOWN, DOING BUSINESS AS OIL FIELD DOZER SERVICE, ET AL., APPELLEES.

118 N. W. 2d 327

Filed November 30, 1962. No. 35266.

SUPPLEMENTAL OPINION

Appeal from the district court for Cheyenne County: JOHN H. KUNS, Judge. On motion for rehearing. See *ante* p. 129, 116 N. W. 2d 187, for original opinion. Original opinion clarified. Motion for rehearing overruled.

Heaton & Heaton and Leon A. Sprague, for appellants.

Halcomb, O'Brien & Everson and Harry R. Meister, for appellees.

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

MESSMORE, J.

The opinion contains the following language: "We believe the question is not so much whether there was a submissible issue for a jury as whether Thompson was negligent as a matter of law." "He had a clear duty to exercise due care in attempting to pass the deceased. We do not believe he did. It is also evident he did not have his truck under reasonable control when

he attempted to pass." "It may well be that when Thompson became aware of the car behind him, he was in an emergency situation from which he could not extricate himself. Yet the situation was one of his own making. It was brought on by his own actions and omissions."

As a matter of clarification, the foregoing conclusions were not intended to control the rulings of the trial court or the manner of its submission to the jury if it be determined that a jury question is presented.

With this clarification of our opinion, the motion for rehearing is overruled.

ORIGINAL OPINION CLARIFIED.
MOTION FOR REHEARING OVERRULED.

IN RE ESTATE OF ALFRED ANDERSON, DECEASED.
MYRTH ANDERSON ET AL., APPELLANTS AND CROSS-APPELLEES, V. WILLIAM H. LAMME, ADMINISTRATOR OF THE ESTATE OF ALFRED ANDERSON, DECEASED, APPELLEE AND CROSS-APPELLANT.

118 N. W. 2d 339

Filed November 30, 1962. No. 35267.

1. **Executors and Administrators.** An administrator who pays out money in pursuance of an order made by the county court cannot be personally charged with the reimbursement of the same in the absence of evidence showing that the order was obtained by fraud and that he had guilty knowledge of the same.
2. **Attorney and Client.** An attorney at law has a general or retaining lien for the balance of compensation due him upon money in his hands belonging to his client. The lien extends to the whole indebtedness covering the general balance due. To the extent of the lien, the attorney is the owner and cannot be called upon to pay over that part of the money in his hands.
3. ———. The right of an attorney at law to a general or retaining lien is not affected by the fact that the client is a personal representative and that the services were rendered and the money received on behalf of an estate.
4. **Executors and Administrators.** A secured creditor may rely

upon his security and is not required to file a claim in the estate proceedings.

5. ———. The personal representative of an estate is a fiduciary in his relation to the beneficiaries of the estate of the deceased. As such he is required to make a full disclosure of all facts within his knowledge which are material for the beneficiaries of the estate to know to protect their interest.

6. ———. Before the administrator of an estate can be held liable to the heirs of a deceased for a violation of the fiduciary relationship, the heirs must show that they were damaged as a result of that fact.

7. **Executors and Administrators: Attorney and Client.** Where the administrator of an estate is a lawyer and performs legal services which are necessary and beneficial to the estate, such services are extraordinary within the meaning of section 30-1412, R. R. S. 1943, and the court may make an allowance as reasonable compensation for such services.

8. **Executors and Administrators.** The continuance of the operation of the business of a decedent is not a service required of the administrator of an estate in the common course of his duty. It is in the nature of an extraordinary service within the meaning of section 30-1412, R. R. S. 1943, and the court may make an allowance as reasonable compensation for such services.

9. ———. The compensation allowed an administrator for his services in the continuance of the operation of the business of a decedent should be the reasonable value of the time and effort expended.

Appeal from the district court for Dodge County: H. EMERSON KOKJER, Judge. Affirmed in part, and in part reversed and remanded with directions.

William G. Line and Theodore W. Vrana, for appellants.

A. C. Sidner and Charles H. Yost, for appellee.

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

BOSLAUGH, J.

Alfred Anderson died intestate on May 6, 1959. He was survived by his widow, Myrth Anderson; a daughter, Gloria Youngquist; and a son, Donald N. Anderson.

During his lifetime the deceased operated a cafe at

Fremont, Nebraska, known as Al's Restaurant. In addition to the cafe the deceased owned a 1956 Oldsmobile automobile and had approximately $2,700 in cash at the time of his death. This was the property which was available to pay debts of over $12,000 and the expenses of administration.

On May 7, 1959, William H. Lamme, a member of the firm of Spear, Lamme & Simmons, was appointed special administrator of the estate upon the petition of the widow. On June 1, 1959, he was appointed administrator of the estate.

The cafe was sold on November 30, 1960. In August 1961, the heirs of the deceased filed an application in the county court to set aside the sale of the cafe, remove the administrator, and require him to account. The administrator filed an answer to the application of the heirs and also a final report and petition for discharge. The heirs filed objections to the report. The county court set the petition for hearing and ordered that notice of hearing be given, which was given as required by law.

The county court denied the application to remove the administrator, overruled the objections to the report of the administrator, and approved the report, including an allowance of $9,000 to the administrator for his services as attorney and administrator. The heirs then appealed to the district court from both orders.

At the trial in the district court the appeal from the order denying the application to remove the administrator was abandoned. The district court approved the report of the administrator except as to an item of $1,008 for attorney's fees to Spear, Lamme & Simmons for services concerning a claim for damages resulting from a fire that occurred in 1958. Both parties filed motions for rehearing which were overruled. The heirs then appealed to this court and the administrator cross-appealed.

The assignments of error all relate to the disposition of the proceeds of the claim for the fire loss, the sale

of the cafe, and the fee allowed the administrator for his services as attorney and administrator. In disposing of these matters we will discuss them separately.

On May 30, 1958, the cafe was damaged by fire. A part of the loss was covered by insurance. The insurance carriers paid $2,887.50 to the deceased and took subrogation agreements from him.

The insurance carriers and the deceased then presented claims against third parties who were alleged to have negligently caused the fire. Both the insurance carriers and the deceased were represented by Spear, Lamme & Simmons. The deceased died while the claims were pending. The administrator succeeded to the interest of the deceased and the services of the attorneys who had represented the deceased in his lifetime were continued. More than 6 months later a settlement of the claims was negotiated.

The administrator then filed an application in the county court requesting authority to complete the settlement. The application alleged that a total sum of $6,247.14 had been agreed upon and that of this amount $2,887.50 was due the insurance carriers by reason of their rights of subrogation. The county court entered an order approving the settlement and directed that the proceeds of the settlement be paid to the estate and the insurance carriers in the amounts alleged in the application. The proceeds of the settlement were distributed in accordance with the order of the county court except that Spear, Lamme & Simmons deducted 30 percent ($1,007.82) from the amount due the estate as attorney's fees and paid the net amount ($2,351.82) to the administrator.

The heirs contend, first, that the administrator is liable for the $2,887.50 paid to the insurance carriers. This payment was made pursuant to an order of the county court, and the order of the county court is a complete defense so far as any personal liability of the

administrator is concerned. Weeke v. Wortmann, 84 Neb. 217, 120 N. W. 933.

The contention of the heirs is based upon a theory that the insurance carriers were required to file claims in the estate proceedings before they could obtain their share of the proceeds of the settlement of the claim. The deceased was not indebted to the insurance carriers as a result of the payments made to him during his lifetime by the insurance carriers. By reason of their payment of a part of his loss, the insurance carriers were subrogated to the rights of the deceased against the third parties whose negligence caused the fire. Although the insurance carriers had a right to proceed against the third parties in the name of the deceased or his administrator, neither the deceased nor the administrator had any beneficial interest in the part of the recovery that was due the insurance carriers. As to that part of the recovery the administrator was a trustee for the benefit of the insurance carriers. There is no merit in the contention of the heirs with respect to the $2,887.50 paid to the insurance carriers.

The heirs next contend that the administrator is liable for the $1,007.82 deducted as attorney's fees by his firm from the share of the proceeds of the settlement due the estate. This is the item in the report of the administrator which the district court did not approve.

The heirs contend that the fee arises from a contract made by deceased during his lifetime and that the failure of the administrator or his firm to file a claim in the proceedings defeats any right to compensation for their services. There is a further contention that the administrator was barred from testifying about the transaction by reason of section 25-1202, R. R. S. 1943. At most, this contention of the heirs would be applicable only to services performed before the death of the deceased. Services performed by or for the administrator after the death of the deceased would be an expense of administration and not indebtedness of the deceased.

An attorney at law has a general or retaining lien for the balance of compensation due him upon money in his hands belonging to his client. § 7-108, R. R. S. 1943. The lien extends to the whole indebtedness covering the general balance due. To the extent of the lien the attorney is the owner and cannot be called upon to pay over that part of the money in his hands. Van Etten v. State, 24 Neb. 734, 40 N. W. 289, 1 L. R. A. 669. The right of lien is not affected by the fact that the client is a personal representative and that the services were rendered and the money received on behalf of an estate. Burleigh v. Palmer, 74 Neb. 122, 103 N. W. 1068. A secured creditor may rely upon his security and is not required to file a claim in the estate proceedings. Crawford State Bank v. McEwen, 132 Neb. 399, 272 N. W. 226. The deduction by Spear, Lamme & Simmons of 30 percent of the amount due the estate from the proceeds of the settlement and the payment of the balance to the administrator were, in effect, an assertion of a lien and a satisfaction of the amount due by a retention of the money.

There is no dispute about the reasonableness of the fee. The heirs concede that the amount of the fee is reasonable for the services performed. There being no issue over the reasonableness of the amount of the fee, that item of the report should have been approved.

On September 29, 1960, the cafe was listed for sale with the Fremont State Company. The sale of the cafe and the listing of it with the Fremont State Company was authorized by the county court. The listing agreement was signed by the administrator and all of the heirs and provided for an "asking price" of $40,000.

The sale of the cafe was actually handled by Lloyd C. Blair, an officer of the Fremont State Company. Blair obtained two offers to purchase which were submitted to the heirs. Harold Krumel offered to purchase the cafe for $30,000. Several days later Dayton Camp offered to purchase the cafe for $33,000. Both of these offers were

rejected by the heirs. Shortly after the Camp offer had been rejected, Krumel submitted a written offer to purchase the cafe for $33,500. This offer was accepted in writing by the administrator and all of the heirs on October 28, 1960. The controversy arises out of the fact that the heirs did not know that Blair had agreed to and did assist Krumel in financing the purchase of the cafe. Blair made a full disclosure of his interest in the transaction to the administrator, but the administrator did not advise the heirs that Blair had a personal interest in the transaction.

The personal representative of an estate is a fiduciary in his relation to the beneficiaries of the estate of the deceased. As such he is required to make a full disclosure of all facts within his knowledge which are material for the beneficiaries of the estate to know to protect their interest. Johnson v. Richards, 155 Neb. 552, 52 N. W. 2d 737.

It is unfortunate that the administrator failed to advise the heirs that Blair had an interest in the offers to purchase which had been submitted by Krumel. But, before the administrator can be held liable to the heirs, they must show that they were damaged. The theory of the heirs is that the cafe could have been sold for $40,000 and would have been sold for that amount if they had known about Blair's interest in the transaction.

The evidence is that when the deceased died, the cafe equipment had a depreciated value of $8,400. During the course of administration, $7,000 in new equipment was purchased. At the time of the sale the depreciated value of the cafe equipment was $10,600. The lease had a remaining term of 2 years and 10 months. There was a controversy with the lessor as to whether the lease had terminated when the deceased died, and there was difficulty in securing the consent of the lessor to an assignment of the lease. In June 1960, Blair and an experienced restaurant operator had appraised the cafe and had advised the administrator that

in their opinion the cafe could be sold at that time for between $20,000 and $25,000. Although the cafe did a large volume of business, it produced a comparatively small net return.

There was evidence that at one time Camp had told Blair that if Camp could get the backing, he would pay the full asking price of $40,000. However, when Camp finally did get backing and made an offer to purchase, it was for $33,000. When Blair notified Camp that his offer had been rejected, Blair further advised Camp that he would have to increase his offer if he wanted to buy the cafe. Camp's reply was that he had no further backing, and that he would "see what happens," and talk about it later. Blair testified that he checked and found that Camp could not obtain the lease. There was also evidence to the effect that Blair did not contact another possible prospective purchaser after the $33,500 offer had been received. Although the heirs knew about Blair's interest soon after the cafe had been sold, there is no evidence that they took any action as against the purchasers to attempt to rescind the sale.

The evidence, when considered as a whole, establishes that the cafe sold for a fair price. In fact, if Blair had not offered to assist Krumel, it is doubtful whether the cafe could have been sold to another purchaser at the price offered by Krumel. We conclude that the evidence fails to establish that the heirs were damaged by the failure of the administrator to advise them that Blair had an interest in the offers to purchase submitted by Krumel.

The report of the administrator listed as a disbursement an item of $9,000 to William H. Lamme for administrator's and attorney's fees. This item of the report was approved over the objections of the heirs by both the county court and the district court.

The amount which may be allowed to an administrator as compensation for his services is regulated in the first instance by statute. Section 30-1412, R. R. S. 1943, pro-

vides that an administrator "shall be allowed commissions upon the amount of personal estate collected and accounted for by him * * * as follows: For the first thousand dollars at the rate of five per cent; for all above that sum and not exceeding five thousand dollars, at the rate of two and one-half per cent; and for all above five thousand dollars at the rate of two per cent. * * * In all cases such further allowances may be made as the county judge shall deem just and reasonable for any extraordinary services not required of an executor or administrator in the common course of his duty."

The heirs contend that the administrator has made no claim for compensation for extraordinary services and is now estopped from making such a claim; and that the administrator has claimed that his fees should be computed by applying the statutory schedule to the gross receipts, including the gross receipts from the operation of the cafe. Although there is some evidence which tends to support this theory, we do not think that it is a correct interpretation of the record. Apparently there is some confusion on the part of both the administrator and the heirs as to the meaning of the term "extraordinary services" as used in section 30-1412, R. R. S. 1943.

The administrator has claimed a fee of $9,000 for all of his services. As we view the record, the question to be determined is whether that is the reasonable value of the services to the estate in this case.

The administrator in this case was a lawyer and performed all of the legal services for the estate. Such services are extraordinary within the meaning of the statute. Where an administrator performs legal services which are necessary and beneficial to the estate, the court may make an additional allowance as reasonable compensation for such services. In re Estate of Wilson, 83 Neb. 252, 119 N. W. 522. The heirs admit that if the administrator is entitled to any compensation, he is entitled to reasonable compensation for the legal serv-

ices which were furnished to the estate in this case. In their brief the heirs suggest $1,201 as a proper allowance for such services.

The heirs contend that the allowance to the administrator for his services to the estate other than legal services should be computed by applying the statutory schedule to the amount by which the receipts exceeded the disbursements. By their computation this would result in an allowance of $1,072.38 or a total of $2,273.38.

The administrator in this case was appointed as special administrator on the day after the deceased died. He immediately took charge of the cafe and supervised its operation from May 7, 1959, until December 1, 1960, when it was sold. Donald N. Anderson, one of the heirs, was employed as manager of the cafe at a salary of $100 per week. His wife was also employed at a salary of $75 per week.

During the period of approximately 19 months in which the administrator was responsible for the operation of the cafe, he took charge of the receipts, which were in excess of $400,000, and paid all of the bills. There was an average of 45 employees at the cafe and a high rate of turnover in personnel. In one year it was necessary to prepare 129 W-2 forms. Donald N. Anderson was in the office of the administrator almost daily and, frequently, he and the administrator would confer about problems at the cafe. There were matters with the lessor which required the services of the administrator. There was trouble with the heating and cooling systems, with the plumbing, and with the cafe equipment. There was no accounting system for the cafe and no provision for protecting supplies from pilferage. One supplier had a claim for an account of more than $7,000 which extended back over a year and a half which required analysis and investigation. The cafe operated under licenses, including a beer license, which required the attention of the administrator. The administrator prepared all of the reports and returns re-

quired by the Internal Revenue Service and other governmental agencies. In summary, the operation of the cafe required a part of the time of the administrator almost every day during the 19-month period of his supervision.

The continuance of the operation of the business of a decedent is not a service required of an administrator in the common course of his duty. It is in the nature of an extraordinary service for which an additional allowance may be made under the statute. In re Estate of Wilson, *supra*. See, also, Annotation, 66 A. L. R. 515. The compensation allowed an administrator for such services should be the reasonable value of the time and effort expended.

The administrator produced three lawyers who testified as expert witnesses as to their opinion of the value of the services of the administrator to the estate. Their testimony placed the value of all services at between $9,000 and $13,500 and the value of the legal services considered separately at between $1,150 and $2,000. The heirs presented no expert testimony and claimed that such evidence was inadmissible.

In arriving at our conclusion as to what was the reasonable value of the services of the administrator in this case we have considered the entire record, including the findings of the county court and district court. We have given consideration to the fact that it was necessary to sell the cafe before the claims could be paid and the estate closed; that the cafe had more value if sold as a going business; and that the report of the appraisers in June 1960 recommended that the cafe be operated for a year. We have also given consideration to the fact that the operation of the cafe enabled the administrator to pay a widow's allowance of $4,800 during the first year; that the heirs have received approximately $21,500 cash in advance distribution; and that there is a remaining balance of approximately $3,500 in cash for distribution to them. We conclude that $9,000

is a fair and reasonable allowance to the administrator for his services to the estate in this case.

The judgment of the district court is affirmed except as to the finding and judgment that the account of the administrator should be surcharged in the amount of $1,008. As to that finding and part of the judgment, the judgment is reversed and the cause remanded with directions to enter a judgment in conformity to this opinion and to certify it to the county court.

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

STATE OF NEBRASKA, APPELLEE, V. RICHARD HOYE, APPELLEE, IMPLEADED WITH WAYNE WIEMERS, APPELLANT.

118 N. W. 2d 325

Filed November 30, 1962. No. 35284.

1. **Burglary.** An attempt to commit any of the acts prohibited by section 28-532, R. R. S. 1943, constitutes the criminal offense of attempted burglary as that offense is defined in section 28-532.01, R. S. Supp., 1961.
2. ———. Anyone attempting to break and enter a storehouse is guilty of the offense of attempted burglary.
3. ———. A storehouse, within the meaning of the statute, is some kind of structural barrier to ingress of the public.
4. ———. A gasoline tank used for storage of gasoline for the purposes of the owner not connected with or a part of another structure is a storehouse within the meaning of the statute.

Appeal from the district court for Buffalo County: S. S. SIDNER, Judge. Affirmed.

Andrew J. McMullen, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee State of Nebraska.

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

YEAGER, J.

This is a criminal action wherein in an information filed by the county attorney of Buffalo County, Nebraska, in the name of the State of Nebraska, plaintiff, Richard Hoye and Wayne Wiemers, defendants, were charged with the offense of attempted burglary, which offense, it was alleged, was committed on or about December 3, 1961. The alleged attempted burglary was the breaking and attempted entering of a gasoline storage tank, which tank was denominated a storehouse.

The two were convicted of the offense and Hoye was sentenced to serve a term of 1 year in the Nebraska State Reformatory for Men, and Wiemers was sentenced to serve a term of 1 year in the Nebraska State Penitentiary. Wiemers filed a motion for new trial or in the alternative for judgment notwithstanding the verdict. This motion was overruled. From the order overruling the motion and the judgment sentencing him to serve the term imposed he has appealed. Hoye is not a party to the proceeding in this court. Wiemers will therefore hereinafter be referred to as the defendant.

There is no dispute in the record as to the facts which are by the information alleged to be a criminal offense. The only substantial contention of the defendant is that the acts charged against the defendant and proved do not constitute the criminal offense of attempted burglary within the meaning of the laws of this state.

The brief of the defendant contains four separate assignments of error. They do not, however, require specific mention for the reason that they must stand or fall upon a determination of whether or not the acts of the defendant amounted to the criminal offense charged.

The facts are that on and prior to the date of the offense charged herein, the Kearney Country Club of Kearney, Nebraska, had and maintained on its grounds a steel gasoline tank with a capacity of about 300 gallons. The tank was not within or connected with any other building or structure, but was located 5 to 10 feet

from the nearest building. The tank was attached to steel poles which were anchored in bases of concrete. There was a spigot in the tank for the removal of gasoline from the tank protected by a metal hasp to which was attached a padlock, the purpose of which was to prevent access to the gasoline in the tank. Unauthorized access could be had by breaking the lock, removing the hasp, and turning the spigot.

The purpose of the tank was to have a supply of gasoline to be used to furnish fuel for the motor equipment used by the Kearney Country Club. It was subject to withdrawal by certain employees of the club.

In the early morning of December 3, 1961, noises were heard in the vicinity of the tank by employees of the club. They went out and identified the defendant in the immediate vicinity of the tank. He escaped with someone else in an automobile. The described protective features of the tank were broken making available a withdrawal of gasoline from the tank. These were found in the vicinity of the tank.

On the trial the jury effectually found that the evidence was sufficient as proof that the defendant had committed these acts and the defendant does not dispute here the validity of that finding, and for these reasons it does not appear that the evidentiary details require statement herein.

The basic contention of the defendant is that the gasoline tank was not a storehouse within the meaning of the statute defining the crime of burglary. This definitive statute is section 28-532, R. R. S. 1943. Section 28-532.01, R. S. Supp., 1961, provides as follows: "Whoever attempts any act prohibited by section 28-532, shall be guilty of attempted burglary * * *." One of the acts prohibited is the breaking and entering of a storehouse.

This court, in Metz v. State, 46 Neb. 547, 65 N. W. 190, approved from the Century Dictionary the following as a proper definition of storehouse: "A house in which things are stored; a building for the storing of grain,

food-stuffs, or goods of any kind; a magazine; a repository; a warehouse; a store." This was approved in Steele v. State, 80 Neb. 9, 113 N. W. 798, 127 Am. S. R. 741. In the latter case it was said: "The term storehouse, as used in our statute, necessarily means some kind of a structural barrier to the ingress of the public. A repository or receptacle where goods are stored is a storehouse. Such a structure need not be a house or a building, strictly speaking. It is enough if it is shown to be a structure properly barred from entrance by the public, where goods are stored and kept."

Moss v. Commonwealth, 271 Ky. 283, 111 S. W. 2d 628, was a case wherein the court held that a gasoline storage tank buried in the ground was a storehouse.

In the light of the definitive language contained in these cases, the conclusion reached is that within the meaning of the statute the gasoline tank described in the evidence was a storehouse. The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD P. EASTER, APPELLANT.

118 N. W. 2d 515

Filed December 7, 1962. No. 35184.

1. **Criminal Law: Trial.** Where there is distinct evidence on each material fact necessary to establish the guilt of the accused before the jury, a verdict against him will be upheld, although such testimony may be contradicted by other witnesses.
2. ———: ———. A defendant may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made.
3. ———: ———. While it would not be improper to admonish the jury in the instructions to disregard any testimony ordered stricken during the course of the trial, it is not a necessary instruction.
4. **Criminal Law: Evidence.** As a general rule, evidence of other

crimes than that with which the accused is charged is not admissible in a criminal prosecution.

5. ———: ———. Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court.
6. **Constitutional Law: Searches and Seizures.** All evidence obtained by searches and seizures in violation of the federal Constitution is inadmissible in a criminal trial in the courts of this state.
7. ———: ———. The issues of unlawful arrest and unconstitutional search and seizure are questions for the trial court and are not subject to reconsideration by a jury.
8. **Corporations: Searches and Seizures.** Where one availed himself of the privilege of doing business as a corporation, even though its sole shareholder, documents which he could have protected from seizure, if they had been his own, could be used against him, even though they were illegally obtained from the corporation.
9. **Criminal Law: Searches and Seizures.** Immunity against the use of illegally obtained evidence cannot be claimed by a defendant if he does not own or have a proprietary interest in the property which has been seized.
10. **Criminal Law.** Where the punishment of an offense created by statute is left to the discretion of a 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 such discretion.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Byron M. Johnson, for appellant.

Clarence A. H. Meyer, Attorney General, and Richard H. Williams, for appellee.

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

SPENCER, J.

This is a criminal action prosecuted in the name of the State of Nebraska, plaintiff, appellee herein, against Donald P. Easter, defendant, appellant herein. Defend-

ant was charged by information filed by the county attorney in the district court for Scotts Bluff County.

Upon trial, defendant was found guilty by the jury and was sentenced to the Nebraska State Reformatory for a period of from 3 to 5 years. Defendant appeals to this court.

There are 40 separate assignments of error. We do not deem it necessary herein to list these specific assignments. We will allude to many of them specifically but, where appropriate, reference will be to the general subject matter involved.

The portion of the information essential to a review of the questions raised in this appeal is as follows: "* * * defendant on the 12th day of June, 1961, in the County of Scotts Bluff and State of Nebraska, then and there being, did then and there, wilfully, unlawfully and feloniously and fraudulently obtain from Katie Betz $150.00 with intent to cheat and defraud her by making the following false and fraudulent representations: (1) That defendant was bonded in the sum of $10,000.00, when in fact he had no such bond; (2) That Katie Betz would be employed by A.I.L., Inc., when in fact neither he the said defendant nor A.I.L., Inc., ever intended to employ Katie Betz: (3) That the $150.00 was for a 'Bond of Intent' to A.I.L., Inc., when in fact the $150.00 was paid to defendant in his name and treated by defendant as income either of himself or A.I.L., Inc., and not as a bond: and Katie Betz, relying upon such false and fraudulent representations made by defendant, gave a check for $150.00 payable to defendant Donald L. (sic) Easter which he presented for payment at the bank on which it was drawn and received payment, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the people of the State of Nebraska."

There is evidence from which the jury could have determined the facts to be as set out hereinafter. On June 12, 1961, defendant, being in Scottsbluff, Nebraska,

telephoned Mrs. Katie Betz, an elderly retired farm lady living alone in that city, and asked her if she " 'would like to make a little extra money.' " When he received an affirmative reply, he asked permission to come up to her home to explain his proposition to her. He was at her home approximately 10 minutes after she said " 'All right.' " His proposition was that for answering telephone calls connected with the business of A.I.L.,Inc., for 2 or 3 hours a day, she could earn about $900 a year. A.I.L., Inc., is an Oregon corporation, which purports to be able to secure discounts for its members on various articles and services by eliminating some of the costs of the "middleman" in the selling process. The letters themselves purport to represent "Anti-Inflation League."

The defendant had been soliciting representatives in other states for several months. These representatives were in each instance elderly ladies who had been contacted by a phone call. Nothing appears in the record as to how their names were obtained. These representatives were told that their duties would be to process inquiries from members of A.I.L., Inc., who called to determine what they could buy at a discount and from whom. These representatives were to be paid by receiving a percentage of the membership fees collected from members in the area. They were also told that it was necessary that they give a bond called a "Bond of Intent" in the amount of $150, to guarantee their good faith, and that they would hear from the defendant in 30 or 40 days. At that time they would receive instructions on their duties as well as a written agreement as to their percentage of the membership fees.

The defendant testified that he and his wife were the only officers of A.I.L., Inc., and that he regarded himself as one and the same as A.I.L., Inc. The money obtained from the ladies for their "Bonds of Intent" was used by him for his personal expenses or was sent to his wife to be deposited in their personal savings account. Several prospective representatives from Nebraska and

some from other jurisdictions testified. Although the "Bond of Intent" money had been paid, none of them had ever received instructions from the defendant or the corporation as to their specific duties, nor were they given information as to where any prospective callers might secure articles or services at a discount. In fact, the defendant testified that the only agreement he or the corporation had with anyone who would supply articles or services at a discount was the dealer who sold him his car and two or three others in Oregon whose names and addresses were too fragmentary to be very informative. There had been no agreements made in Nebraska, although several aged ladies had given "Bond of Intent" deposits to serve as representatives. Further, there is no evidence in this record which would indicate that any memberships had been sold. The most we find is a suggestion in the record that the defendant, some time in the future, expected to hire agents to sell memberships.

The foregoing is the barest outline of the method of operation used by the defendant. There is no dispute in this case but that the defendant did ask for and receive a check for $150 from Katie Betz which was for a purported "Bond of Intent"; that this check was made payable to him personally; and that it was immediately cashed by him. Katie Betz testified this check was given in reliance on defendant's representations.

Defendant questions the sufficiency of the evidence to sustain a conviction. As we view the record, there is evidence on all the material elements which we do not deem necessary to detail herein. In the early case of Dutcher v. State, 16 Neb. 30, 19 N. W. 612, we said: "Where there is distinct evidence of each material fact necessary to establish the guilt of the accused legally before the jury, a verdict against him will be upheld, although such testimony may be contradicted by other witnesses."

There is no question that a jury could properly find

the defendant guilty of obtaining money under false pretenses. It would severely strain credulity to describe defendant's method of operation in any other manner. The questions to be determined herein are whether the defendant's constitutional rights were protected, and whether he was accorded a fair trial.

The record clearly indicates that the defendant was apprehended at Sidney, Nebraska, about 5 p. m., June 15, 1961, at the request of the Scotts Bluff County sheriff, who held a warrant for his arrest. He was placed in the Cheyenne County jail until approximately 9:15 p. m., when he was delivered to a deputy sheriff from Scotts Bluff County. Before leaving Sidney, defendant requested and was granted permission to get a suitcase which was locked in the trunk of his car. The defendant testified that his brief case, which at that time was under the deputy's arm, had been on the front seat of his car the last time he saw it. When the defendant arrived at the county jail in Gering, he started to take the suitcase and the brief case upstairs with him, but they were taken from him to be placed in the property room which was near the sheriff's office.

The next morning, out of the presence of the defendant and without the defendant's knowledge, the deputy sheriff inspected the contents of the brief case and the suitcase. That afternoon, the defendant was brought into the county courtroom, and in the presence of the deputy and the court reporter, was examined by the county attorney. On that occasion, the brief case and the suitcase were on a table in front of the defendant. The county attorney testified that when he asked the defendant if he had any objection to his looking in the suitcase and the brief case, the defendant said: "'No. I operate a legitimate business. I have nothing to hide.'" The deputy sheriff testified: "A We had the brief cases laying on the table there, and when Mr. Easter sat down, why, you'd asked him if he had any objections to going through them and using what was said in there. Q

And what did Mr. Easter say? A He said he had no objections to it at all." This statement was denied by the defendant. Subsequently, and out of the presence of the defendant, the county attorney did examine the papers in the brief case and the suitcase to obtain the names of witnesses. These he contacted and some of them appeared as witnesses at the trial.

Defendant's first assignment of error concerns the overruling of his motion to require the State to specify the statute and the subdivision of the statute upon which the State was relying in making the charge. The basis of the defendant's motion is his constitutional right to be informed of the nature and the cause of his accusation. "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of accusation * * *." Art. I, § 11, Constitution of Nebraska. The motion was a proper one. The section of statute on which he was charged on motion should have been made a matter of record. The ruling herein, however, was error without prejudice. The defendant understood he was charged under section 28-1207, R. R. S. 1943. Before the preliminary hearing in county court, the defendant filed a motion to abate and strike each specification of the complaint because it did not charge a crime under section 28-1207, R. R. S. 1943. Further, his brief concedes that he was able to ascertain that he was charged under section 28-1207, R. R. S. 1943, and that the county attorney advised him that the charge was brought under that section. It is evident also that the complaint as drawn only charged an offense under the first subdivision of section 28-1207, R. R. S. 1943.

Defendant's assignments of error Nos. 2, 3, 4, 5, and 6 cover the overruling of his motion to quash, plea in abatement, demurrer, and motion to strike and require the State to elect. These were all filed on the 29th day of August 1961. The defendant was arraigned on the same day, and upon the advice of counsel stood mute. The court entered a plea of not guilty. From the state

of the record itself, it is not possible to tell whether the motions and pleas were filed prior to the time the defendant was arraigned. However, the defendant has brought up by supplemental transcript the affidavit of the district judge that the motions, plea, and demurrer were ruled on before the court entered a plea for the defendant. For the purpose of this opinion we will consider the record as so modified.

Defendant argues that the information did not sufficiently inform him under what subdivision of the statute he was charged. Concededly, the information is poorly drawn. However, it is apparent that what the defendant refers to as counts and subdivisions are no more than purported false and fraudulent representations made, allegedly to cheat and defraud Katie Betz of $150. The wording of the information is such that defendant could only be charged with obtaining money on representations he knew to be false with the intent to defraud and cheat Katie Betz. As suggested, it is evident that the complaint as drawn only charged an offense under the first subdivision of section 28-1207, R. R. S. 1943. The defendant was fully and sufficiently informed by the information of the charge against him. The motion to quash was properly overruled.

Defendant's plea in abatement set forth many allegations, but the evidence thereon was directed to the manner in which the State obtained its evidence, which will be discussed hereafter. There is no merit to defendant's contention that he was illegally taken into custody. After a warrant had been issued in Scotts Bluff County, the sheriff at Sidney was requested to apprehend the defendant for the Scotts Bluff County sheriff. He was taken into custody and delivered to a deputy sheriff of Scotts Bluff County who came to Sidney with the warrant. There was probable cause for the defendant's arrest, and his arrest was legal.

Defendant's general demurrer was without merit, and was properly overruled. The motion to strike and to

require the State to elect upon which of the separately numbered false pretenses the State would rely was also properly overruled. As suggested heretofore, the numbered portions of the information were the representations upon which the State was relying to prove the obtaining of the $150 by false pretenses. They constituted but one offense and were specifically set out to advise the defendant of the specific representation upon which the State based its case.

The defendant's assignments of error Nos. 8, 9, 10, 11, 12, 13, and 14 are directed to the court's refusal to give instructions tendered by the defendant. In each instance, the instructions tendered either did not reflect the charge specified in the information or were sufficiently covered by instructions given by the court. There was no error in the refusal of tendered instructions.

Defendant's assignments of error Nos. 15 to 25 cover instructions given by the court. The principal instruction complained of in the brief is instruction No. 13, which defined false pretenses. While the instruction is not very artfully drawn, it is not prejudicially erroneous but in fact is probably more favorable to the defendant than it would have been if it had been more carefully drawn. Defendant may not predicate error on an instruction that is more favorable to him than is required by the law applicable to the charge made. Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

The defendant urges that the court in effect withdrew essential elements of the case from the jury by failing to specifically instruct on certain particulars of the law and the evidence. We do not so construe the instructions. When the instructions are read in their entirety, there is no merit to this contention. They correctly state the law applicable to the crime charged, and in no sense are prejudicially erroneous. If anything, the instructions narrow the scope of the charge and were more favorable to the defendant than they might have been. Grandsinger v. State, *supra*.

Defendant's assignment of error No. 30 complains that the court failed to instruct the jury that testimony which had been stricken or which the jury had been admonished to disregard was not evidence in the case and must not be considered by the jury in its deliberations. Where testimony had been stricken, it was not before the jury, and while it would not be improper to admonish the jury in the instructions to disregard any testimony ordered stricken during the course of the trial, it is not a necessary instruction.

Defendant's assignment of error No. 32 involves the admission, over objection, of testimony of similar transactions with other persons at different times and places. As a general rule, evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. Erving v. State, *ante* p. 90, 116 N. W. 2d 7. There is, however, a recognized exception to this rule. As we said in Sall v. State, 157 Neb. 688, 61 N. W. 2d 256: " 'Evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. Whether such other alleged crimes are too remote rests largely in the discretion of the trial court.' " The evidence about which the defendant complains was properly admitted under this rule. The trial court amply protected the rights of the defendant in his instructions to the jury by carefully defining the limitations placed upon the admission of the testimony of similar acts and transactions.

The principal questions raised by the defendant revolve around the contention that his records and papers were illegally seized in violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States. There is no question but that the federal exclusionary rule is now the law of the land. It may no longer be considered as a mere rule of evidence but is a part and parcel of the Constitution. Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081,

states: "All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court."

Has there been an illegal search and seizure herein? The Fourth Amendment does not forbid all searches without a warrant incident to a valid arrest. The constitutional issues should be whether the searches and seizures are reasonable. This is certainly true when we understand that there is no uniform body of law which defines what constitutes lawful arrest or reasonable search incident to lawful arrest. It is always a problem of degree, of what is reasonable or unreasonable under the circumstances.

There is no evidence in this record that the defendant's car was searched incident to an arrest other than the implication to be drawn from defendant's testimony. He testified he left his brief case on the front seat of his car, that he locked the car and gave the key to the police officers at Sidney, and that when he next saw his brief case, the deputy sheriff of Scotts Bluff County had it under his arm. This testimony is disputed by the deputy sheriff, who testified defendant took it from the car. Defendant does admit that he himself unlocked the trunk of his car and took out his suitcase. In any event, we would hold that taking possession of a brief case lying on the seat of an automobile being driven by the defendant would be reasonably incident to an arrest.

The defendant strenuously argues that it was the subsequent use of the papers in the suitcase and the brief case to secure the names of the women previously contacted by defendant which violated his constitutional rights. The defendant's volunteered statement during the trial to the county attorney, during an exchange between counsel, reflects his position: "In other words, if you hadn't had access to something you shouldn't have had access to in the first place you wouldn't have had any case."

As we view the record, there was sufficient evidence (set out heretofore) by which the court could find that the defendant consented to an inspection of the papers in the two cases. The rights granted by the Fourth and Fifth Amendments to the Constitution of the United States may be waived. United States v. Jones, 204 F. 2d 745. Defendant argues, however, that the issue of unlawful arrest and unconstitutional search and seizure was an issue that should have been submitted to the jury by proper instruction, but he fails to furnish authority other than his own statement for this position. Undoubtedly, defendant is confusing this situation with the special procedure required in this jurisdiction regarding confessions. There is no parallel between the two situations. The rule in the instance of confessions is justified by the fact that the jury must necessarily be informed of the circumstances surrounding the confession to be able to properly evaluate it. The probative value of evidence obtained by search and seizure, however, does not depend on whether the search or seizure was legal, and no purpose would be served by having a jury make a second determination of that issue.

As was well said in People v. Gorg, 45 Cal. 2d 776, 291 P. 2d 469: "Moreover, the legality of a search or seizure will frequently depend on whether the officer had reasonable cause to make an arrest, and since such cause is not limited to evidence that would be admissible at the trial on the issue of guilt * * * evidence that was otherwise inadmissible and prejudicial would frequently be presented to them if the jury were required to pass on the legality of the search or seizure."

We hold that the issues of unlawful arrest and unconstitutional search and seizure are questions for the trial court and are not subject to reconsideration by a jury. When the issue is raised both sides present their evidence, and, as with the usual challenge to the admissibility of evidence, the decision is made by the trial judge. The decision is then subject to review on ap-

peal, but will stand if sustained by the evidence.

There is a more cogent reason herein, however, as to why there is no merit to the defendant's position. Defendant has chosen to operate as a corporation. Although he could see nothing wrong in depositing alleged corporate funds in his own name or using the funds for his own purposes because he considered himself one and the same as the corporation, the fact remains that he dealt with the complaining witness as the president of a corporation. It is obvious that all of the papers from which the information for the trial was derived were the property of the corporation. We feel this is a situation embraced by the rule announced by the Circuit Court of Appeals for the Second Circuit in Lagow v. United States, 159 F. 2d 245: "Where one availed himself of the privilege of doing business as a corporation, even though its sole shareholder, documents which he could have protected from seizure, if they had been his own, could be used against him, even though they were illegally obtained from the corporation, * * *." We approve of this rule and hold that immunity against the use of illegally obtained evidence cannot be claimed by a defendant if he does not own or have a proprietary interest in the property which has been seized. See 2 Wharton's Criminal Evidence (12th ed.), § 700, p. 706.

Defendant complains of the severity of the sentence. Where punishment of an offense created by statute is left to the discretion of a 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 such discretion. Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. In view of the fact that the record indicates that the defendant specialized in victimizing aged women, who in most instances could not afford the loss, the sentence was more lenient than the record might justify. There was no abuse of discretion.

For the reasons set out above, we find no error in the

record prejudicial to the rights of the defendant, and the judgment herein is affirmed.

AFFIRMED.

SIMMONS, C. J., participating on briefs.

IN RE APPLICATION OF BLACK HILLS STAGE LINES, INC. BLACK HILLS STAGE LINES, INC., NORFOLK, NEBRASKA, APPELLEE, V. GREYHOUND CORPORATION, OMAHA, NEBRASKA, ET AL., APPELLANTS.

118 N. W. 2d 498

Filed December 7, 1962. No. 35250.

1. **Motor Carriers.** The purpose of the Nebraska Motor Carrier Act is the regulation of motor carrier transportation in the public interest. Its purpose is not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices.
2. ———. In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to the public interest.
3. **Public Service Commissions: Motor Carriers.** Where there is evidence to sustain the factors advanced by the parties which are required to be considered by the Nebraska State Railway Commission by section 75-222, R. R. S. 1943, the determination of the public interest is for the commission and not the courts.
4. ———: ———. Where there is evidence to sustain a finding of the Nebraska State Railway Commission that the benefit which would be denied the general public outweighs the detriment accruing to existing carriers, it cannot be said that the granting of a new certificate is unreasonable or arbitrary.

Appeal from the Nebraska State Railway Commission. Affirmed.

Jack Devoe, James E. Ryan, and John C. Coupland, for appellants.

Viren & Emmert and Kaye E. Wolcott, for appellee.

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

CARTER, J.

The Black Hills Stage Lines, Inc., of Norfolk, Nebraska, filed its application with the Nebraska State Railway Commission for a certificate of public convenience and necessity authorizing the transportation of passengers, mail, and express from Omaha to the point where U. S. Highway No. 385 crosses the Nebraska-South Dakota state line, serving all intermediate points as a common carrier. The commission granted the certificate as requested in the application.

The granting of the application was protested before the commission by the Greyhound Corporation, Omaha, Nebraska; Fred Larsen, Jr., doing business as Winner Bus Line, Winner, South Dakota; Gale Earl, doing business as Earl Bus Line, Chadron, Nebraska; and United Motor Ways, Inc., Grand Island, Nebraska. Upon the final grant of the certificate to Black Hills Stage Lines, Inc., the four named protestants appealed to this court.

The route sought for the operation applied for was from Omaha to the Nebraska-South Dakota state line via Fremont, Norfolk, O'Neill, Valentine, and Chadron. The Greyhound Corporation is authorized to serve a route from Omaha to Norfolk, via Fremont. The Winner Bus Line has authority to serve between Norfolk and O'Neill. Earl Bus Line has authority to serve between Valentine and Chadron. United Motor Ways, Inc., is authorized to serve between O'Neill and Valentine. From the foregoing it will be noted that the route from Omaha to Chadron is served by the four protestants. The evidence shows that there is no through bus from Chadron to Omaha and it is not possible to travel the entire route without numerous interchanges and long delays. The evidence shows that the elapsed time one way between Chadron and Omaha under existing schedules of the four

protestants is in excess of 32 hours. Under the proposed schedule of the applicant it would be less than 10½ hours. It is not disputed that additional service is needed in the area west of O'Neill, no other means of transportation by common carrier being available. The record does not disclose a need for additional service east of O'Neill.

The evidence shows that an interested group of persons and civic organizations west of Norfolk organized themselves into a voluntary organization known as the Northern Nebraska Transportation Association. A committee of that organization contacted each of the protestants in an attempt to secure through service between Omaha, Nebraska, and Rapid City, South Dakota, by each or by joint operation. Protestants declined to provide such service individually although some appeared willing to furnish such service in conjunction with the others. The committee then contacted the Black Hills Stage Lines, Inc., a new corporation whose officers and stockholders are officers of the Arrow Stage Lines, Inc., a bus transportation company operating in northeast Nebraska and connecting with the routes of three of the protestants. It is the contention of protestants that if the application of Black Hills Stage Lines, Inc., is granted, the route between Omaha and O'Neill should be restricted to protect the service provided in the area by Greyhound Corporation and Winner Bus Line. On the other hand, Black Hills Stage Lines, Inc., asserts that such restricted service between Omaha and O'Neill would make the through service between Omaha, Nebraska, and Rapid City, South Dakota, economically unfeasible, and that it could not and would not establish such through service unless certificates authorizing service to all intermediate points can be obtained from the Nebraska State Railway Commission, the South Dakota Commission, and the Interstate Commerce Commission. The problem presented appears to be one of first impression in this state.

The evidence sustains the following findings: There is a public need for through service west of O'Neill. There does not appear to be a public need for additional service between O'Neill and Omaha. The grant of a certificate of public convenience and necessity is not economically feasible without service to intermediate points between Omaha and Rapid City. The institution of the proposed through service will decrease the revenue now being obtained by Greyhound Corporation on its Omaha-Norfolk route, although it will not materially affect the revenue of its overall operations. The grant of the new certificate will reduce the revenue of Winner Bus Line, Earl Bus Line, and United Motor Ways, Inc., with a strong probability that one or more of them might be compelled to cease operations because of depleted revenue.

The purpose of the Nebraska Motor Carrier Act is stated in Shanks v. Watson Bros. Van Lines, 173 Neb. 829, 115 N. W. 2d 441, as follows: "The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry, but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall."

The protestants rely in part on Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756, and In re Application of Effenberger, 150 Neb. 13, 33 N. W. 2d 296. These cases deal with regulated monopolies in cities where competition is wasteful and in all likelihood would result in insufficient and unsatisfactory service and extravagant rates. A transportation company under such a situation is ordinarily granted an exclusive franchise and requires the furnishing of all necessary service, the unprofitable as well as the profitable. A new

competition under such a situation will not ordinarily be permitted to compete in the lush areas of a city while the existing transportation system is required to render service in all parts of the city at rates fixed by the railway commission. These cases involve a principle not found in transportation problems in bus and truck operations outside of urban areas because they are not natural monopolies. The cited cases are not applicable to the situation before us for the reasons stated.

This court has consistently held: "In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest." Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N. W. 2d 265. See, also, Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310; Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665, 90 N. W. 2d 268. The record discloses that the operation applied for will serve a useful purpose that is responsive to a public demand and need. It shows also that the service will not be adequately performed by existing carriers in the area. The question remaining for determination under the foregoing rule is whether or not the service to be performed by the applicant will endanger or impair the operations of existing carriers contrary to the public interest. We shall address ourselves to this question.

It must be conceded at the outset that the operations of the protestants will be impaired and endangered by the granting of the application of the Black Hills Stage Lines, Inc. It must also be conceded that the failure of the commission to grant the application will deprive the area of northern Nebraska west of O'Neill of transportation service which is badly needed and for which there appears to be great demand. In other words,

which is entitled to the greater consideration by the commission,—the furnishing of the badly needed service to this large area west of O'Neill and the 19 towns along the proposed route in the area, or the rights of certificate holders in the area east of O'Neill who cannot or will not provide the service but whose authorized routes will be impaired or endangered by the grant of a new application.

It is contemplated by the Nebraska Motor Carrier Act that the railway commission shall, among other things, regulate transportation by motor carriers in intrastate commerce upon the highways of Nebraska in such manner as to develop and preserve a highway transportation system properly adapted to the needs of the commerce of Nebraska. § 75-222, R. R. S. 1943. See, also, Ferguson Trucking Co., Inc. v. Rogers Truck Line, 164 Neb. 85, 81 N. W. 2d 915; Abler Transfer, Inc. v. Lyon, 161 Neb. 378, 73 N. W. 2d 667.

We point out that the grant of a certificate of public convenience and necessity does not create a vested right which for all time circumscribes the public interest. It never was intended that the granting of certificates for local bus service on fragmentary sections of a needed through service should operate as a permanent bar to the providing of such needed service to other sections of the state. The statute contemplates that the railway commission shall weigh the need for the new service and the detriment accruing to existing carriers, and determine which is the more consistent with the public interest. Where there is evidence to sustain conflicting factors advanced by the parties, which are required to be considered by section 75-222, R. R. S. 1943, the determination of the issue is peculiarly one for the railway commission and not the courts.

In a case similar on its facts the Interstate Commerce Commission stated: "The issues for consideration include whether applicant should be granted authority to transport passengers over the entire route unrestricted,

solely over that portion of the proposed route between Antlers and Wister, or over the entire route if restricted against service at intermediate points located between Wister and Fort Smith. If limited to the former, those elderly people and others needing service to Fort Smith for medical attention would be forced to interchange with protestant at Wister. The evidence clearly establishes a need for a direct service to Fort Smith, leaving for consideration the question whether a grant of the entire route subject to the closed-door restriction between Wister and Fort Smith would be practicable and feasible. Applicant takes the position that it would not be. A closed-door passenger operation is difficult for waiting passengers to understand and may at times result in wasteful transportation. In the absence of special circumstances not here present, we are reluctant to impose such a restriction. Based on the evidence of record, it is doubtful that a partial grant, or a grant restricted in the manner sought by protestant, would enable applicant to provide a practicable and profitable operation, and we conclude that the benefits which would be denied to the general public would far outweigh any detriment occurring to protestant." Jordan Bus Co. Extension—Fort Smith, Ark., 74 M. C. C. 611. We think the reasoning of the foregoing decision supports and justifies the grant of a new certificate to the applicant in the instant case. The order of the railway commission granting the new certificate to Black Hills Stage Lines, Inc., was within the jurisdiction of the commission to make, and under the evidence it was not arbitrary or unreasonable.

For the reasons stated, the order of the railway commission granting the application of Black Hills Stage Lines, Inc., for a new certificate of public convenience and necessity for the route between the described terminal points is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM S. HENRY, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. JOHN EDWARD HENRY, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. DONALD LEE JOHNSON, APPELLANT.

118 N. W. 2d 335

Filed December 7, 1962. Nos. 35261, 35262, 35268.

1. **Receiving Stolen Goods: Criminal Law.** Guilty knowledge, which is an element of the crime of receiving stolen property, may be proved by circumstantial evidence.
2. ———: ———. Where the facts which were known to a defendant were such that a man of the age, intelligence, and experience of the defendant would know that the property was stolen, the jury can find that the defendant had guilty knowledge.
3. **Criminal Law: Evidence.** A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered.
4. **Criminal Law: Trial.** It is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, but a failure to do so is not reversible error unless such an instruction was requested.

Appeals from the district court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

Thomas P. Lott and Jack L. Spence, for appellants.

Clarence A. H. Meyer, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

BOSLAUGH, J.

The defendants, Donald Lee Johnson, William S. Henry, and John Edward Henry, were charged in separate informations with receiving stolen property in violation of section 28-508, R. R. S. 1943. Upon the motion of the State the cases were consolidated before trial. The jury returned separate verdicts of guilty against the defendants. Apparently, a fourth defendant, Louis Wil-

son, was acquitted. The defendants' motions for new trial were overruled and they have appealed to this court.

The assignments of error are that the evidence is not sufficient to sustain the conviction; that the trial court erred in admitting certain evidence; and that the trial court erred in giving and failing to give certain instructions.

The evidence shows that sixteen television sets were stolen from the Chandler Furniture & Appliance Store in Omaha, Nebraska, on the night of March 28, 1961. On the evening of March 30, 1961, the defendants were riding in an automobile in the vicinity of Tenth and Hickory Streets in Omaha, Nebraska, when they were stopped by the police. Four of the stolen television sets were found in this automobile. Three more of the stolen sets were found in the trunk. Six of the television sets were in their original cartons and had the warranty and other papers stapled to the boxes. Each of the television sets had a wholesale value in excess of $100.

The defendants were arrested and taken to the police station where they were questioned concerning the television sets found in the automobile. The defendant Johnson stated that he had purchased the television sets from a stranger; that two more of the sets were at his home; and that the sets were apparently stolen. The defendant, William Henry, stated that he had been asked to go along and help remove the television sets from a house where they had been placed earlier in the day; and that he did not know that the television sets had been stolen but that they appeared to have been stolen. The defendant, John Henry, stated that he had no direct knowledge but that he felt sure that the television sets were stolen.

At the trial Johnson testified that a stranger approached him in the Apex Bar on the evening of March 28 or 29, 1961, and offered to sell him nine television sets for $200; that the stranger said that he worked for the Railroad Salvaging Company, an Omaha con-

cern; that the television sets were in a station wagon with Kansas license plates; that he examined the television sets and they appeared to be new and in good working order; that he paid the stranger $150 and placed the television sets upstairs in his home; that on the next day he asked John Henry or William Henry if he knew of anyone who would be interested in buying television sets; that he was referred to Russel Bretz, a part-time television repairman; that he took seven of the television sets to Bretz's home that afternoon and offered them to Bretz for $50 each for the portable sets and $75 for a larger one; and that Bretz said he would try to sell them.

Russel Bretz testified that William Henry, John Henry, and a third man brought the television sets to his home on the afternoon of March 30, 1961; that the sets, which appeared to be new, were placed in the basement; that from reading the evening newspaper he learned that the Chandler Furniture & Appliance Store had been burglarized and a number of television sets stolen; that he then telephoned John Henry and told him that the television sets were stolen property and that Bretz wanted them removed from his house; and that William Henry, John Henry, and three other men came to the Bretz home that evening and picked up the television sets.

John Henry testified that Johnson came to his home on the aftenoon of March 30, 1961, and asked if he knew anyone who wanted to buy a television set; that John Henry then inquired of his brother and a friend, Paige Taylor, and was referred to Russel Bretz; that he telephoned Russel Bretz; that Bretz later called back and talked to Johnson; that Johnson did not know the way to Bretz's house so William Henry went with Johnson to deliver the television sets; that when William Henry returned he stated that it "didn't look right to him" or that "he didn't like the way it was"; that later Russel Bretz telephoned him and said that the television sets

were stolen and that Bretz wanted them removed from his house; and that he gave this message to Johnson that evening and went with Johnson and William Henry to pick up the television sets.

William Henry testified that he drove Johnson to the Bretz home on the afternoon of March 30, 1961, and helped unload the television sets; that "the thing looked completely—it didn't seem right and I figured, well, I would do this much and after I went home I would wash my hands of the whole mess"; that "after I had seen there was more than one television set involved and I didn't like the looks of it, I decided I would go as far as I had gone and wash my hands completely of it"; that after returning home he told his brother that he didn't like the looks of it, that he wouldn't have anything else to do with it, and requested that his brother do the same; that Russel Bretz called later and said that he thought the television sets had been stolen from the Chandler Furniture & Appliance Store, that he didn't want anything to do with them, and wanted them removed from his house; that this message was given to Johnson that evening; and that he went along on the trip to the Bretz home that evening and helped remove the television sets from the Bretz home.

The defendants argue that the evidence is not sufficient to sustain the conviction because there is no direct evidence that the defendants knew the television sets had been stolen; that the defendants cannot be convicted merely because they may have been stupid or negligent; and that the defendants cannot be held to the standard of mentality of some imaginary man of ordinary intelligence or to the degree of diligence that should be exercised by such a man.

Guilty knowledge is an element of the crime of receiving stolen property. It arises from the requirement that the stolen property be received with intent to defraud the owner. St. Clair v. State, 103 Neb. 125, 169 N. W. 554.

The State was required to prove that each defendant knew, at the time he received the television sets, that the television sets had been stolen. This fact could be proved by circumstantial evidence. Smith v State, 123 Neb. 17, 241 N. W. 750; Hans v. State, 109 Neb. 269, 190 N. W. 577; Burris v. State, 104 Neb. 641, 178 N. W. 216. There is no rule which requires that guilty knowledge be established by direct evidence.

In determining whether each defendant knew that the television sets had been stolen, the jury was required to consider all of the facts and circumstances. The age, intelligence, and experience of each defendant is a part of the facts and circumstances. If the facts which were known to each defendant were such that a man of the age, intelligence, and experience of each defendant would know that the television sets were stolen, then the jury could find that each defendant had guilty knowledge. State v. Marcovitz, 63 N. D. 458, 248 N. W. 481. See, also, Pounds v. United States, 265 F. 242; Annotation, 147 A. L. R. 1058.

The evidence shows that the defendants were arrested while attempting to dispose of seven new television sets that had been stolen in a burglary 2 days before. It was apparent to Russel Bretz that the television sets had been stolen. The evidence was sufficient for the jury to conclude that the defendants knew that the television sets had been stolen.

The defendants complain that a written statement obtained from John Henry at the police station should not have been received in evidence. The statement when originally offered by the State was excluded upon an objection that it was hearsay as to the defendant Johnson. Later the defendant Johnson withdrew the objection and asked that the exhibit be received. The court then admitted the exhibit and noted that there was no objection by counsel for any of the defendants. The defendant cannot now complain of the admission of the statement into evidence.

The defendants also complain that Russel Bretz should not have been permitted to testify about a telephone conversation with John Henry. Since no objection was made to this testimony at the time it was offered, no objection can be made to it at this time. A defendant may not predicate error on the admission of evidence to which no objection was made at the time it was offered. Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357.

The defendants contend that the trial court should not have instructed the jury as to aiders and abettors. There was evidence that after Johnson bought the stolen television sets he enlisted the help of John Henry and William Henry to dispose of them; that all three defendants delivered the sets to the home of Russel Bretz; and that all three defendants helped move the sets from the Bretz home after Bretz demanded that the sets be removed from his house. The jury could have found that John Henry and William Henry aided and abetted Johnson in committing the offense. Thus, the instruction was proper.

The defendants urge that the trial court should have given a cautionary instruction as to the testimony of an accomplice. None of the defendants requested such an instruction. Although it is the better practice for a trial court to give a cautionary instruction on the testimony of an accomplice, a failure to do so is not reversible error in the absence of a request for such an instruction. Cornell v. State, 138 Neb. 708, 294 N. W. 851.

The judgment of the district court is correct and it is affirmed.

AFFIRMED.

MAMIE ROOT ET AL., APPELLEES, V. MORNING VIEW CEMETERY ASSOCIATION, A CORPORATION, ET AL., APPELLANTS.
118 N. W. 2d 633

Filed December 7, 1962. No. 35280.

1. **Cemeteries.** The establishment, ownership, conduct, and management of cemeteries, except those owned, operated, and maintained by towns, villages, churches, and by fraternal and benefit societies, are governed by the provisions of sections 12-501 to 12-529, R. R. S. 1943.
2. ———. By the terms of statute, cemetery associations are empowered to receive gifts, devises, and bequests to be used in the performance of their functions.
3. **Wills: Charities.** A gift of property by will to an existing cemetery association is a gift to a charitable trust to be used for the purpose indicated in the will, and if no specific purpose is specified, then in the performance of the lawful objects and purposes of the cemetery association.
4. ———: ———. In case of the failure of the charitable purpose of a gift by will to a cemetery association, the res of the gift would pass to the heirs of the testator, and they would be proper parties to maintain action for recovery thereof.
5. **Wills.** No right of a citizen is more valued than the power to dispose of his property by will, and this right is in no manner based upon its judicious exercise.
6. ———. The provisions of a will must be construed with a view of carrying out the intention of the testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid.

Appeal from the district court for Lincoln County: CLARENCE S. BECK, Judge. Reversed and remanded.

Donald H. Kelley, Wilson & Barlow, and Hollman & McCarthy, for appellants.

Beatty, Clarke, Murphy, Morgan, Pederson & Piccolo, for appellees.

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

YEAGER, J.

This is an action in equity instituted by Mamie Root, Genevieve Singleton, Irene Huntington, Florence Mur-

ray, Margaret Cary, Willie Horner, Gertrude Schricker, and Mae Tannehill, nieces and nephew, and heirs at law, of Maria Hughes, deceased, plaintiffs, against Morning View Cemetery Association, a corporation; Walker Kelley, George Gregg, Mabel Rees, Carrie Cowles, Gerald Conneally, and Warren Smith, trustees of the association; and Elsie McGovern, executrix of the estate of Maria Hughes, deceased, defendants. The purpose of the action is to have interpreted and applied a provision of the last will and testament of Maria Hughes, deceased, whereby the residuary estate, except certain designated items of expenditure which do not require mention here, was devised and bequeathed to Morning View Cemetery Association, Lincoln County, Nebraska, in fee simple forever.

The theory on which the plaintiffs' action is predicated is that they are the heirs at law of Maria Hughes, deceased, and as such are entitled to receive to the exclusion of Morning View Cemetery Association all of the residuary estate of Maria Hughes, except $25,000, which amount they contend is the maximum the association is entitled to in the light of law and the facts, under the will.

This theory was defended against by the defendants, who asserted additionally that the plaintiffs were without legal right to maintain the action. These questions will be considered later herein.

The case was tried to the court and at the conclusion of the trial a judgment was rendered, the effect of which, to the extent necessary to state here, was to award $35,000 of the residue of the estate to the Morning View Cemetery Association, and that the balance thereof should be and become a resulting trust for the benefit of the heirs at law of Maria Hughes, deceased.

A joint motion for new trial was filed by all of the defendants except Elsie McGovern, executrix. This defendant filed a separate motion. These motions were overruled. From the judgment and the order over-

ruling the motions for new trial the defendants have appealed.

An outline of the facts, about which there is no substantial dispute, is that Maria Hughes, North Platte, Lincoln County, Nebraska, died September 29, 1959, at North Platte; that she had made a will disposing of her estate; that the will contained 12 specific bequests of $13,303, 100 shares of stock, not valued, and her clothing, personal effects, and jewelry, not valued; that the balance of the estate was declared by the will to be residue and remainder; and that this residue and remainder, after the payment of certain expense items which it is not deemed necessary to enumerate herein, was devised and bequeathed to the defendant Morning View Cemetery Association.

The part of the will providing for the disposition of the residue and remainder of the estate is as follows: "I do hereby give, devise and bequeath unto the Morning View Cemetery Association of Wallace, Lincoln County, Nebraska, all the rest, residue and remainder of my estate of whatsoever description and wheresoever found, both real estate, personal property and mixed property. This gift and bequest is in fee simple forever except that it is subject to the provisions of my Will as hereinbefore set forth and subject to the payment of all the bequests and devises and payment of costs, taxes and expenses as hereinbefore mentioned, and shall consist of whatever is left after all of the above have been satisfied and paid in full." The estimated value of the estate given by the will to the cemetery association was from $260,000 to $270,000.

At the time of the trial there were 5 acres of land in the cemetery. It is located 45 miles southwest from North Platte, Nebraska, 24 miles south of U. S. Highway No. 30, and 2 miles from the village of Wallace. Its existence extends back to 1892. There have been about 87 burials in the cemetery in the past 10 years. A large number of lots are available for sale and use. The popu-

lation of Wallace was, at the time of the trial, about 293, and of the surrounding election precinct about 547. The area for local service extends into two or three adjacent counties. The amount expended for care and upkeep has been but a few hundred dollars a year. Members of the association, however, have contributed other service without compensation. Much more of detail is contained in the bill of exceptions, but this, it is believed, is sufficient to present the general aspect of the area and the basis of the problem presented. This is the purpose of these descriptive features.

By the action here the plaintiffs do not urge that a devise or bequest of the character described is invalid and in consequence should be vacated and set aside entirely. The theory of their pleaded action is to the contrary. They declare that this devise and bequest is valid to the extent of about $25,000.

The action here is to have the court declare the devise and bequest invalid and unlawful on the ground that it exceeds the amount necessary to effect the purposes and perform the services committed to the Morning View Cemetery Association under the statutes enacted for the creation, control, and operation of this and like cemetery associations.

The transcript of the record which came from the district court contains a number of subjects presented there but the basic question on appeal here is limited to that of whether or not the Morning View Cemetery Association, which will be referred to hereinafter as the association, could under law receive and retain the entire bequest and devise given to it by the will.

This question depends in part on the interpretation and application of certain statutory provisions, the pertinent essence of which will follow. It is pointed out here that the validity of none of these provisions is under attack in this case.

Section 12-501, R. R. S. 1943, contains the provisions under which the association was established and under

which it operates and designates the officers. Section 12-502, R. R. S. 1943, contains directions as to the details of organization and the recording of the creation and original legal record of such organizations.

Section 12-506, R. R. S. 1943, provides in part: "Such association shall have the power to purchase or take by gift, devise, * * * and to hold lands, not exceeding three hundred and sixty acres, and improvements thereon, exempt from taxation, execution, or from any appropriation of public purchasers, if the same are used exclusively for cemetery purposes and in nowise with a view to profit. After such land is paid for, all the future receipts and income of such association, whether from the sale of lots, from donations, or otherwise, shall be applied exclusively to laying out, protecting, preserving, and embellishing the cemetery and the avenues leading thereto, to the erection of such building or buildings, vault or vaults, chapel, crematory, mausoleum, and other structures as may be deemed necessary for the cemetery purposes, and to paying the necessary expenses of the association." There is no provision in this section which forbids or prohibits a devise of land to a cemetery association in excess of 360 acres for the purposes of the association. The exemption simply does not apply to the excess over 360 acres.

Section 12-507, R. R. S. 1943, provides: "No debts shall be contracted in anticipation of future receipts except for purchasing, laying out, enclosing and embellishing the grounds and avenues, and erecting buildings, vaults, a chapel, a crematory, a mausoleum and other structures, for which a debt or debts may be contracted, not exceeding eighty-five thousand dollars in the aggregate, to be paid out of future receipts."

Section 12-509, R. R. S. 1943, provides: "Such association shall have the power to establish a fund to be known as the perpetual care fund, placing therein such money as it may from time to time determine, out of its general funds; and it shall have the authority to receive gifts or

bequests of money and other personal property, and devises of real estate and interests therein, to be placed in the perpetual care fund. The principal of the perpetual care fund shall be forever held inviolate as a perpetual trust by said association, and shall be maintained separate and distinct from any other funds. * * * the income earned therefrom shall be used solely for the general care, maintenance and embellishment of the cemetery, and shall be applied in such manner as the association may from time to time determine to be for the best interest of the cemetery."

Sections 12-510 and 12-511, R. R. S. 1943, deal with the subject of specific gifts for special purposes which is of no concern here since the bequest and devise has no relation to the subject of special gifts for particular purposes.

Section 12-518, R. R. S. 1943, contains the following with relation to power: "It shall have power to enclose, improve and adorn the grounds and avenues, and erect buildings for the use of the association; * * *."

It appears proper to indicate here the correct legal characterization of this legacy. From the language of the act of which the foregoing cited provisions are a part the reasonable conclusion is that it is a charitable gift to the association. Section 12-511, R. R. S. 1943, while not declaring this specifically, does declare that gifts for specific purposes, which include all of the generally described functions of such an association as this in the receipt and disposition of money and property received, are classed as charitable and benevolent.

Also, in Rohlff v. German Old People's Home, 143 Neb. 636, 10 N. W. 2d 686, wherein the subject has received exhaustive consideration, it is pointed out that a gift such as this is a gift to a charitable corporation.

In the case of In re Estate of Harrington, 151 Neb. 81, 36 N. W. 2d 577, it was said: "A bequest to a charitable corporation by name, without further restriction or limitation as to use, is in fact not a bequest to the

corporation as such, but to the objects and purposes for which such corporation was organized."

In Allebach v. City of Friend, 118 Neb. 781, 226 N. W. 440, attention has been called to definitions of charity with a conclusion that a legacy such as this is a charitable trust. It must be said therefore that involved here is a charitable gift or legacy.

Returning now to the matter of the right of the plaintiffs to maintain the action, it must be said that they did and do have such a right. The language of the provision of the will makes this clear. It is made clear that no general charitable intent was expressed, and no such intent is inferable, that is, the charitable intent involved extended only to the purposes of the association. The declaration was that this gift was for a particular charitable purpose. In such instance, if the charitable purpose failed the estate would revert to the heirs. In such instance, the heirs would have the right to maintain action to recover the property. See, Rohlff v. German Old People's Home, *supra;* Allebach v. City of Friend, *supra.*

A legacy such as is involved here is a valid disposition of an estate under a will. In Tetschner v. Cram, 157 Neb. 734, 61 N. W. 2d 378, this court said: "A cemetery association organized under Chapter 16, section 45, Comp. St. 1893, is authorized to create a perpetual care fund and to receive property as trustee for the purpose of providing for the care of burial lots, graves, and the like, under sections 12-509 to 12-512, R. S. 1943.

"A bequest of the property of a testator to an existing cemetery association, directing that it be used for the purpose of maintaining its cemetery in proper condition * * * constitutes a valid bequest in trust for the purposes indicated as authorized by section 12-510, R. S. 1943." These statutory sections have the same numerical designation in the 1962 Reissue of Volume I, Revised Statutes of Nebraska, 1943.

The remaining question is that of whether or not

some condition existed at the time of the death of Maria Hughes or came into being thereafter which invalidated the gift in whole or in part. The plaintiffs predicated the action here on the theory that such a condition did at the time and does exist. That theory is that the gift made by the will exceeds the amount reasonably needed to meet the purpose of the gift, and thus is in violation of public policy, and on this account may not be enforced regardless of the desires or intentions of the testatrix.

Obviously the district court accepted this viewpoint and rendered its judgment accordingly, except that it allocated to the purpose of the legacy $35,000, or $10,000 more than the plaintiffs by their petition indicated as a sufficient and necessary amount.

Certain principles have been declared in decisions of this court which have application in the interpretation of the statutory provisions to which reference has been made here. In Benge v. Sutton, 169 Neb. 769, 100 N. W. 2d 857, it was said: "No right of a citizen is more valued than the power to dispose of his property by will. The right is in no manner based upon its judicious exercise." See, also, Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568.

In the case of St. James Orphan Asylum v. Shelby, 60 Neb. 796, 84 N. W. 273, 83 Am. S. R. 553, it was said: "The provisions of a will, like all other contracts, must be construed with a view of carrying out the intention of a testator, and unless there is something in it contrary to the law of the state, or in contravention of public policy, it will not be declared invalid." See, also, Brooks v. Kimball County, 127 Neb. 645, 256 N. W. 501; In re Estate of Vohland, 135 Neb. 77, 280 N. W. 241.

In Reed v. Ringsby, 156 Neb. 33, 54 N. W. 2d 318, it was said: "In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind

in which it was contemplated by the settlor that he should act."

From what is said in the statutory provisions referred to and the cases cited it may not well be said that the gift here is violative of public policy. It is not contrary to any statute, and as to character or quality it is not forbidden by any recognized legal or equitable principle. The only question for determination therefore is that of whether or not on the facts and the controlling principles it may be regarded as excessive for the purpose or purposes intended by the testatrix, and if so, the extent of the excess.

Examination discloses that the gift was, by the terms of the will, for the general purposes of the association and not for any specific or defined cemetery purpose. From this and what has been pointed out it was properly for use in the performance of the lawful purposes and functions of the association. The uses are by virtue of statute determinable by designated representatives of the association. One of the named purposes was to have a general fund, and it appears reasonable to say that a legacy such as this would become a part of the general fund of the association.

Powers of an association such as this include the right to acquire land for cemetery purposes; to apply receipts, income from donations, or otherwise, to laying out, protecting, preserving, and embellishing the cemetery and avenues leading thereto; to erect buildings, vaults, a crematory, a mausoleum, and other structures deemed necessary; to pay necessary expenses; to contract debts in the anticipation of receipts up to $85,000; and to establish a perpetual care fund from gifts and bequests for that purpose and out of the general fund.

The parties are in accord that the value of the estate which would pass to the association by this will would be from about $260,000 to $270,000. The effect of the judgment is that any amount over $35,000 was excessive and that the balance should be and become the property

of the plaintiffs, this amount being all that could be regarded as reasonably necessary for compliance with the purpose and intent of Maria Hughes.

On the record in this case it cannot be ascertained with any degree of accuracy what, if any, excess there will be over the reasonable requirements of this association in the performance of its projected purposes and functions, especially in the light of the intent of the testatrix which has become manifest by the terms of the will.

The record discloses that the total of expenditures for the association for the years 1955 to 1961 inclusive, which included $300 for land acquired, was $2,881.83. In addition to this some members did work on the premises for which they received no pay. It is of course true that this should not be regarded as a measure for guidance for the future by the association in the performance of the functions conferred upon it by statute. It is reasonably inferable that this represented only the current availability of funds.

In arriving at a conclusion as to whether or not this legacy could be applied to the purposes of the association it appears proper to consider elements definitive of the present and the future contemplated purposes.

The association was organized in 1892. There are more than 500 lots in the cemetery. The lots are designed to contain multiple graves. At least 327 lots have been sold. There are approximately 616 marked graves and many which are not marked. About 20 percent of the graves are of residents of Wallace, Nebraska; 30 percent are from elsewhere in Lincoln County, Nebraska; and the balance came from Perkins, Hayes, Gage, and Webster Counties, Nebraska, and from Colorado, California, and Oregon. About 35 relatives of Maria Hughes were buried there.

The record discloses that the association has in prospect the following improvements with their estimated costs: Seeding, $7,786.88; removal of trees, $1,250; equipment, $781; fence, $2,999.50; well, $1,067.50; irriga-

tion well, pump, and motor, $5,317; sprinkler system, $5,721.50; paving, including two new driveways, $28,965; landscaping, $9,244.90; gates, $885; building, $17,600; retaining wall, $14,181; flagpole, $96; furniture and fixtures, $1,610; and memorial, $4,800; all for a total of $102,305.28. These amounts are the result of estimates contained in the record which may depart from accuracy, but it cannot be said that there is a sufficient departure to be of significance here.

The right and power to make expenditures of funds for these purposes is inferable from the language of sections of statute already referred to herein, and it is made definite by the following which is contained in section 12-518, R. R. S. 1943: "It shall have power to enclose, improve and adorn the grounds and avenues, and erect buildings for the use of the association; * * *."

It is to be observed, as has been indicated, that the association is empowered to pledge the credit of the association for its purposes up to $85,000.

It is to be observed further that no estimate of current and continuing cost of operation, further extension of area, and possibly needed additional facilities appears in this, and also in this is not included any item for perpetual care.

It is not suggested that improvements of the character named would not be desirable, but only that there is a lack of necessity therefor and that the estimated cost is excessive.

The substance of the insistence of the plaintiffs is that in the light of the existing conditions, the manner of operation up to the date of the death of Maria Hughes, and the environmental situation, the approval of this legacy cannot be justified beyond the amount of $35,000.

This insistence cannot be accepted as controlling. In the light of the statutes and other authorities cited herein, Maria Hughes had the lawful right to make her will to the extent involved here and to dispose of the estate involved as she did for the purpose indicated. The as-

sociation thereafter by and through its representatives had the discretion to allocate it as it chose and shall choose to the statutorily declared purposes. The amount to which a purpose has been indicated far exceeds the amount which was allocated to the association by the judgment of the district court. There are other purposes to which allocation by the association may be made which are not determined and are not capable of determination. There is nothing of an evidentiary character upon which to base a reasonable conclusion that all of this legacy may not properly and within the meaning of law and equity be used conformable to the intent of the testatrix and the proper powers of the association.

The intent of Maria Hughes by her will obviously was to transform this from just a burying ground, and to create in this community for the years to come a place of serene beauty and utility with funds to keep it lastingly so as a resting place for relatives and friends already departed and others who would follow. This intent cannot and should not be defeated or denied on the basis of a mere showing of earlier years of meager expenses of acquisition, maintenance, and operation.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

SIMMONS, C. J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DUANE D. WITMER, APPELLANT.

118 N. W. 2d 510

Filed December 7, 1962. No. 35283.

1. **Incest. In a prosecution for the crime of incest the testimony of the prosecutrix must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction.**
2. **———. The unsupported testimony of a prosecutrix in an**

incest case, that frequent acts of sexual intercourse with defendant occurred prior to the commission of the act informed against, is not corroborative of her testimony as to the commission of the offense charged.

3. **Criminal Law: Evidence.** When the law requires the corroboration of a witness, the testimony of such witness must be supported by other evidence than that of the witness herself.
4. **Incest.** Where a previous act of sexual intercourse is relied upon as the sole corroboration of the prosecutrix in a prosecution for incest, the evidence of prosecutrix as to such previous act must be corroborated.
5. **Witnesses.** Where a witness is called for the purpose of impeaching a witness on the trial, the evidence of such witness is not admissible unless a foundation for such impeachment has been laid by calling the attention of the witness to be impeached to the alleged inconsistent acts or statements, and giving him an opportunity to state whether or not he performed such acts or made such statements.
6. ———. The impeachment of a witness by showing contradictory statements made by him is admitted solely for the purpose of discrediting the reliability of the witness; it is not substantive evidence of the facts stated.

Appeal from the district court for Hall County: DONALD H. WEAVER, Judge. Reversed and remanded with directions to dismiss.

Mitchell & Taylor, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

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

CARTER, J.

The defendant was convicted in the district court for Hall County for having committed the crime of incest upon his 17-year-old daughter, Judith Witmer, on September 22, 1961, and has been sentenced to serve a term of 20 years in the State Penitentiary. He has brought the case to this court for review.

Judith Witmer, the prosecuting witness, was born on September 7, 1944, and at the time of the commission of

the act charged was 17 years of age. She testified that on September 22, 1961, she was living with her father, mother, and brother at a natural gas compressor station located 6 or 7 miles northeast of Grand Island, Nebraska, in Merrick County. Her father was the supervisor of the compressor station, her mother worked as a cosmetologist in Grand Island, and her brother worked at the Grand Island Ordnance Plant. The family lived at the compressor station in a home provided by the gas company, which they had occupied for more than 10 years.

On the day in question the defendant, Judith, and her brother, David, ate their evening meal at home. Her mother was working and was not present. After the evening meal David left in his automobile on business of his own. Judith testified that shortly thereafter she and defendant went for a ride in defendant's automobile, the father doing the driving. He proceeded to Eagles Lake near Grand Island in Hall County and there had sexual intercourse with Judith in the back seat of the automobile. Thereafter, about 8:45 p. m., they drove around for 15 or 20 minutes in Grand Island. They passed the beauty shop where her mother worked, waved to her when they saw her standing on the sidewalk in front of the shop, and went on to Frontier Village. There the defendant had two beers and Judith had two bottles of pop, after which they went home. The mother was at home when they arrived. Judith made no complaint to her mother.

Judith testified to a series of acts of sexual intercourse with her father, commencing in May 1959, none of which was alleged to have occurred in Hall County. In Schrum v. State, 108 Neb. 186, 187 N. W. 801, this court stated: "There can be no doubt that proof of facts and circumstances tending to show other acts of intercourse about the time charged in the information is properly admissible in cases of this nature. Leedom v. State, 81 Neb. 585; Woodruff v. State, 72 Neb. 815. This evidence, in order to be corroborative in character, should proceed from other

sources than from the prosecutrix alone. If a witness testifies that criminal intercourse was had upon one day, the fact that she testifies that a like act was had upon another occasion does not corroborate her testimony. Boling v. State, 91 Neb. 599 * * *. The court instructed the jury that the prosecuting witness could not corroborate herself by statements of other acts, and thus the interests of the defendant were protected." See, also, Gammel v. State, on rehearing, 101 Neb. 538, 166 N. W. 250; Fitzgerald v. State, 78 Neb. 1, 110 N. W. 676.

The State asserts that the previous uncorroborated acts of sexual intercourse testified to by a prosecuting witness are sufficient corroboration of the specific act charged to sustain a conviction. The cases of Smothers v. State, 81 Neb. 426, 116 N. W. 152, Woodruff v. State, 72 Neb. 815, 101 N. W. 1114, and State v. Way, 5 Neb. 283, are cited in support of this assertion. The previous acts of sexual intercourse are admissible to show the lustful inclination or disposition of the defendant to commit such acts upon his daughter, and to that extent they may be considered to be corroborative. But such uncorroborated acts testified to by the prosecutrix are not sufficient to sustain a conviction for the offense charged. A prosecutrix cannot by her unsupported testimony corroborate herself. When the law requires the corroboration of a witness, it must be accompanied by other evidence than that of the witness herself. Mott v. State, 83 Neb. 226, 119 N. W. 461.

In a prosecution for incest the evidence of the prosecutrix need not necessarily be corroborated by an eyewitness to the particular act, but it is necessary that she should be corroborated as to the material facts and circumstances which tend to support her testimony and to establish the truth thereof. Such corroboration may be either by direct testimony or by circumstantial evidence. Toth v. State, 141 Neb. 448, 3 N. W. 2d 899; Bridges v. State, 80 Neb. 91, 113 N. W. 1048.

There is no corroboration of the specific offense

charged in Hall County other than the contention of the State that a previous act of sexual intercourse testified to by Judith as having occurred in Merrick County was sufficiently corroborated so as to adequately make it corroborative of the offense charged in the information. This requires a consideration of the facts of the previous act relied upon.

Judith testified that in May 1959, she was working at the family home near the compressor station when her father came home about 2 p. m. She said her father, after a 2-hour struggle, had sexual intercourse with her. During the course of the struggle she ran into the kitchen, picked up a knife, and attempted to use it on him. He took the knife away from her and continued his lustful actions until she gave up and submitted. After the sexual act was completed she dressed, ran to the compressor station office, and asked John Brunken, an employee of the gas company, to help her. She testified as follows: "I told John he had to help me; that fathers just don't do those kind of things to their daughters." When she saw her father coming to the office she ran out the back door. When he went out to find her she came back into the office and hid in a restroom. Her father returned to the office, took her from the restroom, and took her back to the house. Brunken testified as follows: "As near as I can remember, she said my dad done something awful to me. And that she said fathers just don't do that to their daughters, do they? I said, No, I don't suppose they do. She said, I tried to stick a knife in him but he got it away from me. She said, You've got to help me. I told her to call her mother and have her come home." Brunken further testified that Judith called her mother and that he went toward the house when he met the defendant. He asked what was going on and defendant replied that he had mentioned something about sex to Judy and she ran out of the building. He corroborated Judith's testimony about her leaving the office, her return, and defendant

taking her from the restroom and telling her to go home. Another employee, Gordon Backer, testified that he came to the office to work the 4 p. m. shift, that Judith was standing in the office crying, that she ran out the back door when her father came in, that she came back and went into the restroom, and that defendant came in, pulled her from the restroom, and told her to go home and finish the housework.

With reference to this event the defendant testified substantially as follows: He denies that he had sexual intercourse with Judith at this time or at any other time. He says that he came home on the day of the incident and took an afternoon nap. When he awoke Judith was doing some ironing in the kitchen. She called him to the kitchen and told him she had a date that evening. She had been on a date the night before. She was then in junior high school and 14 years of age. Defendant insisted on knowing who the boy was and on discovery that he was a senior in high school and 3 or 4 years older than Judith, he told her she could not go. She became angry and during the argument she drew a knife on him which he forcibly took from her. She ran out of the house. He later followed her out and met Brunken coming toward the house. He walked back to the office with Brunken, who asked him what was the matter with Judy. He told Brunken about Judith wanting to go out with older boys all the time and that she had drawn a knife in the course of the ensuing argument. He said that his wife came home in about 15 minutes. She talked with Judith, who had returned to her ironing. His wife said nothing to him about the incident. The wife testified that Judith said nothing to her indicating the commission of an incestuous act by the defendant. She observed nothing unusual about the home. She said that Judith complained about being scolded by her father. She was not crying. No mention was made of the knife. Her hair and clothes were not rumpled. She did not appear to be emotionally upset.

The evidence of the May 1959 incident, if it is sufficient to corroborate the charge in the instant case, must be of such a character as would support a conviction for incest for the alleged act of sexual intercourse occurring in May 1959. We point out that the corroborative evidence of the May 1959 incident is indefinite and uncertain as to the conduct referred to by Judith when she complained to Brunken and Backer. The nature of the act purporting to have been corroborated was left to speculation and conjecture, which will not support a verdict of guilty. Neither of these two witnesses reported the incident to anyone. Judith's complaints were consistent with the story told by the defendant. It could be that the story told by Judith was an expression of resentment against her father for his refusal to permit her to date with older boys. The alleged corroborative evidence does not sufficiently point to the crime of incest to the exclusion of other conduct of defendant which the prosecutrix may have resented. Judith alleges that defendant had frequent acts of sexual intercourse with her for 3 or 4 years and admits that she complained to no one, not even to her mother.

The crime charged against the defendant, if true, indicates complete moral depravity. It offends the moral senses of the public from which juries are drawn and tends to create sympathy for a young girl alleging a grievance of this magnitude against her own father. The penalty for such a crime is commensurate with the nature of the crime and, if the crime be established, a severe penalty is required to be assessed. But a defendant cannot be properly convicted on the evidence of the prosecutrix alone. There must be corroborative evidence pointing to the guilt of the defendant of the specific crime charged. In the absence of sufficient corroborating evidence, the protection of the innocent demands that the prosecution must fail for want of competent proof. We find the evidence of corroboration

to be insufficient to sustain a finding of guilt by a jury beyond a reasonable doubt.

There is testimony in the record which, if competent and properly admitted, would lead a jury to the verdict it reached. We shall present the situation and point out the reasons why it does not support the verdict.

The State called Ruth Witmer, the wife of the defendant and the mother of Judith, as a witness. She testified in support of defendant's contentions, denying all the assertions of Judith that she had knowledge of incidents tending to sustain Judith's testimony. The county attorney requested the court for permission to treat Mrs. Witmer as a hostile witness. The request was granted. The interrogation of Mrs. Witmer continued. No attempt was made to lay a foundation for her impeachment. In rebuttal, the State thereafter called many witnesses who testified to statements made by Mrs. Witmer which were contrary to the testimony she gave on the witness stand. Among these witnesses was the court reporter who took statements made by Mrs. Witmer when she was interrogated by the county attorney in his office on September 25, 1961. This evidence was erroneously admitted for the reason that no foundation had been laid for its admission during the course of Mrs. Witmer's examination as a hostile witness. In Omaha St. Ry. Co. v. Boesen, 74 Neb. 764, 105 N. W. 303, 4 L. R. A. N. S. 122, this court said: "For the purpose of impeachment, the defendant offered certain portions of the evidence of the same witness given at the first trial. The offer was rejected, and its rejection is now assigned as error. It does not appear that any attempt was made at the second trial to lay a foundation for the impeachment of the witness by calling his attention to the alleged inconsistent statements, or otherwise. The evidence offered was not, under the circumstances, admissible for the purpose of impeachment."

The improper evidence tended strongly to destroy

the credibility of Mrs. Witmer and to indicate that the defendant was guilty of other criminal acts. Even if Mrs. Witmer had been properly impeached, the only legal effect that could have resulted was a finding that she was not worthy of belief. Such impeaching evidence, even when it is properly admitted, is not competent as substantive evidence of the facts to which such statements relate. In a similar situation, this court said: "If this line of evidence was properly received, a question which the record before us does not impose upon us the duty of determining, still its effectiveness and probative force is limited solely to the credibility of Degele. 'Evidence of such contradictory statements is admitted only to discredit the witness; it is not affirmative evidence of the facts stated.'" State ex rel. Nebraska State Bar Assn. v. Bachelor, 139 Neb. 253, 297 N. W. 138. See, also, 3 Jones, Evidence, Civil Cases (4th ed.) 1591, quoted with approval in State ex rel. Nebraska State Bar Assn. v. Bachelor, *supra*.

We hold that the offense charged is not supported by sufficient corroborative evidence to sustain a conviction. Defendant's motion to dismiss made at the close of all the evidence should have been sustained. The judgment of the district court is reversed and the cause remanded to the district court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. JOHN BURTON, APPELLANT.

118 N. W. 2d 502

Filed December 7, 1962. No. 35305.

1. **Criminal Law.** It is only where there is in fact no preliminary examination upon a criminal charge, either in form or substance, that a plea in abatement may successfully be directed to the sufficiency of such hearing.

2. ———. A bill of exceptions, preserving the evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case and the State's answer thereto, is a prerequisite to a review of the action of the trial court in overruling such plea.
3. ———. In a prosecution for fondling or massaging in an indecent manner the sexual organs of a girl under 16 years of age, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she is corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
4. ———. It is only when there is a total failure of 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.
5. ———. In a criminal action the Supreme Court will not interfere with a verdict of guilty based on conflicting evidence unless the evidence is so lacking in probative force that as a matter of law it is insufficient to support a finding of guilt beyond a reasonable doubt.
6. **Trial.** Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism.
7. **Criminal Law.** Harmless error in a criminal prosecution is not a ground for the reversal of a conviction.
8. **Criminal Law: Witnesses.** A trial court in a criminal case has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. The discretion is a legal one and subject to proper limitations.
9. ———: ———. Held, in the case at bar, that no error was committed in allowing questions of a leading character to be asked, of which complaint is made.

Appeal from the district court for Scotts Bluff County: TED R. FEIDLER, Judge. Affirmed.

Straight Townsend, Holtorf, Hansen & Fitzke, and Alfred J. Kortum, for appellant.

Clarence A. H. Meyer, Attorney General, and Homer G. Hamilton, for appellee.

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

MESSMORE, J.

The plaintiff in error, subsequently referred to as defendant, was charged with the crime of indecent fondling of a minor. In that connection, the alleged offense is defined by section 28-929, subdivision (2), R. S. Supp., 1961. Trial was had to a jury. The jury returned a verdict finding the defendant guilty as charged. The defendant filed a motion for a new trial which was overruled. Thereafter the defendant was sentenced to be confined in the Nebraska State Penitentiary for a period of 2 years at hard labor, Sundays and holidays excepted. Defendant seeks a review in this court.

The defendant contends that the trial court erred in overruling the defendant's plea in abatement, and that the defendant's constitutional rights were violated in that the defendant was tried in the district court for Scotts Bluff County without first having had a preliminary hearing as required by law.

The defendant filed a plea in abatement in the district court for Scotts Bluff County. The basis of the plea was that the evidence was insufficient to show that an offense had been committed and that the defendant probably committed it. Attached to the plea in abatement is a transcript of the evidence adduced at the preliminary hearing in the county court of Scotts Bluff County.

The State of Nebraska filed an answer to the plea in abatement denying all the allegations therein contained.

The defendant's plea in abatement was overruled by the trial court.

The evidence taken at the preliminary hearing, attached to the plea in abatement and which is a part of the transcript, was not offered as a part of the evidence

when the plea in abatement was argued and is not contained in the bill of exceptions.

In Lingo v. Hann, 161 Neb. 67, 71 N. W. 2d 716, it was said: "The functional purpose of the preliminary hearing is stated in section 29-506, R. R. S. 1943, as follows: 'If upon the whole examination * * * it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law; * * *.'

" 'It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it.' Roberts v. State (145 Neb. 658, 17 N. W. 2d 666) supra.

"The effect of the foregoing, if found to exist, is to hold the accused for trial in the district court, which has jurisdiction to try him. See Dobrusky v. State, 140 Neb. 360, 299 N. W. 539." That is what the county court of Scotts Bluff County did. See, also, Cotner v. Solomon, 163 Neb. 619, 80 N. W. 2d 587; Birdsley v. Kelley, 159 Neb. 74, 65 N. W. 2d 328.

In Hoffman v. State, 164 Neb. 679, 83 N. W. 2d 357, this court said: "When the sufficiency of a preliminary hearing is called in question by a plea in abatement, 'the only question to be considered is with reference to the powers of the magistrate which are called into action in the determination of what shall be the result of such hearing. If he is compelled to act judicially, and to determine as a judicial question the matters over which he has jurisdiction, and does determine such questions upon competent evidence, then an error in judgment as to the result reached can not be determined by a plea in abatement. It is only where there is in fact no preliminary examination, either in form or sub-

stance, that advantage can be taken of by such a plea.' Jahnke v. State, 68 Neb. 154, 94 N. W. 158."

In Bradehorst v. State, 168 Neb. 203, 95 N. W. 2d 495, this court said: "This court has consistently held that, to review a decision of the trial court on error proceedings in a criminal case on a question of fact, it is essential that such evidence be preserved in a proper bill of exceptions. The evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case and the State's answer thereto cannot be reviewed here unless preserved in a bill of exceptions. Burnham v. State, 127 Neb. 370, 255 N. W. 48."

In Burnham v. State, 127 Neb. 370, 255 N. W. 48, this court said: "* * * the evidence adduced by the parties and considered by the court, in determining issues presented by the plea in abatement and the answer thereto, is not preserved in the bill of exceptions. * * * To review a decision of the trial court upon appeal in a criminal case upon a question of fact, where evidence was submitted and considered, it is essential that such evidence be preserved in a proper bill of exceptions, * * *."

In the light of the foregoing authorities, the above assignments of error set forth by the defendant cannot be sustained.

The defendant contends that the evidence was not sufficient to sustain the verdict, and is contrary to law. This requires a review of the evidence.

The chief of police of Mitchell located the Nile Theater in Mitchell and testified generally to its interior and exterior.

Shirley Cline testified that she lives in Mitchell and is in the fifth grade; that she remembered Monday, August 21, 1961; that on that day she saw the defendant in the theater; that prior to that she and Victoria Brunz had been swimming; and that after swimming, the two girls went into the theater and saw the defendant sitting at his desk in the candy shop. She talked to the defendant, and they stayed in the candy shop 15 or 20

minutes after which she, Victoria, and the defendant, went upstairs into the balcony of the theater and into the projection room. She further testified that it was completely dark in the theater, but they could see each other; that there were lights on in the projection room; that all three of them were in the projection room and were standing up; and that the defendant sat down in a chair. This witness further testified that she was dressed in a pair of jeans and a blouse, and Victoria was dressed in like manner; that Victoria pulled down her jeans, and the defendant opened his jeans; that the defendant touched Victoria around the waist first, and touched her between the legs more than once with his hand; and that Victoria had removed her clothing and was in front of the defendant when he touched her. After the defendant stopped touching Victoria she pulled up her jeans and walked over and stood against the wall. It was getting late in the afternoon and Victoria and Shirley decided to go home. When they left the projection room, the defendant had his pants zipped, but they had been unzipped before.

On cross-examination Shirley testified that the defendant asked Shirley and Victoria to go upstairs; that they were upstairs in the projection room about 20 minutes; and that while Victoria was standing against the wall she took down her jeans and her panties and walked over to the defendant. On re-direct examination Shirley testified that when she and Victoria were ready to leave the theater the defendant gave her some candy.

Victoria Brunz testified that she lived in Mitchell; that she was in the fourth grade; and that she was 10 years old at the time of trial. She further testified that she saw the defendant in the Nile Theater the afternoon of August 21, 1961; that after leaving the swimming pool she and Shirley went to the Nile Theater; that when they got to the theater they went up into the balcony; that she and Shirley took off the clothes

they were wearing; and that at the time the defendant was sitting in a chair. She further testified that the defendant made the girls go by him; that the defendant touched her between her legs with his hand more than once; that the defendant put his hand on her sexual organs; that Shirley watched; that she was in the balcony undressed with the defendant about 15 minutes; that the defendant did the same thing to Shirley as he did to this witness; that after they put on their clothes, they went to the candy shop and the defendant gave them money; that he sometimes gave them 50 cents and sometimes a dollar; that on that day he gave them both 50 cents; and that they left the theater by the back door and went home. Before they left the theater the defendant told them that if anyone saw them they would get into trouble. Victoria further testified that she was afraid to tell what happened, and that the defendant told them not to tell their mothers, and that they had to go home.

Jacqueline Brunz, the mother of Victoria Brunz, called by the defendant, testified that she made a complaint in this matter to the county authorities; that the matter first came to her attention when one of the other children told her Victoria had some money that the defendant had given her; that she questioned Victoria and Victoria told her what had happened; that she made complaint to the chief of police; and that she had a conversation relating to this matter on August 22, 1961, with Victoria in their home, when Victoria told her what had happened the previous day, which would be August 21, 1961. Victoria told her mother that she took off her clothes, as the defendant told her to do so. On cross-examination this witness testified that Victoria told her that the defendant touched her, "messed with her body," and patted her.

A salesman for a radio station testified that he usually called on the defendant at Mitchell on Monday. He could not testify as to whether or not he saw the defend-

ant on Monday, August 21, 1961. He did receive a check from the defendant on August 22, 1961.

The chief of police of Mitchell testified for the defense that he received a complaint on August 22, 1961, from Mrs. Brunz; that he contacted the county attorney on August 23, 1961; and that there was a conference on August 26, 1961, with the county attorney, Mrs. Brunz, the two girls, and this witness present. The county attorney questioned the girls, and they told him what happened on Monday afternoon, August 21, 1961.

On cross-examination this witness testified that the girls told the county attorney that they went into the theater, went upstairs with the defendant to the projection room where they undressed, and the defendant played with them with his hands on their private parts. The girls redressed and left the theater. The girls also said that at that time the defendant had his pants unzipped, and that this had happened more than once. The girls made a statement that they received a small sum of money and some candy or a drink; and that the defendant had asked them to undress.

The defendant testified that he was a theater manager for the Midwest Amusement Company for 16 years and thereafter in business for himself; that he had resided in the community for 20 years; that he lived in a house in Scottsbluff; and that his daughter and her husband lived in the main part of the house and he and his wife lived in the basement apartment. He further testified that the operation of the theater is in the evening, and there is necessary paper work to be done during the daytime; that the Sunday operation of the theater is continuous from 1 p.m., until closing time; that his wife, Marguerite, helps him; that she works the floor of the theater and he works the projection room; that his wife also works at the Standard Hardware Company in Scottsbluff; that he usually spends from 10 o'clock in the morning until approximately 4 o'clock in the afternoon, either at his desk, doing seat repair, advertising,

carpet repair, or projector repair work; and that he usually drove back to Scottsbluff at 4 p.m., to pick up his wife at 5:30, and they got back to Mitchell at 6:30 or quarter until 7 p.m. He further testified that he was not in the theater on August 21, 1961, due to having trouble with a stomach ulcer that weekend; that on August 21, 1961, he was in bed, and had been in bed most of that day because of his physical condition; that his wife went to work at 9 a.m., came home at 11:30 a.m., went back to work at 12:30 p.m., and came home at 5:30 p.m.; that when she came home he was sitting in a chair with his robe and slippers on; that he then got dressed and he and his wife drove to Mitchell, arriving there at approximately 10 minutes until 7 p.m.; that he did not see Shirley Cline or Victoria Brunz that day; that during the years he has been operating the theater he has become acquainted with the two girls and other children in the Mitchell community; that with reference to his relationship with these two particular girls, they would come in, visit and talk, and want treats or something like that, and he usually gave them a candy bar or a coke; that he never molested Victoria Brunz in any way; that the previous week Shirley Cline and Victoria Brunz came into the theater at about 3 or 4 p.m., and asked the defendant what he was doing and he told them, then they asked him for a coke which the defendant refused to give them; that the girls had on little dresses; and that they pulled their dresses up, and the defendant told them they had better get home or he would call their mothers. The defendant further testified that his daughter visited him at 2 o'clock the afternoon of August 21, 1961.

A neighbor of the defendant who lived north of the defendant's residence testified that August 21, 1961, was the first day of his vacation. He was unable to say whether he saw the defendant's car parked in front of the defendant's house on that day.

The defendant's wife corroborated the defendant's

testimony with reference to his illness on August 21, 1961, and that he was home all day, and further testified that she had a prescription filled at a drug store to be used by the defendant.

Defendant's daughter testified that she remembered August 21, 1961; that her parents went to Mitchell about 6 p.m., on that day; that her father's car was in front of the house all of that day; and that she saw her father in his home at about 2 o'clock that afternoon and he was in bed.

A police officer testified that on August 21, 1961, at approximately 4:30 or 5 p.m., he pulled up in front of the post office and saw the defendant sitting on the fender of his car in front of the theater in Mitchell; that he noticed two little girls along the side of the post office, between the post office and the Legion club; and that when the girls saw him they ducked to the back end of the building. On cross-examination this witness testified that to the best of his knowledge Shirley Cline and Victoria Brunz were the girls that he saw duck behind the post office building.

It was stipulated that the defendant appeared before the county court on August 29, 1961.

The defendant moved for dismissal of the case primarily because of the failure of proof on the part of the State to prove the crime charged, and if the court ruled adversely on that motion, the defendant moved to direct a verdict for the defendant for the same reason. The trial court overruled this motion.

This court has not heretofore, in a case of this kind, laid down a rule with reference to the evidence required to corroborate the prosecutrix. We believe that the rule announced in Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380, which is a case of assault with intent to commit rape, should be adopted. There are a number of cases in this jurisdiction setting forth the same rule. Therefore, we hold that in a prosecution for fondling or massaging in an indecent manner the sexual organs

of a girl under 16 years of age, it is not essential to a conviction that the prosecutrix should be corroborated by other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.

As to corroboration, the following additional principles are applicable.

"* * * corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. Nabower v. State, 105 Neb. 848; Kotouc v. State, 104 Neb. 580; Day v. State, 102 Neb. 707; Hammond v. State, 39 Neb. 252." Robbins v. State, 106 Neb. 423, 184 N. W. 53.

In the instant case, although the two young girls were reluctant to testify and confess to an immoral act on their part, their testimony was such, coupled with the testimony of other witnesses, as to show corroboration of the testimony of the prosecutrix. The defendant admitted to giving these young girls money to get rid of them. The record also discloses that the defense called the mother of the prosecutrix who was asked on direct examination about the conversation she had with her daughter, and the details of this conversation were brought out on cross-examination as heretofore set forth.

"This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Williams v. State, 115 Neb. 277, 212 N. W. 606. See, also, Haines v. State, 135 Neb. 433, 281 N. W. 860; Onstott v. State, *supra*.

"It is only when there is a total failure of 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." Wanzer v. State, 41 Neb. 238, 59 N. W. 909. See, also, Onstott v. State, *supra;* State v. Wilson, *ante* p. 86, 115 N. W. 2d 794.

The defendant in his motion for new trial predicated error on the part of the trial court in refusing to give certain instructions requested by the defendant, and on certain instructions given by the trial court. The defendant, in argument to this court, apparently has abandoned this assignment of error. However, we have examined the instructions requested by the defendant and given by the trial court.

Some criticism was made of instruction No. 9 given by the trial court, which is the same instruction requested by defense counsel shown in requested instruction No. 8. The only difference is the substitution of the word "an" for the word "the," which does not in any manner change the subject matter contained in the instruction requested by the defendant.

"Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism." Brown v. Chicago, B. & Q. Ry. Co., 88 Neb. 604, 130 N. W. 265. See, also, Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170. This assignment of error is without merit.

The defendant has not specifically assigned as error, but has made objection to certain testimony and the disposition of it in his brief. This testimony consisted of a statement by a deputy sheriff of Scotts Bluff County that when he arrested the defendant he smelled "like an odor like you get off of a mental person." Objection was

made by the defense counsel who asked "that that be stricken as a conclusion of the witness and the jury admonished to disregard that." The court sustained the objection. The defendant asserts that a motion for mistrial would have been in order, but the defendant's request for admonishing the jury should have been allowed and followed. The defendant fails to point out in what manner this procedure was prejudicial to his defense. The rule in Jurgensen v. State, 135 Neb. 537, 283 N. W. 228, is applicable, which states that error may creep into the proceedings in a criminal prosecution in spite of impartiality, care, and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the reversal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice.

A statute relating to the review of criminal prosecutions reads in part as follows: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." § 29-2308, R. R. S. 1943.

The defendant's contention is without merit.

The defendant complains that the county attorney was allowed to ask leading questions of the two 9½-year-old girls here involved, and to repeat the questions in order to obtain a response from them as witnesses. As previously stated, these young girls were reluctant to confess that they had acted improperly. After repeated assurances of counsel and the court, the girls told their story in a rather realistic and clear manner.

The law recognizes that the trial court has wide discretion in this type of situation. The trial court permitted the asking of leading questions in the instant case to a limited degree. The following is applicable.

In Woodruff v. State, 72 Neb. 815, 101 N. W. 1114, the court said: "Some of these questions which were permitted to be asked and answered may have been, and probably were, in a measure, of a leading character, but regarding which we are satisfied no abuse of discretion was committed by the trial court in suffering the examination to be pursued in the manner in which it was. It is, say all the authorities, discretionary with the trial court in both civil and criminal cases to allow leading questions on the direct examination; the discretion, of course, being a legal one and subject to proper limitations. Stephen, Digest of the Law of Evidence, 445, and note; McKelvey, Evidence, sec. 237, and notes. In Edwards v. State, 69 Neb. 386, it is held that the trial court has a large, though not unlimited, discretion in granting or refusing permission to ask a witness leading questions. In support of the rule there is cited in the opinion, Schmelling v. State, 57 Neb. 562, and Welsh v. State, 60 Neb. 101."

The general rule is stated in 98 C. J. S., Witnesses, § 332, p. 46. This rule is to the effect that it is usual and proper for the court to permit leading questions in conducting the examination of a witness who is immature, unaccustomed to court proceedings, inexperienced, agitated, terrified, or embarrassed while on the stand, and lacking in comprehension of the questions asked.

We find no prejudicial error was committed by the trial court in respect to the matter complained of.

Other matters complained of by the defendant are without merit and need not be discussed.

For the reasons given in this opinion, the judgment of the trial court is affirmed.

AFFIRMED.